THE LAW REFORM COMMISSION

AN COIMISIÚN UM ATHCHÓIRIÚ AN DLÍ

CONSULTATION PAPER

ON

SENTENCING

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The Law Reform Commission
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THE LAW REFORM COMMISSION

The Law Reform Commission was established by section 3 of the *Law Reform Commission Act, 1975* on 20th October, 1975. It is an independent body consisting of a President and four other members appointed by the Government.

The Commissioners at present are:

The Hon. Mr. Justice Anthony J. Hederman, Judge of the Supreme Court, President;
John F. Buckley, Esq., B.A., LL.B., Solicitor;
William R. Duncan, Esq., M.A., F.T.C.D., Barrister-at-Law, Associate Professor of Law, University of Dublin;
Ms. Maureen Gaffney, B.A., M.A. (Univ. of Chicago), Senior Lecturer in Psychology, University of Dublin;
Simon P. O'Leary, Esq., B.A., Barrister-at-Law.

The Commission's programme of law reform, prepared in consultation with the Attorney General, was approved by the Government and copies were laid before both House of the Oireachtas on 4th January, 1977. The Commission has formulated and submitted to the Taoiseach or the Attorney General forty four Reports containing proposals for the reform of the law. It has also published eleven Working Papers, five Consultation Papers and Annual Reports. Details will be found on pp.415-419.

Alpha Connelly, B.A., LL.M., D.C.L., is Research Counsellor to the Commission.

Ms. Emily Egan, LL.B., B.C.L. (OXON), Ms. Clíona Kimber, LL.B., LL.M., Mr. James Kingston, LL.B., LL.M., Barrister-at-Law, and Ms. Julianne O'Leary, B.A., LL.B., Barrister-at-Law are Research Assistants.

Further information from:

The Secretary,
The Law Reform Commission,
Ardilaun Centre,
111 St. Stephen's Green,
Dublin 2.
Telephone: 715699.
Fax No: 715316.

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INTRODUCTION

As part of its First Programme for examination of different branches of the law, which was laid before both Houses of the Oireachtas on 4th January, 1977, the Commission proposed to examine various aspects of the criminal law and criminal procedure, including in particular the law on the matters proper to be taken into account in sentencing convicted persons.

On the 6th March, 1987, the then Attorney General, Mr John Rogers S.C., requested the Commission to formulate proposals for reform of the law in relation to a number of areas. These included the law relating to certain aspects of the criminal law, and, first and foremost, sentencing policy.

During the course of its research on sentencing, the Commission noted that a clear statement of the matters proper to be taken into account in sentencing convicted persons is closely dependent on the policy governing the sentencing of offenders first being clearly articulated: where the policy is vague or incoherent, any number of matters may without impropriety be taken into account by reference to that policy. The Commission concluded that the primary matter to be dealt with, therefore, was the formulation of a coherent sentencing policy, which, once in place, would indicate what matters ought properly be taken into account in sentencing.

In the present Consultation Paper we begin by setting out in Chapter 1 the existing law and practice of sentencing and touch briefly upon the difficulties encountered in this area. In Chapter 2 we then examine the role of sentencing policy and the effect which incoherent policy has on existing sentencing law and practice. In Chapter 3 we examine the respective roles of the legislature and the courts in sentencing reform, and in Chapter 4 we discuss the role of the existing components of our sentencing policy making some provisional recommendations for reform of sentencing policy which would be more purposive, consistent and

just. Chapter 5 examines the types of matter proper to be taken into account in sentencing, and Chapter 6 looks at the importance of prior criminal record. Chapter 7 contains a review of sentencing policy in other jurisdictions. Chapter 8 examines continental European responses to sentencing disparity. Chapter 9 discusses in detail means of implementing sentencing policy, drawing on the rich vein of comparative experience. Subsequent chapters are concerned with the statutory context of sentencing (Chapter 10); matters of procedure (Chapters 11, 12, 13 and 14); the co-ordination of penal and sentencing policy (Chapter 15); and sentencing information and studies (Chapter 16). We conclude by setting out our provisional proposals for reform.

On the 30th of September, 1992 when the Commission was on the point of going to print, the Minister for Justice presented the *Criminal Justice Bill, 1992*. The Commission had to decide at that stage whether to ignore or examine the Bill.

We decided to examine it, even if this delayed publication. Our examination led in particular to a re-appraisal of the Commission's approach to Victim Impact evidence. The Commission was unable to agree on a provisional recommendation so we have simply set out below arguments for and against the introduction of mandatory victim impact statements and have sought views.

In the Whitaker Report on the Penal system, it is concluded that "complexities" are the reality of the criminal justice system but that given the present state of criminal justice statistics, their frequency cannot be measured.

> "This lack of information is not merely a nuisance which hinders research. It is a feature of the criminal justice system that decisions are taken at one stage in ignorance of what is occurring elsewhere in the system."[1]

Unfortunately, this situation remains unchanged. Any provisional recommendations in this paper or recommendations ultimately made in our Report will be rendered comparatively ineffective by the absence of proper information. Details of every sentence imposed in every court and of every instance of election for trial venue by judge, prosecution or accused should be recorded and speedily retrievable. It would not be possible to attain this by relying on occasional research.

A distinct national office or agency should be established under the aegis of the Department of Justice, the Gardaí or the DPP, staffed by experts in criminological research to conduct the necessary research and provide statistics. This office, which could be given a statutory basis, would have to secure the trust and confidence of the aforementioned bodies and of the judiciary in order to ensure that the relevant information would readily be made available, if necessary by affording access to files and orders.[2]

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1 Report of Committee of Inquiry into the Penal System (PL 3391, 1985), p236.

2 The design of such a system is examined in chapter 9 *infra*.

While the President of the Commission, Mr. Justice Hederman, was appointed before this paper went to print, he took no part in its preparation and it would be unfair in the circumstances to associate him with any provisional recommendation made in the Paper. Happily, the Commission will have the benefit of his extensive experience in this area when it comes to make its final Report.

We emphasise that the proposals for reform contained in this Consultation Paper are provisional in their nature. We invite written submissions in relation to any of these proposals and the material contained in this Consultation Paper. Any such submissions received by us will be assessed with great care before we present our final proposals to the Attorney General. We also hope to hold a Seminar which will enable a full discussion of the Consultation Paper to take place.

We would be grateful if submissions on the Consultation Paper were sent to us at the Commission's Offices not later than 1st June, 1993.

CHAPTER 1: OVERVIEW OF IRISH SENTENCING LAW AND PRACTICE

A: GENERAL

1.1 What is sentencing? While there exists a general consensus as to the etymology of the expression "sentence" - from the Latin *sententia*, meaning literally "feeling" or "opinion"[1] - there appears to be very little in the way of coherent Irish statement as to the nature of sentencing. Little assistance is to be gained from the definition of "sentence" which appears in section 21 of the *Criminal Appeal Act, 1907*:

> "The expression "sentence" includes any order of the court made on conviction with reference to the person convicted or his wife or children, and any recommendations of the court as to the making of an expulsion order in the case of a person convicted, and the power of the Court of Criminal Appeal to pass a sentence includes a power to make any such order of the Court or recommendation, and a recommendation so made by the Court of Criminal Appeal shall have the same effect for the purposes of section three of the Aliens Act, 1905, as the certificate and recommendation of the convicting Court."

1.2 As well as being, perhaps, somewhat verbose, this explanation would exclude from the ambit of sentencing many orders made by the District Court under the *Probation of Offenders Act, 1907* which do not require *conviction* before they may be made.[2] Nowadays, conviction is not always a prerequisite for the imposition of sentence; rather what *is* always required is a finding of guilt. A number of more helpful formulations appear in recent sentencing reform literature. The British Government, for example, describes "sentence" thus:

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1 Drapkin, *The Art of Sentencing*, p233; Canadian Sentencing Commission, *Sentencing Reform: A Canadian Approach*, (1987) p111.

2 See eg s1(1) of the *Probation of Offenders Act, 1907*; also para 1.102, *infra*. (Probation).

"The sentence of the court prescribes the punishment for criminal behaviour."[3]

1.3 JUSTICE, the British section of the International Commission of Jurists has said:

> "A sentence is the order of a criminal court imposing punishment on an individual for an offence of which he has been found guilty."[4]

1.4 Sentencing might thus be described as the act of a criminal court imposing punishment on an individual found guilty of an offence. Other formulations of "sentencing", however, avoid the concept of *punishment*. The Victorian Sentencing Committee said:

> "Sentencing is the process by which people who offend against the criminal law have sanctions imposed upon them in accordance with that law. Many of those sanctions involve punishment, others involve the exercise of mercy and yet others represent means by which a person's conduct or attitudes may be altered so they do not offend in the future."[5]

1.5 The Canadian Law Reform Commission also took this approach, defining "sentencing" as:

> "that process in which the court or officials, having inquired into an alleged offence, give a reasoned statement making clear what values are at stake and what is involved in the offence."[6]

1.6 That certainly is not the case in Irish courts; rarely do our courts give "reasoned statements" of the values at stake in sentencing.[7] The most cogent, perhaps, of this kind of formulation is that of the Canadian Sentencing Commission:

> "Sentencing is the judicial determination of a legal sanction to be imposed on a person found guilty of an offence."[8]

1.7 This description highlights the most important element of sentencing: *judicial determination*. Sentencing involves a decision by a judge[9] as to what the criminal justice system should do to a person found guilty of an offence. Occasionally, as we shall see, the District Court may decide simply to "dismiss

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3 White Paper, *Crime, Justice, and Protecting the Public*, CM 965 (1990) p5.
4 JUSTICE Report, *Sentencing, A Way Ahead*, (1988) p1.
5 Victorian Sentencing Committee, *Sentencing*, (1988), para 2.2.1.
6 Law Reform Commission of Canada, *Studies on Sentencing*, (1974) p4, and *Principles of Sentencing and Dispositions*, (1974) px.
7 See para 1.145, *infra*. (Reasons).
8 Canadian Sentencing Commission, *op cit*, p115.
9 Judicial involvement is a constitutional requisite: *Deaton v AG* [1963] IR 170; see Chap 3, *infra*. (Formulation of Sentencing Policy).

the information or charge."[10]

1.8 This type of formulation is also to be preferred at an early stage of discussion because it avoids reference to "punishment". The notion of punishment implies, as we shall see, a certain ideological approach to the question of sentencing: i.e. *retribution*. Another approach, that of rehabilitation, prefers to view the imposition of legal sanction not as punishment, but as *treatment*. Later, we shall examine the merits of these differing views,[11] but for the present it may be of some assistance to discussion if we do not commit ourselves to any one ideological approach.

1.9 Also, by avoiding reference to punishment, it is easier to conceive of orders, such as indefinite adjournment and absolute discharge, as forming part of the sentencing process[12] - even though they may not impose such a measure of pain as to properly be described as punishment in the ordinary sense.

1.10 We prefer to describe sentencing, therefore, as the judicial determination of the sanction, if any, to be imposed on a person found guilty of an offence.

B. THE SENTENCING HEARING

1.11 The sentencing hearing may begin once there has been a plea or a finding of guilt. The proceedings may have taken a number of courses prior to this: the defendant may have pleaded not guilty at the trial but subsequently have been found to be guilty by the judge or jury; or may have changed his or her plea to guilty during the course of the trial; or he or she may have pleaded guilty at the outset. The court may then proceed to sentence, or it may adjourn for the compilation of reports and to allow the parties to call witnesses to the court. If the plea or finding of guilt was made in the District Court, the District Judge may have sent the offender forward to the Circuit Court for sentencing in order to avail of that court's wider jurisdiction.

1.12 We now examine the procedures which may be implemented in the course of the sentencing hearing. It should be observed that not all sentencing hearings will follow this pattern, since neither the rules of court, legislation nor judicial precedent set out a course of procedure to be followed at every sentencing hearing. Indeed, in some cases, particularly at District Court level, it is difficult to distinguish the sentencing hearing from the determination of the substantive issue of guilt since the District Judge may decide the sentence to be imposed on the evidence adduced during the course of the trial. Nonetheless, practice has over the years established a pattern of procedure which is generally followed at sentencing hearings in the superior courts.

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10 The District Court is empowered to do this under s 1(1) of the *Probation of Offenders Act, 1907*, when it appears to the Court that it is "inexpedient to inflict any punishment".

11 See Ch 4, *infra*. (A Coherent Sentencing Policy).

12 See para 1.99, *infra*. (Adjournment *Sine Die*).

(i) Outline of the Offence

1.13 It is normally the prosecution which opens the sentencing hearing by presenting the facts of the offence to the court. When an offender pleads guilty to the charge at an early stage of the trial, the court may know little about the circumstances of the offending behaviour. Similarly, if the offender has been sent forward to the Circuit Court by the District Court for sentencing, the Circuit Court Judge will know little about the case. Occasionally, in District Court sentencing hearings, the District Judge may have learnt many of the details during the course of a preliminary examination, particularly if there has been some question as to whether or not the offence was minor in nature and fit to be tried summarily, and, thus, may feel that it is unnecessary to rehear all the circumstances of the offence.

1.14 The prosecution will explain to the court what the case involves by summarising the evidence which has been heard during the trial, or, if the offender has pleaded guilty, the evidence which the prosecution would have presented at the trial - normally starting with the circumstances of the crime and finishing with the offender's apprehension and charge. It is usual for the prosecution to call a Garda witness to give sworn testimony as to these matters.

On a Plea of Guilty

1.15 If the defendant pleads guilty but disputes the prosecution's version of the facts, the defence may either contact the prosecution prior to the hearing to see if they are prepared to modify their version of the facts, or, if the prosecution is not prepared to do so, the defence may address the court on the facts in dispute. There is no clear authority as to how the court should resolve such a conflict, but it seems from English decisions that the court will not order a trial on a verdict of not guilty simply to enable the sentencer determine a question of fact which does not affect the outcome of the trial itself.[13] There is also some English authority to the effect that the sentencing court may either hear evidence and come to a conclusion on the matter[14] (both sides calling witnesses and cross examining them in the usual way, if appropriate[15]), or hear no evidence, but listen instead to the submissions of counsel and come to a conclusion.[16] If the latter course is followed, the benefit of any doubt must be given to the defence.[17]

The Standard of Proof

1.16 There is no established rule as to the standard of proof which should be attained by the prosecution and defence at the outline stage. In England,

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13 *R v Milligan* (1982) 4 Cr App R (S) 2; *R v Newton* (1982) 4 Cr App R (S) 388, [1983] Crim L R 198, disapproving *R v Taggart* (1979) 1 Cr App R (S) 144.

14 *R v Newton, supra*; also *R v Gravell* [1978] Crim L R 438; *R v Gortat and Pirog* [1973] Crim L R 648; *R v Ball* [1983] Crim L R 198 and *R v Parker* [1984] Crim L R 763.

15 *R v McGrath and Casey* (1983) 5 Cr App R (S) 460.

16 *R v Newton, supra* n.14.

17 *R v Gortat and Pirog, supra* n.15.

however, if the sentencing court chooses to hear evidence from both sides, the usual standard of proof in criminal trials is applied (i.e. beyond any reasonable doubt),[18] but this carries only the weight of English precedent and there seems to be no Irish authority on the matter. The usual requirements as to corroboration should also be applied, although this may have the peculiar consequence of the trial judge issuing a corroboration warning to himself.[19]

On a Plea of Not Guilty

1.17 Where an offender pleads not guilty, the court will usually have received evidence on all the germane facts during the course of the trial. The judge must make his own decision as to what were the true circumstances of the case. Where the defendant has been found guilty by a jury and the factual basis for the verdict is implicit in that verdict, it seems that the sentencer is bound to accept this and sentence accordingly.[20] A dispute as to the facts may still arise, however. For example, if the finding of guilt results from a jury verdict, the basis of the verdict may remain unclear. Similarly, if the sentencing hearing is taking place in the Circuit Court following a finding of guilt in the District Court, the basis of the District Judge's verdict may remain unclear. Again, the task of the sentencing judge is to make his or her own decision on the evidence as to what were the true circumstances of the case,[21] and, seemingly, giving the offender the benefit of the doubt where any doubt lies.[22]

1.18 It is not normal practice for the sentencing judge to question the jury so as to clarify the basis upon which it arrived at its verdict, although some older authority exists for doing so in murder trials where a verdict of guilty of manslaughter is returned without the factual basis of the verdict being made apparent.[23] In *R v Solomon and Triumph*,[24] the extent to which it is permissible or desirable for a sentencer to question a jury about the basis on which it arrived at a particular verdict was considered. Beldam J concluded that it is generally undesirable to ask a jury to explain an otherwise ambiguous verdict,[25] since the jury may not have been unanimous on the basis for the particular verdict although in agreement on the general verdict.[26] A "sensible precaution",[27] however, where the trial is on a charge of murder, is for the trial judge to follow the procedure used in *R v Frankum*.[28] In that case the jury was directed, (prior to reaching its verdict), that if it found the appellant guilty of manslaughter instead of murder, it would be asked to indicate whether the abnormality arose as a result of inherent causes or as the result of the effects of drugs, or both; if the diminished responsibility arose from the effects of a drug

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18 *R v McGrath and Casey, supra* n.16.
19 *R v Gortat and Pirog, supra* n.15.
20 *R v Boyer* (1981) 3 Cr App R (S) 35.
21 Archbold, *Criminal Pleadings, Evidence and Practice*, (43 ed, 1988) p622.
22 See *R v Stosiek* (1982) 4 Cr App R (S) 205.
23 *R v Doherty* (1887) 16 Cox CC 306.
24 (1984) 6 Cr App R (S) 120.
25 See also *R v Stosiek* (1982) 4 Cr App R (S) 205.
26 See *R v Larkin* [1943] KB 174.
27 According to the Court of Appeal in *R v Frankum*, (1983) 5 Cr App R (S) 259.
28 *Ibid.*

then imprisonment would probably not be appropriate. The jury returned a verdict of guilty of manslaughter on the grounds of diminished responsibility arising out of inherent causes. The defendant was sentenced to life imprisonment, and on appeal tendered medical evidence which tended to support the claim that it was the effects of a drug which caused the abnormality. The Court of Appeal held, however, that the fresh evidence did not justify the court in reaching a conclusion different to that of the jury.

(ii) The Offender's Antecedents and Character

1.19 The prosecution will then present to the court evidence of the offender's *antecedents* (criminal record) and *character*.[29] It is normal practice for the prosecution to call a witness, usually a Garda officer, to given sworn evidence of the offender's age, domestic and family circumstances, education, employment, previous convictions, date of arrest, and whether he or she has been on bail.

Antecedents

1.20 Where previous convictions are to be relied upon they must be either:

(a) proved in lawful evidence, or

(b) expressly admitted to by the accused.[30]

In respect of each and every alleged conviction, the offender should have been given an opportunity of admitting or denying it before putting the information to the court.[31] In respect of any conviction disputed by the offender, proper evidence - such as the court order of the previous conviction - would be required to be presented to the court, and the defendant allowed an opportunity to controvert that evidence.[32] Hearsay evidence, such as a copy of the Garda criminal history record, would not be sufficient to prove convictions in dispute.[33] In respect of convictions not in dispute, however, a copy of the Garda record will suffice.[34]

Character

1.21 There is no hard and fast rule as to what constitutes evidence of character at the sentencing stage, but generally included are personal details such as age, family background, education and work record, and other details such as income and personal situation since arrest, including whether or not the offender was on bail or in custody.

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29 *The State (Stanbridge) v Mahon* [1979] IR 214; *R v Ball* (1951) 35 Cr App R 164.

30 *Ibid*, p219; *R v Turner* (1924) 18 Cr App R 161.

31 *Ibid.* A photocopy of the Garda record is a convenient method of presenting the information personally to the convicted offender.

32 *Ibid.*

33 *Ibid.*

34 *Ibid; R v Marquis* (1951) 35 Cr App R 33.

1.22 The rules of evidence are relaxed in relation to character evidence, so that hearsay evidence may be relied upon. In *The State (Stanbridge) v Mahon*[35] Gannon J quoted from a judgment of the English Court of Criminal Appeal delivered by Goddard LCJ in *R v Marquis:*[36]

> "The other thing to which I desire to call attention is that the learned Recorder seems to have had some doubt whether he could accept what he called 'hearsay evidence' of character after conviction ... It would be a very unfortunate thing if evidence of that kind could not be given, because it would prevent evidence from being given in favour of the prisoner, and would prevent a police officer from saying: 'I have made inquiries of the prisoner's employer, he works well and his character is good'. After conviction, any information which can be put before the Court can be put before it in any manner which the Court will accept."

1.23 It is generally accepted that the role of the prosecution in sentencing is to provide the court with information - not to seek to influence the court's sentencing decision in any way.[37] However, a problem which may occur when evidence of antecedents is being given by prosecution counsel or a Garda officer is that damaging general remarks about the defendant's character, which are not capable of substantiation, are made, having the effect of damning the offender in the eyes of the court. For example, the officer may state that the defendant "associates with known criminals" or is "known to the police" (i.e. he has often been in trouble with the police) or even that "there is a lot of this type of crime in the locality." These types of remarks can be seen as attempts by the prosecution to influence the decisions of the sentencing court.

1.24 English precedent may again prove persuasive here. In *R v Van Pelz*, evidence was given that the appellant was a prostitute who was "an adventuress ... a very dangerous woman ... completely unscrupulous." Caldecote CJ held that "a police witness should not be allowed to make allegations which are incapable of proof and which he has reason to think will be denied by the prisoner."[38] The present English rule is that witnesses should confine themselves to the details of the antecedents, and any adverse comments should be contained in the antecedents form.[39] Any such adverse evidence should not be given as part of the antecedents "unless it is first hand information about which the officer giving the information can be questioned."[40] There is no Irish authority on the matter.

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35 [1979] IR 214.

36 (1951) 35 Cr App R 33.

37 See for example Rule 9.20 of the *Code of Conduct for the Bar of Ireland:*

> "Prosecuting Counsel should not attempt by advocacy to influence the court in regard to sentence. If however an accused person is unrepresented it is proper for prosecuting Counsel to inform the Court of any mitigating circumstances as to which he is instructed".

38 See also *R v Wilkins* (1977) 66 Cr App R 49: associates with "a notorious Soho gangster" and "a violent criminal."

39 *Practice Direction* [1966] 2 All ER 922.

40 *Ibid.* Such evidence must be sufficiently particularised for the defence to be able to cross examine on it and specifically rebut it: *R v Wilkins* (1977) 66 Cr App R 49; *R v Robinson* (1969) 53 Cr App R 314.

(iii) Reports

1.25 At this stage of the hearing, the court will consider any reports which it has requested or ordered. These will have taken time to prepare, so an adjournment will invariably have been required for this purpose.

(a) The social inquiry (presentence) report

1.26 The social inquiry report is prepared by the Probation and Welfare Service. If the offender is already on probation, it is likely that his supervising officer will prepare the report - if not, the offender will be assigned an officer to interview him and make appropriate inquiries into the offender's domestic situation and social background. As well as outlining the offender's attitudes and responses to the offence, the report evaluates how further crime may be avoided and what services and forms of intervention can be utilised towards this end. Following this analysis, a supervision programme may be proposed (if considered feasible) which will both continuously monitor the behaviour of the offender and involve him or her in a constructive use of time through availing of community resources. Recommendations can then be made to the court concerning what type of supervision would underpin such a programme as well as the terms and conditions of sentence that would be appropriate in the particular case.[41] The Probation officer's recommendations will be based on his or her assessment of the offender's likely reaction to a particular sentence. The court, however, is not bound to accept the officer's recommendations as it will have other factors to take into account, such as the public interest.[42]

1.27 There is only one situation in which such a report is a prerequisite, that is prior to the making of a community service order.[43] However there are certain types of order, such as adjourned supervision,[44] or orders under s28 of the *Misuse of Drugs Act, 1977*,[45] which cannot be made without consultation with the Probation and Welfare Service - in effect requiring a social inquiry report.

1.28 The social inquiry report is accorded some degree of confidentiality in that it is not read aloud in court. However, whereas in England the prosecution is never allowed to see the contents of the report, in Ireland it is not uncommon for the prosecution to be given a copy of the report to peruse.[46] The defence will, of course, be given a copy to read, and will have opportunity to question the probation officer in court if any matter contained in the report requires clarification, or if a dispute arises.[47] Of necessity, this requires that the report

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41 *Report on the Probation and Welfare Service, 1988* (PL 6843), p2.

42 For a brief summary of the criticisms made by the English Court of Appeal of probation officers making unrealistic recommendations without recognising this difference in perspective see Boyle and Allen, *Sentencing Law and Practice*, (1985), p238.

43 *Criminal Justice (Community Service) Act, 1983*, s4(1)(a); see para 1.108, *infra*. (Community Service).

44 See para 1.128, *infra*. (Adjourned Supervision).

45 See para 1.111, *infra*. (Medical Treatment or Therapy).

46 Which they may even keep on file for future occasions.

47 *R v Kirkham* [1968] Crim L R 210.

be presented to the judge in open court in the presence of the accused.[48]

(b) Medical reports

1.29 If the court is of the opinion that an inquiry ought to be made into the physical or mental condition of the offender then it may adjourn[49] to enable a medical examination and report to be made.

1.30 It used to be that such reports had to be furnished in respect of all offenders under certain sections of the *Misuse of Drugs Act, 1977,*[50] but this is no longer the case.[51] However, the extended sentencing powers[52] under that Act are only exercisable upon consideration of a medical report and social inquiry report, so a medical report will be required if the court considers that one of these extended penalties is viable option. The reports will be prepared by "a health board, Probation and Welfare officer or other body or person, considered by the court to be appropriate."[53]

(c) Reports of prison officers, and community service reports

1.31 If the defendant has served a custodial sentence, a report from that institution will be available to the court. Likewise, if the defendant has served a term of community service, the court may request a report from the Probation and Welfare officer responsible for the supervision of the particular scheme. Such reports will outline how the defendant responded to the particular regime, if he failed to respond, or if any problems arose. Very often these reports will already have been used by the probation officer when preparing a social inquiry report.

(iv) Plea in Mitigation

1.32 The prosecution having outlined the facts of the offending behaviour and the character and circumstances of the accused, and all disputes in relation to the foregoing having been made known to the court, the defence now has a duty to address the court by way of a *plea in mitigation*. Despite the reference to 'mitigation' in the name of the plea, the defence, in making the plea, is not limited to factors relevant solely to the mitigation decision,[54] and may raise matters relevant to the decision as to which approach the court should adopt in determining sentence.[55]

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48 See *The People (DPP) v John McGinley* 3 Frewen 251.

49 The period of remand of an offender for the purposes of s28 of the *Misuse of Drugs Act, 1977* shall not exceed eight days if he or she is kept in custody; *id* s28(1)(a).

50 See Charleton, *Controlled Drugs and the Criminal Law*, (1986) p150.

51 *Ibid; Misuse of Drugs Act, 1984 (Commencement) Order, 1984*, (SI No 205 of 1984).

52 See para 1.111, *infra.* (Medical Treatment).

53 S28(1) *Misuse of Drugs Act, 1977.*

54 See para 1.71 *et seq, infra.* (The Mitigation Decision).

55 I.e. whether the sentence should reflect a rehabilitative, retributive, or deterrent approach; see para 1.45 *et seq, infra.* (The Choice of Approach).

1.33 There is no defined or exclusive list of matters which are relevant to the mitigation decision, or to the sentencer's choice of approach for determining sentence (an infinite variety is thought to exist[56]). Thus, the defence will be left to rely on its own ingenuity and experience when deciding what factors to raise during the plea in mitigation. It is far from unlikely that the defence will from time to time overlook a factor which the trial judge would have found persuasive; or, alternatively, that the defence will burden the court with a large range of factors, only some of which in the event will prove to be relevant. It appears, however, that the sentencing judge should permit the defence an opportunity to do so,[57] listening patiently and not interrupting, even if the defence has earlier put forward a lying defence.[58]

1.34 *Boyle and Allen* give the following list of factors commonly raised by the defence during the plea in mitigation:[59]

(1) Those circumstances of the offence of a mitigating nature such as the impulsive nature of the offence, the presence of provocation, the fact that the defendant was led into trouble by older and more experienced offenders, the fact that he or she was entrapped, or the limited role he or she played in the commission of the offence.

(2) Those circumstances subsequent to the offence which indicate contrition, such as the fact that the defendant made a full and frank confession to the police, his or her co-operation with the police, or the fact that he or she has made restitution to the victim. If the police officers in charge of the case can be called to give evidence on these points this will strengthen the effect of the plea.

(3) Those factors in his or her personal life, character and conduct which indicate an ability to reform, such as the fact that this is his or her first offence, or that he or she has kept out of trouble for a substantial period since his or her last conviction, that he or she has been in regular employment or has obtained employment since committing the offence, that he or she has a stable home and family background. If imprisonment might have an adverse effect on his or her health or family, this should also be mentioned. If possible, character witnesses should be called to add substance to these factors.

1.35 Where appropriate, the offender may be called to the stand to give evidence, particularly if his or her bearing, personality and desire for reform are likely to impress the court. It is clear that the likelihood of reform is not a factor relevant to mitigation; but it *is* of crucial importance in determining the correct

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56 See the remarks of Finlay CJ in *The People (DPP) v Tiernan* [1988] IR 250; and para 5.51 *et seq*, *infra* (Factors which Mitigate Offence Seriousness).

57 *The People (AG) v Kearns* [1949] IR 385.

58 *R v Jones* [1980] Crim L R 58.

59 Boyle and Allen, *Sentencing Law and Practice*, p243.

approach to adopt when sentencing. In *The People (DPP) v Conroy (No 2)*[60] Finlay CJ said of the likelihood of reform:

> "Such evidence could never be in mitigation of the crime but could be a ground for supposing that there was a reasonable chance that he could be rehabilitated provided he was induced by the length of his sentence to have an expectation of eventually returning to ordinary society."[61]

1.36 The defence may present, if appropriate, character evidence as part of the plea in mitigation, and may call character witnesses such as the local priest, youth club leader, school teacher, or employer (particularly if the employer is willing to keep the offender in his or her employ).

(v) Bringing Other Offences into Consideration

1.37 At this stage, the defence may also wish to have other charges taken into consideration to which the offender has pleaded guilty. The Court may then take them into consideration at its discretion.[62]

C: THE SENTENCING DECISION

1.38 The sentencing decision is essentially a matter for the judge, not for the jury, and while it is permissible for the jury to offer a rider to its verdict, such as a recommendation that mercy be shown, the judge is in no way bound by it.[63]

1.39 As to the procedure to be followed at the sentencing hearing, there is little in the way of legislative or judicial ruling on the decisions which must be made by the sentencing judge.[64] Cryptic guidance is to be found, however, in various judicial pronouncements to the effect that the sentence to be imposed must not only be appropriate to the particular circumstances of each case, but also to the particular offender.[65]

1.40 Of course, it is not possible to say with precision what goes on in the mind of every sentencer when choosing a sentence appropriate to the characteristics of both the particular offender and offence. The judicial reluctance to state reasons for choice of sentence does not help us in our analysis.[66] However it is possible to identify some of the various decisions which may be made by sentencers in coming to a final conclusion. Thus, during the 1970s in England, *Thomas* was able to construct a three stage decision model generally followed by the English Court of Appeal and the lower courts in

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60 [1989] IR 160.
61 *Ibid*, p165.
62 See para 1.120 *et seq*, *infra*. (Other Offences taken into Consideration).
63 Ryan and Magee, *The Irish Criminal Process*, (1983), p391.
64 Section 5 of the *Criminal Justice Bill, 1992*, recently initiated, provides for the Court's taking into account, in determining sentence, the effect of sexual offences or offences of violence on the victim, see para 2.22, *infra*. (Victims).
65 See for example *The People (AG) v Poyning* [1972] IR 402; *The State (Healy) v Donoghue* [1976] IR 325.
66 See para 1.145, *infra*. (Reasons) and Ch 13, *infra*. (Reasons for Sentence).

determining sentence.[67] Thomas's analysis was accepted by the English courts as being accurate, and in the twenty one years that have followed, has been accepted as an authority on the matter. Our examination of Irish sentencing decisions suggests that Irish sentencers follow a broadly similar pattern in making their decisions. The Irish pattern may be outlined as follows:

(I) Factual Basis:

The sentencer determines the correct factual basis upon which to base his sentencing decision.

(II) The Appropriate Sentence:

(a) The sentencer decides on the correct *approach* to adopt, having regard to the particular circumstances of both the offender and the offence.

(b) The sentencer then chooses the particular sentence by reference to the approach adopted in (ii)(a) above.

(III) Mitigation:

The sentencer may take mitigating factors into account in reducing sentence below the level chosen in (ii)(b) above.

(I) Determining the Factual Basis

1.41 The first task of the sentencing judge is to determine the factual basis of the offence upon which to assess the appropriate sentence. A principle of fundamental importance in determining the factual basis upon which to assess the appropriate sentence is expressed in the ancient maxim *nulla poena sine lege,* i.e. no one is to be punished on a charge for which they have not been tried and found guilty. In *The People (Attorney General) v O'Callaghan*,[68] Walsh J gave this the weight of a constitutional prescript:

> "In this country it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter upon which he has not been convicted."[69]

1.42 Thus, the sentencing judge must sentence only on the facts supporting the offence in hand, and must ignore any other evidence which would tend to

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67 Thomas, *Principles of Sentencing*, (2 ed, 1979).

68 [1966] IR 501. See also *The People (AG) v Edge* [1943] IR 115; *King v AG* [1981] IR 233.

69 The requirement of conviction here might be thought to cast some doubt on the constitutionality of sentencing options which may be imposed merely upon proof of guilt but without conviction, such as those available to the District Court under s1(1) of the *Probation of Offenders Act, 1907*. However, if Walsh J's reference to conviction is taken to mean that the offender has been tried and found guilty in due course of law (as the Constitution, Article 40.4.1, puts it: see also the judgment of Gavan Duffy J in *The State (Burke) v Lennon* [1940] IR 136) then these doubts are unfounded.

support the commission of other or more severe offences. English case law has recently produced a number of subsidiary principles based on the principle of *nulla poena* which, because they share the same foundation, may be considered *a fortiori* declaratory of Irish law. They can be summarised as follows:

(a) **The sentencer must not impose sentence on the basis of an opinion that the offender is actually guilty of offences with which he or she has not been charged.** In *The People (DPP) v O'Leary*[70] the applicant was convicted in the Special Criminal Court on two charges relating to membership of an unlawful organisation and possession of incriminating documents. In the course of sentencing the applicant on the first count, the Special Criminal Court stated:

> "The Court also accepts the evidence of Inspector Brennan that the accused was disseminating such posters to young people as part of a campaign on his part - as part of a campaign conducted by him to recruit new young members for the Irish Republican Army. The Court must regard such conduct as being most reprehensible and grievously wrong."

In fact, dissemination of such posters amounts to a separate offence, with which the applicant had not been charged. McCarthy J, in reducing sentence from 5 to 4 years imprisonment, said:

> "The Court should not have been influenced, as it clearly was, by an allegation of wrongdoing with which the applicant was never charged or convicted. The Court therefore erred in principle."[71]

(b) **Where an offender has been tried and acquitted on some counts but convicted on others, the evidence of the charges of which he or she was acquitted must be disregarded.** In *R v Ajit Singh*[72] the appellant was convicted of unlawful wounding although acquitted of wounding with intent to do grievous bodily harm, despite evidence that he had attacked a workmate, stabbing him several times with a kitchen knife and causing a deep cut to one eye. The trial judge sentenced him on the basis that he had wounded with intent to do grievous bodily harm. The Court of Appeal reduced the sentence saying:

> "One had to look at it from the point of view that one was punishing an unpremeditated unlawful wounding, somewhat artificial in this case, but that was the approach that had to be

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70 3 Frewen 163.
71 See also *R v Connor* (1981) 3 Cr App R (S) 225.
72 [1981] Crim L R 724, (1981) 3 Cr App R (S) 160.

made."[73]

(c) **Where an offender pleads guilty to some of the counts, but not to others, he or she must be sentenced only on the charges to which he has pleaded guilty.** Unless, of course, he or she is tried and convicted on the other counts. In *R v Clutterham*[74] the appellant pleaded guilty to assault occasioning actual bodily harm, but not to possession of an offensive weapon. His pleas were accepted, but in sentencing him, the trial judge referred to the alleged possession of an offensive weapon. The Court of Appeal reduced the sentence, saying:

> "It seemed to us from what the recorder said when sentencing that he failed to eliminate from his mind the second incident which he plainly should have done."[75]

(d) **Where an offender pleads guilty to a lesser offence not charged he or she must not be sentenced on the charge to which he or she pleaded not guilty.** Unless again, of course, he or she has been tried and convicted on that charge. In *R v Rogina*[76] the appellant pleaded not guilty to a single count of incest with his daughter, but guilty to indecent assault which did not appear on the indictment. The Court of Appeal reduced the sentence saying that it was important:

> "not to sentence or appear to sentence for incest when in fact the offence with which we are dealing is the lesser one of indecent assault."[77]

(II) Choosing the Appropriate Penalty

1.43 The second task of the sentencing judge is to choose the appropriate penalty based on the facts of the case. It is rare that the sentence for an offence is fixed by law.[78] The sentencer must, thus, be aware of his or her sentencing options and any legal restrictions which apply to them, such as the statutory maxima which govern the sentence for that particular offence, the limits on the jurisdiction of his or her court, or the separate provisions for young offenders or drug abusers.[79] But within this framework there is a considerable degree of discretion for sentencers in choosing sentence in individual cases.

1.44 Making this choice is a two stage process. The first stage involves

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73 *Ibid.* See also *R v Hudson* (1979) 1 Cr App R (S) 130; *R v Hazelwood* (1984) 6 Cr App R (S) 52; *R v Worsfold*, unreported, April 29 1975 (See Thomas, *Encyclopedia of Current Sentencing Practice*, (loose leaf service), L2.1(b)).

74 (1982) 4 Cr App R (S) 40.

75 *Ibid.* See also *R v Booker* (1982) 4 Cr App R (S) 53; *R v Ayensu and Ayensu* (1982) 4 Cr App R (S) 248; *R v Johnson* (1984) 6 Cr App R (S); *R v Fisher* (1981) 3 Cr App R (S) 313.

76 (1977) Cr App R 79.

77 *Ibid.* See also *R v Fisher* (1981) 3 Cr App R (S) 313.

78 See *The People (DPP) v Gray* [1987] ILRM 4, and para 1.132, *infra.* (Mandatory Sentences).

79 See para 1.77, *infra.* (The Range of Choice).

choosing the correct principle or approach to adopt in the instant case according to the particular characteristics of the offender and offence. This is decided by reference to the traditional "objects" or purposes of sentencing.[80] The second stage then involves choosing the particular penalty or measure appropriate to the offender by reference to the approach adopted in the first stage.

(a) The Choice of Approach

1.45 The primary decision the sentencer has to make is to choose which approach to adopt in sentencing the particular offender. Traditionally, there have been four approaches to the sentencing of offenders, corresponding to the four traditional "objects" or purposes of sentencing, namely *retribution, rehabilitation, deterrence* or *incapacitation,* i.e. the offender should be punished for crime; the offender should be given an opportunity to mend his or her ways; the offender and others should be deterred from committing similar crimes in the future; and the offender should, if necessary, be prevented from repeating his or her crime.[81] Of these four, only the first three have been expressly favoured by the Irish courts. In *The State (Stanbridge) v Mahon*[82] Gannon J said:

> "The first consideration in determining sentence is the public interest, which is served not merely by punishing the offender and showing a deterrent to others but also by affording a compelling inducement and an opportunity to the offender to reform."

1.46 Thus the sentencing judge must decide whether to impose a sentence of sufficient severity to punish the offender, or of such severity so as to deter the offender and others from committing similar offences in the future, or, alternatively, to choose an "individualised" measure, i.e. a sentence based not on the severity of the offending behaviour but on the individual needs of the offender; i.e. a sentence likely to reform the offender.

Incoherent policy

1.47 There is no clear legislative or judicial policy which governs how the sentencing judge will decide which approach to adopt. The decision represents what the Victorian Court of Criminal Appeal described as an "instinctive synthesis"[83] of all the various aspects of the offending behaviour and the circumstances of the offender.

1.48 This lack of coherent policy has a perplexing consequence for the sentencing judge. The problem is that there are a number of competing objects which are used to determine the sentence which may be imposed, and these approaches frequently conflict. For example, a sentencing judge when faced with

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80 See paras 1.45, *infra.* (The Choice of Approach) and Ch 4 *infra.* (Objects/Distribution).
81 Ryan and Magee, *The Irish Criminal Process*, p391.
82 [1979] IR 214.
83 *R v Williscroft* [1975] VR 292.

a young addict who is caught peddling drugs to feed his or her habit might rationally decide to impose a lengthy prison sentence to deter, although the sentencer may as easily decide to impose a short sentence in the interests of rehabilitating the offender. Ultimately a choice has to be made to follow one object the expense of another, yet, when faced with conflicting principles, sentencers have no principle to guide them:

> "Nothing tells us, however, when or whether any of these several goals are to be sought, or how to resolve such evident conflicts as that likely to arise in the effort to punish and rehabilitate all at once."[84]

1.49 In this jurisdiction, Walsh J gave some general guidance to assist sentencers by favouring rehabilitation as the most positive aim. In *The People (AG) v O'Driscoll*, he said:

> "The objects of passing sentence are not merely to deter the particular criminal from committing a crime again but to induce him as far as possible to turn from a criminal to an honest life and indeed the public interest would be best served if the criminal could be induced to take the latter course."[85]

1.50 However, even though it would seem from this that sentencers should generally favour a rehabilitative approach, it is not clear when such an approach would be inappropriate and a different approach more appropriate. Some small amount of guidance may be divined from decided cases, but, since the decision represents an "instinctive synthesis", sentencers are by no means bound by decided examples, and are free to adopt any approach they wish.

A rehabilitative approach

1.51 In *O'Driscoll*, a rehabilitative approach was appropriate where the offence was the offenders' first crime of violence. Recently, in *The People (DPP) v Conroy (No 2)*[86] a rehabilitative approach was found to be appropriate where the high standard of behaviour on the part of the appellant while on remand in custody could be a ground for supposing that there was a reasonable chance of reform.

1.52 One's bearing in court may be accepted as an important indicator as to the likelihood of reform.[87] However a rehabilitative approach may not be appropriate where the offender has not availed of an opportunity to reform under a prior sentence, e.g. where he or she has committed a further offence while on probation.[88]

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84 Frankel, *Lawlessness in Sentencing* (1972) 41 U Cincinnati LR 1, p4.
85 1 Frewen, 351, 359, (1972).
86 [1989] IR 160.
87 *The People (AG) v Poyning* [1972] IR 402.
88 *The People (AG) v Buckley*, 1 Frewen 190.

1.53 Also, as Finlay CJ noted in *The People (DPP) v Tiernan*:

> "an admission of guilt may, depending upon the circumstances under which it is made and the extent of the evidence apparent to an accused person as being available against him, also be taken in some circumstances as an indication of remorse and therefore as a ground for a judge imposing sentence to have some expectation that if restored to society, even after a lengthy sentence, that the accused may possibly be rehabilitated into it."[89]

1.54 Rehabilitative considerations commonly lead the sentencer to impose a reduced sentence. However, since a rehabilitative approach involves an attempt by the sentencer to find a sentence which is most likely to induce reform, a rehabilitative sentence may sometimes appear to be more severe than a sentence imposed following some other approach. In *J v District Justice Sean Delap*[90] the applicant was applying to the High Court for judicial review of a sentence of detention in a reformatory school for a term in excess of three years in length. The District Justice who tried the case had done so upon summary conviction of the applicant, i.e. for a minor offence; despite the fact that the Supreme Court had previously held that an offence carrying a sentence of three years detention in St Patrick's Institution (which is not a reformatory school) could never be considered minor nor tried summarily.[91] Barr J in the High Court held, however, that since the object of a period of detention in reformatory school was the *rehabilitation* of the offender, and *not* the *punishment* of the offender, the offence was legitimately tried summarily as a minor offence. He said:

> "An obligation to remain at a place for the education and training of young offenders does not, in my view, convert a school into a penal institution analogous to a prison, nor ought the period of education and training which a young offender spends there be regarded as a period of imprisonment in the penal sense of that term. I accept that such detention has in it an element of punishment, but its primary purpose is educational and, most importantly, *the period of detention is in the main related to the function of the school as a place of instruction and correction. The duration of a prison sentence on the other hand is primarily related to the gravity of the offence which gave rise to it and the character of the convict.*"[92]

A deterrent approach

1.55 For some offences, a deterrent sentence may be more appropriate; in

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89 [1988] IR 250, p255.
90 [1989] IR 167.
91 *The State (Sheerin) v Kennedy* [1966] IR 379.
92 [1989] IR 167, p170. Emphasis added.

The People (DPP) v Preston[93] it was recognised that it is important in sentencing under the *Misuse of Drugs Acts* that penalties of a deterrent nature be imposed to display society's revulsion at drug abuse and drug trafficking. Similar considerations apply to offences of possession of controlled substances.[94] It is clear that public opinion has a large role to play in the decision to impose a deterrent sentence. In *The People (AG) v Buckley*[95] Maguire CJ said of the offences of house breaking, larceny and malicious damage:

> "There is much disturbance in the public mind at present about such offences and I would not like it to be thought that this court would deal leniently with them."

A retributive approach

1.56 Where the offender shows no likelihood of reform, and a deterrent sentence is not appropriate, the correct approach may be to impose on the offender "a sentence appropriate to his degree of guilt,"[96] in other words, a sentence which is proportionate to the seriousness of the offending behaviour by reference to the retributive principle of *desert* - the offender gets the sentence he or she deserves.[97] In *The People (AG) v Giles*,[98] the appellant was sentenced to six years imprisonment for conspiracy to rob. The Supreme Court held that despite the rule of general practice not to award a period of imprisonment greater than the substantive offence would carry if the accused had been convicted of that, a retributive sentence was appropriate, Walsh J saying:

> "In my view the sentence imposed by the learned trial judge in the present case was a very proper one, having regard to the seriousness of the offence, and was a lawful sentence."[99]

Differing principles

1.57 Having adopted the most suitable approach with regard to the circumstances of the offence and the characteristics of the offender, the sentencer will apply the principles appropriate to that approach to determine the precise penalty or measure which is to be imposed on the offender. As we shall see, only the most general body of such principles exists.[100] However, it is clear that the general principles of each approach differ considerably, depending on the approach taken. For example, the application of retributive principles

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93 Court of Criminal Appeal, unreported, 23 October 1984, *ex tempore*. See Charleton, *Controlled Drugs and the Criminal Law*, (1986) p149.

94 *The People (DPP) v Moylan*, Court of Criminal Appeal, unreported, 12 March 1984, *ex tempore*.

95 1 Frewen, 190.

96 *Per* Henchy J in *The State (Healy) v Donoghue*, [1976] IR 325, p353, *supra*.

97 See para 4.11, *infra*. (Retribution)

98 [1974] IR 422.

99 *Ibid*, p426. Emphasis added.

100 See para 1.62, *infra*. (The Choice of Penalty or Measure). Conversely, proportionality arguments of this type have been successfully relied upon in appeals against sentence, and sentences which were found to be too severe in proportion to the seriousness of the particular offence have been reduced; see *The People (DPP) v Johnston* 3 Frewen 276.

requires the sentencer to find the sentence which most accurately reflects the offender's culpability.[101] Mitigating circumstances may be taken into consideration in reducing the severity of such a sentence. Also, because the retributive approach relies heavily on the theory of *desert,* the sentence imposed should not be more severe than that which the offender deserves.[102] On the other hand, rehabilitative principles require the sentencer to find the measure which will most likely induce the offender to reform.[103] Thus, the gravity of the offending behaviour is irrelevant to such an approach, and the sentence will reflect an assessment of the probable future conduct of the offender and his likely response to various measures.[104] Finally, deterrent sentences reflect neither the gravity of the offending behaviour nor the characteristics of the offender, but rather, they depend on an assessment of the likelihood of the offender and others committing further similar offences.[105]

1.58 It follows that a sentence which would be considered inappropriate as an application of the principles of one approach may be considered entirely correct when seen in terms of another approach. This is clearly illustrated in cases concerning co-accused, who although of equal complicity in the offending behaviour, receive significantly different sentences.

1.59 In *The People (AG) v Poyning,*[106] the appellant was arraigned in the Circuit Court in Cork on a number of counts relating to an armed robbery. He pleaded guilty and was sentenced to four years penal servitude on the first count (armed robbery), 12 months imprisonment on the second (conspiracy) and to six months imprisonment on the fifth (taking a vehicle without authority); the prosecution having entered a *nolle prosequi* in respect of counts 3 and 4. Two other men, Motherway and Twomey, were also indicted but their trial was transferred to the Central Criminal Court where each pleaded guilty and was sentenced to six years penal servitude suspended upon each prisoner entering into a bond to keep the peace for five years, and each was then released. The appellant appealed to the Court of Criminal Appeal on the grounds that there was a gross inequality of treatment of himself as compared to the other two accused in a case in which the circumstances indicated that he was no more culpable than the other two and his previous record was no worse.

1.60 However, the Court of Criminal Appeal could not justify altering the sentences on those grounds; Walsh J said:

> "When two persons are convicted together of a crime or of a series of crimes in which they have been acting in concert, it may be (and very often is) right to discriminate between the two and to be lenient to the one and not to the other. The background, antecedents and character

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101 See para 4.11, *infra.* (Retribution).
102 *Ibid.*
103 See para 4.19, *infra.* (Rehabilitation).
104 *Ibid.*
105 See para 4.32, *infra.* (Deterrence).
106 [1972] IR 402.

of the one and his whole bearing in court may indicate a chance of reform if leniency is extended; whereas it may seem that only a severe sentence is likely to serve the public interest in the case of the other, having regard both to the deterring effect and the inducement to turn from a criminal to an honest life. When two prisoners have been jointly indicted and convicted and one of them receives a light sentence, or none at all, it does not follow that a severe sentence on the other must be unjust. If in any particular case one of such joint accused has received too short a sentence, that is not *per se* a ground on which this court would necessarily interfere with the longer sentence. Of course, in any particular case the court must examine the disparity in sentences where, if all other things were equal, the sentences should be the same; it must examine whether the differentiation is justified. The court, in considering the principles which should inform a judge's mind when imposing sentence and having regard to the character and antecedents of the convicted persons, will seek to discover whether the discrimination was based on those differences."[107]

1.61 The fallacy of this neat explanation of differing treatment of offenders is that there is no uniform set of principles or policies which the appellate court may refer to in considering the 'factors which should influence a judge's mind' when imposing sentence, having regard to the character and antecedents of the offender.[108] Almost any approach may be justified by reference to some or other characteristic of the character and antecedents of the offender since there is no uniform consensus on the weight which should be given to one factor or the other. The problems of this incoherence, as we shall see[109] are profound. Justice and equality of treatment require sentencers to adopt a uniform system for choosing the approach to be adopted,[110] but such uniformity is sadly lacking in Irish sentencing practice. Thus reform of this area should strive to inject coherence and uniformity into choice of approach in sentencing.

(b) The Choice of Penalty or Measure

1.62 How the sentencer, having decided upon the correct approach to adopt in the particular circumstances, decides upon the appropriate penalty or measure to impose belongs to the realms of mystery. It is trite to say that the sentencer, following a retributive approach, will impose a sentence which punishes the offender; or, if a rehabilitative approach is adopted, that the sentencer will impose a sentence likely to induce reform. There is no formal 'scale' or 'tariff' of sentences from which a sentencer can choose the appropriate penalty or measure, although there is some evidence that sentencers occasionally construct

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107 *Ibid* pp408,409. This aspect of *Poyning's* case was recently applied by the Court of Criminal Appeal in *The People (DPP) v Healy* [1990] IR 388; and by the Supreme Court in *The People (DPP) v Conroy (No 2)* [1989] IR 160.

108 See Ryan and Magee, *The Irish Criminal Process*, *op cit*, p433.

109 See para 2.11, *infra*. (Problems with Incoherent Sentencing Policy).

110 See Thomas; *Principles of Sentencing*; Nadin-Davis, *Sentencing in Canada* (1982); and the Canadian Sentencing Commission, *Sentencing: A Canadian Approach*, (1987), p139.

their own personal informal tariffs or 'rules of thumb'.[111] What is unclear, therefore, is how the sentencer decides that a particular penalty or measure will achieve chosen objects.

1.63 One practice which is discernible, however, is that of sentencers considering those factors which *aggravate* or *mitigate*[112] the seriousness of the offending behaviour. In finding a sentence which appropriately corresponds to the seriousness of the offence under consideration, it appears that the sentencer will, not uncommonly, begin by determining the sentence which is appropriate to the ordinary circumstances of that offence in general - e.g. if the offence is one of assault occasioning actual bodily harm, then the court may determine the sentence appropriate to an assault occasioning what it perceives as the ordinary or usual consequences of actual bodily harm committed with full intention to commit such harm. The courts have given on occasion some indication of the relative seriousness of various types of offence.[113] Following this, the sentencer then considers those elements of the particular offence which aggravate or mitigate its seriousness in comparison to the usual offence: such as the extra harmful consequences (aggravating) or the recklessness, as opposed to specific intent, of the offender (mitigating). The sentencer then adjusts the sentence for the ordinary offence to suit the specific circumstances of the instant case.

1.64 A useful illustration of this practice in operation is to be found in the judgment of Finlay CJ in *The People (DPP) v Tiernan*.[114] The appellant was one of three men who forcibly entered a car where the complainant was in the company of her boyfriend. They locked the boyfriend into the boot of the car; took the complainant to a nearby field where two of them raped her; and subjected her to other sexual assaults. The appellant was convicted and sentenced on a charge of rape, for which he received a twenty-one year sentence, and against which he appealed. In the course of his judgment, Finlay CJ followed the practice outlined above. He began by considering the nature of the crime of rape, its consequences, and the appropriate sentence for the commission of the offence *without* aggravating or mitigating factors: the bodily harm to the victim; the psychological, psychiatric and emotional distress which would ensue; the distortion of the victim's approach to her own sexuality; and the possibility of unwanted pregnancy. He concluded:

> "All these features, which I mention in summary and not as an attempted comprehensive account of the character of rape, apply even when it is committed without any aggravating circumstance. They are of such a nature as to make the appropriate sentence for any such rape a

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111 See the *Irish Press* of January 6, 1988, where a Dublin based District Judge announced (admittedly, perhaps facetiously) a New Year's resolution to impose three months extra imprisonment on any offender found to have committed the crime in question while drunk; O'Malley, *Irish Sentencing Reform* (1988) 8 ILTR 111, at p112-3.

112 'Mitigation' in this context is distinct from *mitigation of sentence*; see further para 1.71, *infra*. (The Mitigation Decision).

113 See e.g. *The People (DPP) v Maguire & McDonagh* 3 Frewen 265, p266, where Walsh J said of rape:
"Next to murder, it is probably the most serious offence one could contemplate."

114 [1988] IR 250.

substantial immediate period of detention or imprisonment."[115]

1.65 The learned Chief Justice then went on to consider those factors of the appellant's conduct which aggravated or mitigated the seriousness of the instant offence:

> "Unfortunately, the facts of the rape to which this appellant has pleaded guilty contain very many aggravating circumstances. They are:-
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> (1) It was a gang rape, having been carried out by three men.
> (2) The victim was raped on more than one occasion.
> (3) The rape was accompanied by acts of sexual perversion.
> (4) Violence was used on the victim in addition to the sexual acts committed against her.
> (5) The rape was performed by an act of abduction in that the victim was forcibly removed from a car where she was in company with her boyfriend, and her boyfriend was imprisoned by being forcibly detained in the boot of the car so as to prevent him from assisting her in defending herself.
> (6) It was established that as a consequence of the psychiatric trauma involved in the rape that the victim suffered from a serious nervous disorder which lasted for at least six months and rendered her for that period unfit for work.
> (7) The appellant had four previous convictions, being:-
> (a) for assault occasioning actual bodily harm,
> (b) for aggravated burglary associated with a wounding,
> (c) for gross indecency, and
> (d) for burglary.
>
> Of this criminal record, particularly relevant as an aggravating circumstance to a conviction for rape are the crimes involving violence and the crime involving indecency."[116]

He continued:

> "The mitigating circumstances in rape are indeed limited.
>
> The only single mitigating circumstance which arises in this case, I am satisfied, is the fact that when interviewed by the Garda Síochána the appellant immediately admitted his complicity in the crime and made a full statement. His attitude at that time was followed by a plea of guilty
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> I have no doubt, however, that in the case of rape an admission made at an early stage in the investigation of the crime which is followed by

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115 *Ibid*, p253.
116 *Ibid*, p253-4.

a plea of guilty can be a significant mitigating factor. I emphasise the admission of guilt at an early stage because if that is followed with a plea of guilty it necessarily makes it possible for the unfortunate victim to have early assurance that she will not be put through the additional suffering of having to describe in detail her rape and face the ordeal of cross-examination."[117]

1.66 The Chief Justice then considered the sentence appropriate to the circumstances of the appellant's case. He concluded:

> "I would have little hesitation in upholding a sentence of twenty-one years on the facts of this case had this appellant put the victim to trial and to the ordeal of giving evidence. When he did not, under circumstances from which it is possible to infer that he might have had some chance of escaping conviction for want of identification on a trial, it seems to me that the sentence is excessive.
>
> In these circumstances I would allow this appeal on the basis that the appropriate sentence for the offence in this case is seventeen years' penal servitude."[118]

1.67 What *is* clear, however, is that there is little in the way of legislative or judicial guidance to assist the sentencer in finding the appropriate sentence. As we shall see, the maximum penalties for most offences are far more severe than would be required in general,[119] so they provide little practical guidance to the sentencer as to how serious an offence should be viewed when he is imposing a retributive sentence (i.e. a sentence proportionate to the seriousness of the offence). Yet maximum penalties are the only form of legislative guidance available to sentencers - there exist no statutory provisions which indicate how a suitable rehabilitative or deterrent sentence should be found. It has been observed that:

> "The statutes granting such powers characteristically say nothing about the factors to be weighed in moving to either end of the spectrum or to some place between."[120]

1.68 This predicament is exacerbated by the paucity of reported judicial decisions and precedents which are available in this area. But even decided examples are of little help. To begin with, the concurrent jurisdiction of sentencers in the same courts means that a sentencer is free to disregard the decisions of his or her colleagues. But furthermore, even decisions of superior courts must be treated with caution, for as Finlay CJ noted in *The People (DPP) v Tiernan*:

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117 *Ibid*, p255.
118 *Ibid*, p256.
119 See para 10.12, *Infra*. (Review of Maximum Penalties).
120 Frankel, *Lawlessness in Sentencing*, (1982) 41 U Cincinnati LR 1, p4.

"having regard to the fundamental necessity for judges to impose a sentence which in their discretion appropriately meets all the particular circumstances of the case (and very few criminal cases are particularly similar) and the particular circumstances of the accused I doubt that it is appropriate for an appellate court to appear to be laying down any standardisation of tariff of penalty for cases."[121]

Thus, the sentencer receives little guidance from examples of previous choices made by other sentencers.

1.69 The sentencer, when applying a rehabilitative approach, may receive some assistance from the reports of Probation and Welfare officers, who, from their experience, may be able to suggest a sentence likely to induce reform. However such advice will be of little relevance to a retributive or deterrent approach.

1.70 It is far from clear what principles govern the choice of particular penalty or measure. The decision represents another "instinctive synthesis"[122] of the offence, the characteristics of the offender, and the past experience of the sentencing judge. Here too, then, reform should strive to introduce coherence and uniformity to the principles which govern the choice of penalty or measure.

(III) The Mitigation Decision

1.71 Mitigation refers to the process of making such allowance for mitigating factors as may be just by reducing the sentence level below the level appropriate to the facts of the particular offence committed by the offender.[123] Mitigating factors are matters such as the character and history of the offender, the pressures which led to the commission of the offence and the consequences of conviction and sentence for the offender, rather than variations in the immediate circumstances of the offence, such as the value of the goods stolen, or the relationship between the offender and the victim.[124]

1.72 "Mitigation" in this context is to be distinguished from mitigation in the sense of making allowance for factors which reduce the seriousness of the offending behaviour[125] - the former we shall call *mitigation of sentence*, the latter *mitigation of seriousness* - although the end result of both is a reduction in the severity of sentence. Factors which mitigate seriousness are those elements of the *offending behaviour* which are thought to reduce the seriousness of the particular conduct below the ordinary level of seriousness for that offence - for example, the fact that the offender was less culpable because he was

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121 *Ibid*, p254.
122 *R v Williscroft* [1975] VLR 292; see also para 1.45 *et seq*, *supra*. (The Choice of Approach).
123 Thomas, *Principles of Sentencing*, p194.
124 *Ibid.*
125 See para 1.62, *supra*. (Choice of Penalty or Measure).

provoked;[126] or the fact that the harm caused by the offender was less than the ordinary consequences of that offence.[127] Factors which mitigate *sentence*, on the other hand, are those characteristics of the *offender* which are thought to reduce the severity of the sentence merited by that offender below the level of sentence merited by the particular offending conduct - for example, the fact that the offender has not exhausted all possible credit for previous good character;[128] or the fact that the offender is a single parent and there is no other person to look after the child other than the offender.[129] Factors which mitigate *seriousness* are, thus, not relevant to the determination of a rehabilitative sentence,[130] which focuses on the likelihood of successful re-integration of the offender into society rather than on the circumstances of the offending conduct; *conversely*, factors which mitigate *sentence* are not strictly relevant to the determination of a retributive sentence which focuses on the seriousness of the offending behaviour rather than on the circumstances of the offender.[131] The importance of this distinction will become clear later when we examine the merits of making one approach to sentencing paramount to the exclusion of the others: if, for example, a retributive approach is to be favoured in preference to a rehabilitative one, then there is a danger that some desirable factors which mitigate *sentence* might be excluded in the process.[132]

1.73 There is no exclusive list or defined principle determining the factors which are relevant to mitigation. An infinite variety appears to exist.[133] Irish decisions do not generally make an express distinction between factors which mitigate seriousness and factors which mitigate sentence. Thus, in *The People (DPP) v Maloney*[134] the Court of Criminal Appeal flatly rejected the argument that a plea of guilty by the accused automatically entitled him to a reduction in sentence on the grounds that the plea had been motivated by a hard headed tactical response to being apprehended "red-handed" rather than by a genuine feeling of remorse. Similarly, in *The People (DPP) v Johnston*,[135] where the accused had denied complicity until told that a co-accused had implicated him whereupon he admitted guilt immediately, the Court of Criminal Appeal refused

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126 *R v Morris*, Court of Appeal, 5th August 1974; see Thomas, *Encyclopedia of Current Sentencing Practice*, C3.2(a).

127 See *Tiernan*, *supra*, where an early admission of guilt followed by a plea of guilty was held to mitigate the seriousness of the offence because it diminished the ensuing harm to the victim of having to relate the circumstances of her rape and to face the ordeal of cross-examination.

128 *The People (AG) v Robinson McClure* [1945] IR 275.

129 *R v Franklyn* (1981) 3 Cr App R (S) 65.

130 Except in so far as they may indicate that the character of the offender is such that there is thought to be a high likelihood of successful re-integration into society.

131 Except in so far as they may indicate that the severity of the punishment chosen would be greater on the offender because of his or her circumstances than on another.

132 See Ch 5 (Aggravating and Mitigating Factors) and Ch 7 (Some Comparative Aspects of Sentencing Policy), *infra*, which examine how many jurisdictions which have adopted purely seriousness-based approaches to sentencing have concurrently and expressly retained factors which mitigate *sentence* (which are not strictly relevant to the assessment of seriousness) because they were thought to be nonetheless desirable.

133 An English empirical study of 100 cases comprising a mix of contested and guilty pleas in the magistrates' courts revealed more than 299 different mitigating factors mentioned in the sentencing speeches: Shapland, *Between Conviction and Sentence*, (1981). For examples of the wide range of mitigating factors accepted by the English Court of Appeal see Thomas's *Encyclopedia of Current Sentencing Practice*, chapter C.

134 3 Frewen 267.

135 3 Frewen 276. See also *The People (DPP) v McDonagh* 3 Frewen 265 in which Walsh J said: "The fact that they had either good advice or the good sense to plead guilty in these cases probably saved them six to seven years," *Ibid* at 266-267.

to allow mitigation of sentence, stating that the plea was "a business-like and hard-headed assessment of the situation in which the applicant was" and was lacking in any sense of remorse. Decided examples of mitigating factors include an early admission of guilt in rape cases;[136] being as helpful to the court as possible in cases of contempt;[137] and evidence that the appearance of the girl led the offender to believe she was over seventeen years of age in cases of unlawful carnal knowledge of a girl under fifteen years of age.[138] Also, in *The People (DPP) v Maloney* the court indicated that "co-operation by an accused or convicted person with the police authorities in finding other persons who are involved in the crime may be a ground, and often is a ground, for imposing a more lenient sentence than would otherwise be appropriate."[139]

1.74 The practice of allowing a reduction in sentence on the basis that the offender shows a likelihood of successful integration into society must surely be flawed in this country. One imagines that a prisoner after 17 years of imprisonment has not got a much greater chance of re-integration into society than a prisoner who has served 21 yeas. In this context it is important to realise that imprisonment has very few, if any, positive effects,[140] and that any significant sentence of imprisonment is almost certain to defeat the benefits which a reduction in sentence is thought to achieve. One may well ask if it is fair to allow a reduction at all if it rests on little more than a pious aspiration.[141]

1.75 It is not clear how the sentencer decides the particular amount by which to reduce sentence when mitigating factors exist. *Thomas* remarks that because mitigating factors rarely occur singly, and the weight of a combination of mitigating factors will usually be greater than the sum of their individual values considered separately, it is not possible to construct a negative tariff of mitigating factors showing that a particular factor will normally justify a reduction of a specified proportion of the notional level of sentence fixed by reference to the facts of the offence.[142] All we can say, therefore, is that certain factors can be identified as mitigating factors likely to lead to some reduction in the overall severity of sentence.

1.76 A recent decision of the Central Criminal Court combined unusual examples of mitigating factors with sentencing specificity. Mr Justice Carney, imposing a sentence of three years penal servitude after a plea of guilty to incest, suspended two years of that sentence "to make (his) disapproval of specific features of the prosecution." One year was suspended because, in the opinion of the judge, there was no evidential basis for the preferring of rape charges, which had earlier been dropped. The other year was suspended because the judge did not accept the explanation given by the DPP for a six month delay in

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136 *The People (DPP) v Tiernan* [1988] IR 250.
137 *In Re Kevin O'Kelly* 1 Frewen 366.
138 *The People (AG) v Kearns* [1949] IR 385.
139 3 Frewen 267, *per* Finlay CJ at p269.
140 See Deprivation of Liberty para 1.80, *Infra.*
141 See Chapter 4, *Infra.* (A Coherent Sentencing Policy).
142 Thomas, *Principles of Sentencing*, p194.

initiating charges "(a)fter a complete confession had been obtained and a false allegation of rape had been cleared up".[143]

The Range of Choice

1.77 The decision as to the appropriate measure or penalty is characterised by a wide degree of discretion on the part of the sentencer in relation to both the *nature* and *extent* of the penalty or measure to be imposed.

Options as to the nature of sentence

1.78 Table A sets out the range of options as to the *nature* of sentence available to sentencers upon conviction.

1.79 The District Court also has a number of sentencing options available to it which may be imposed upon proof of guilt, but without the need for conviction. Table B sets out the options available to the District Court without conviction.

143 Judge criticises press reports of incest case, Irish Times 14-7-92.

TABLE A: OPTIONS UPON CONVICTION

Type	Varieties	Authority	Jurisdiction
A. Custodial	1. Penal Servitude	Statutory	Higher Courts
	2. Imprisonment with hard labour	Statutory	Higher Courts
	3. Imprisonment *simpliciter*	Common Law/statute	All[144]
	4. Detention	Statutory	All[145]
B. Suspended	1. Bound by recognisances	Judicial	All
	2. Recognisance and conditions	Judicial	All
C. Adjourned *Sine Die*		No express Authority	All
D. Fine	1. Generally	Common Law/statute	All[146]
	2. With Imprisonment	Statutory	All[147]
E. Probation	1. Recognisance	P.O.A. 1907 s1(2)	Higher Courts
	2. Supervised	P.O.A. 1907 s2(1)	Higher Courts
F. Deferred Sentence		No express Authority	All
G. Community Service		Criminal Justice (C.S.) Act, 1983	All[148]
H. Medical Treatment	1. Recognisance	s28 M.O.D. Act, 1977	All
	2. Custody	s28 M.O.D. Act, 1977	All
I. Disqualification		Statutory	All
J. Compensation		P.O.A. 1907	All
K. Charges considered		s8 Criminal Justice Act, 1951	All
L. Confiscation		Statutory	All
M. Other options for Juveniles	1. Reformatory School	s58 Children Act, 1908	District Court
	2. Whipping[149]	s4(1) Summary Jurisdiction over Children (Ireland) Act, 1884	District Court

144 12 months maximum for most cases in District Court.

145 12 months maximum for most cases in District Court.

146 £1000 maximum for most cases in District Court.

147 £1000 maximum for most cases in District Court.

148 Except Special Criminal Court.

149 Amounts to a breach of Article 3 of the *European Convention on Human Rights* - See *Tyrer v UK* 2 EHRR 1 (birching is degrading); *Corporal Punishment in the Isle of Man* (1978) 27 ICLQ 665.

TABLE B: OPTIONS WITHOUT CONVICTION IN DISTRICT COURT

Type	Varieties	Authority
E. Probation	1. Dismissal	P.O.A., 1907
	2. Recognisances	P.O.A., 1907
	3. Recognisances and conditions	P.O.A., 1907
	4. Formal Probation	P.O.A., 1907
K. Compensation		P.O.A., 1907
M. Juveniles	1. Care of Relative	s58, Children Act, 1908
	2. Industrial School	s58, Children Act, 1908
	3. Monetary Payment by Parent/Guardian	s99, Children Act, 1908
	4. Good Behaviour	s99, Children Act, 1908
N. Adjourned Supervision		No express Authority

We shall now examine in more detail the law governing the imposition of these various sentencing options.

(a) Deprivation of Liberty

1.80 Convicted persons may be deprived of their liberty by being sentenced to *penal servitude, imprisonment*, or, in the case of certain young persons, *detention*.

Penal Servitude

1.81 *Penal servitude* was substituted for deportation to convict settlements in the British colonies after the abolition of slavery by section 2 of the *Penal Servitude Act, 1857*.

1.82 Section 2 of the *Prisons (Ireland) Act, 1856*, provided for the Minister for Justice to set apart certain places of confinement known as 'convict prisons' for prisoners serving a sentence of penal servitude, but no such order was ever made, so nowadays, for all practical purposes, there is no distinction in the treatment of prisoners sentenced to penal servitude and those sentenced to imprisonment.[150] Penal servitude was abolished in England by the *Criminal Justice Act, 1948*, and the last Irish statute to prescribe a sentence of penal servitude was the *Criminal Justice Act, 1964*, s2.[151]

1.83 Penal servitude may only be imposed under statute, and in most cases

150 *Annual Report on Prisons and Places of Detention*, (1982, Pl 1811), p71.

151 I.e. mandatory penal servitude for life in cases of non-capital murder. The *Criminal Justice Act, 1990*, s2, replaces this with imprisonment for life.

the particular statute will specify the maximum term which may be imposed. If not, the maximum term is to be five years, except for felonies created by statutes in force on 5th August 1891, for which the maximum term is to be seven years.[152]

1.84 A person undergoing penal servitude may not be elected to either House of the Oireachtas.[153] Since penal servitude was introduced in direct substitution for the sentence of transportation, it cannot as such be imposed in a manner not applicable to transportation.[154] Therefore unlike imprisonment, it cannot be ordered to commence at a date prior to the date on which sentence is pronounced.[155] Bearing in mind that there is no difference in the treatment of offenders undergoing sentences of penal servitude and those serving terms of imprisonment, it is undesirable that these residual disqualifications for persons undergoing penal servitude should be retained. It may be suggested that penal servitude is to be considered a stronger punishment than imprisonment *simpliciter*, but the indications are that penal servitude is an anachronism and in that case, in the interests of fairness and consistency, penal servitude should be abolished in favour of imprisonment.

Imprisonment

1.85 *Imprisonment* may be awarded in lieu of penal servitude for a term not exceeding two years, unless any act provides otherwise.[156] Some older statutes provided for imprisonment with hard labour, and it has been held that in such cases, the maximum term is to be two years.[157] Imprisonment with hard labour attracts many of the disqualifications which carried by penal servitude, and since the indications are that it too is a relic of bygone times, it may well be taken off the statute books.

1.86 Since 1964, imprisonment has been favoured over penal servitude and imprisonment with hard labour in statutes creating offences, and such statutes have stated the maximum[158] term which may be prescribed. There was no limit at common law to the term of imprisonment which could be imposed, and that remains the case for all common law offences.[159] However, the maximum sentence of imprisonment which may be imposed in the District Court is twelve months,[160] except in certain circumstances governed by the *Criminal Justice Act*, 1984, in which a consecutive sentence may extend the aggregate sentence to a maximum of twenty four months. Section 102 of the *Children Act, 1908*, forbids sentencing persons under 17 years of age to penal servitude or imprisonment.

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152 *Criminal Law (Ireland) Act, 1828*, s15; *Penal Servitude Act, 1857*, s2; *Penal Servitude Act, 1891*, s1.

153 *Electoral Act, 1923*, s51, s57.

154 *The People (AG) v Poyning* [1972] IR 402.

155 *Ibid.*

156 *Penal Servitude Act, 1891*, s1(2).

157 *AG v Duffy* [1931] IR 144.

158 Or mandatory term; e.g. *Air Navigation and Transport Act, 1973*, s11, s16, - life imprisonment mandatory for unlawful seizure of an aircraft or committing an indictable act of violence against a person on board; *Criminal Justice Act, 1990*, s2, - mandatory life sentence for treason and murder.

159 *The People (DPP) v Giles* [1974] IR 422.

160 *Criminal Justice Act, 1951*, s4 and *Criminal Procedure Act, 1967*, s13(3)(a).

However an exception to this exists in relation to young persons between the ages of fifteen years and seventeen years who are of "so unruly a character" or "so depraved a character" that they are not fit persons to be detained in special places for the detention of young persons.[161] Under s5(1) of the *Summary Jurisdiction Over Children (Ireland) Act, 1884* district judges are confined to sentencing young persons (between fifteen and seventeen years of age) convicted of an indictable offence to no more than three months imprisonment (with or without hard labour) following conviction of an indictable offence tried summarily.[162]

1.87 *Detention* in St Patrick's Institution[163] may be prescribed against a juvenile offender between the ages of seventeen and twenty one in lieu of imprisonment. A young person between the ages of fifteen and seventeen may only be sent there in exceptional circumstances.[164] A child between the ages of seven and fifteen may not be sentenced to a term in St Patrick's Institution, but may be sent to a reformatory or industrial school.[165] In all of the cases set out above, detention is merely one option from a number of methods of sentencing young offenders, and the choice is at the discretion of the court.[166]

Modern attitudes towards imprisonment

1.88 The Whitaker Committee of Inquiry into the Penal System noted that there exists an over-reliance on the use of imprisonment and custodial sanctions despite a general effort by the courts to use their imprisonment powers sparingly.[167] The Committee found that imprisonment accounted for one-fifth of all sentences in the District Court, and about half of all sentences in the superior courts. Also noted was an increase in the average length of prison sentences since the 1970's, which was further facilitated by the increase in the sentencing powers of the District Court by sections 11 and 12 of the *Criminal Justice Act, 1984*.[168] The Committee predicted that this combination of factors would lead to a "prison crisis" due to a rising prison population and overcrowding. The *Annual Report on Prisons and Places of Detention, 1988* bears out these predictions:

> "The prisoner population has been increasing steadily in recent years with the result that considerable stress has been placed on available accommodation. The emergence in prisons of offenders with the HIV positive virus has also had to be dealt with within the limits of existing accommodation."[169]

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161 *Ibid.*

162 See *Hutch v Governor of Wheatfield Prison*, Supreme Court, unreported, 18-11-92; see also *Supreme Court limits sentencing of young persons to three months*, Irish Times, 19-11-92 p4.

163 Formerly referred to as 'Borstal' - *Prevention of Crime Act, 1908; Criminal Justice Act, 1960*, s102.

164 *Children Act, 1908*, s102.

165 *A Report on the Law and Procedures Regarding the Prosecution and Disposal of Young Offenders*, Denis C. Mitchell, 1977.

166 See para 1.125 *et seq, infra.* (Young Offenders).

167 Report of Committee of Inquiry into the Penal System, (Pl 3391, 1985), p45.

168 *Ibid.* See para 1.137 *et seq, infra.* (District Court).

169 *Annual Report on Prison and Places of Detention, 1988*, (pl 7039), p7.

1.89 The Whitaker Committee felt that imprisonment should be imposed merely to deprive the prisoner of liberty, not to deprive him of any other rights, i.e. "offenders are sent to prison *as* punishment, not *for* punishment":[170]

> "Nothing should be done to inflict hardship or punishment beyond that inevitably consequential on the deprivation of liberty involved in imprisonment."[171]

1.90 However, in reality, it appears that prison conditions and overcrowding make this an ideal beyond reach, and it is not inconceivable that prison conditions due to overcrowding could become so bad as to ground an action under Article 3 of the *European Convention on Human Rights* (i.e. "inhuman or degrading treatment or punishment").[172]

1.91 With this in mind Ireland recently ratified the *European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment,*[173] which empowers an international committee of experts "chosen among persons of high moral standing, known for their competence in the field of human rights or having professional experience in the areas covered by the Convention" to visit any place of detention in the State. The Committee will draw up a detailed report on the conditions in the place of detention and transmit this to the Government with recommendations for improvement. If the State refuses to carry out the recommendations the Committee may make a public statement on the matter, with the aim, it seems, of embarrassing the Government into taking positive action.

1.92 Other international obligations include the *UN International Covenant on Civil and Political Rights* which provides in Article 10 that all persons deprived of their liberty

> "shall be treated with humanity and with respect for the inherent dignity of the human person."[174]

1.93 The impending accommodation difficulties coupled with the severe loss of liberty in forbidding surroundings,[175] and the enormous cost of imprisonment to the State,[176] all led the Whitaker Committee to conclude that

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170 *Ibid*, para 4.5; see Editorial, *An Unjust Measure of Pain - The Irish Prison System* 8 ILT 213 (1990).

171 Whitaker Report, para 2.16, p12.

172 In the US of the 1960's many cases succeeded on the Eighth Amendment Grounds of "cruel or unusual punishment": D Rothman, *Decarcerating Prisoners and Patients* in *Sentencing*, (Gross and von Hirsch eds, 1981) pp130 *et seq*. The Canadian Sentencing Commission reported that "in 1982 there were no fewer than 32 American states or territories which were either under court order due to the degraded conditions of confinement resulting from prison over-population or were involved in litigation likely to result in such court orders" and that in "Canada, it is not inconceivable that prison overcrowding may lead to court litigation on the basis of the Charter prohibition of cruel and unusual punishment"; see *Sentencing Reform: A Canadian Approach* (1987) p132. Ireland is now a party to the UN *International Covenant on Civil and Political Rights* which forbids such punishment in the same terms.

173 See O'Malley, *A Ray of Hope for Prisoners - The New European Convention Against Torture* 8 ILT 216 (1990).

174 See Editorial, *supra*, n.171.

175 Whitaker Report, p38, para 4.2.

176 *Ibid*, para 4.3.

imprisonment should only be imposed as a last resort:

> "Broadly, the Committee's view is that imprisonment should be imposed only if the offence is such that no other form of penalty is appropriate ..."[177]

1.94 To facilitate this move, the Committee recommended the extension and strengthening of existing forms of non-custodial sanctions. Imprisonment would only be imposed after consideration of a full personal report on the offender from the Probation and Welfare Service, supplemented, where appropriate, by a psychological and medical/psychiatric report,[178] so as to be certain that no other penalty was appropriate.

(b) Suspended sentence

1.95 A suspended sentence is imposed by prescribing a custodial sentence and then suspending its operation on condition that the offender enters into a recognisance, with or without sureties, to keep the peace and to be of good behaviour for a specified period. Further conditions may be imposed, at the court's discretion, such as an obligation to pay compensation, or to stay away from a certain person or place.

1.96 Unlike England, there is no statutory authority in Ireland for the suspension of prison sentence.[179] However in *The State (McIlhagga) v Governor of Portlaoise Prison*, O Dáláigh CJ declared that the suspended sentence had been long recognised as "a valid and proper form of sentence."[180] In fact, in *People (DPP) v Dennigan*,[181] the Court of Criminal Appeal recognised a power to suspend even the consecutive sentences required by s11, *Criminal Justice Act, 1984*.

1.97 Sometimes the court may adjourn the matter of sentence for a certain time to allow the offender to show good behaviour, and then pass a derisory sentence. Alternatively, the court may remand the accused in custody prior to sentence in order to give him a "taste of prison."[182]

1.98 The Whitaker Committee of Inquiry into the Penal System said of suspended sentences:

> "Suspended sentences are unsatisfactory as alternatives because they lack a clear status. There is no mechanism by which non-compliance with the court's conditions is automatically brought to the attention of the

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177 *Ibid*, p45.
178 *Ibid*, p11.
179 Although this was countenanced by s50 of the *Criminal Justice Bill, 1967* which proposed the introduction of the suspended fine or sentence of imprisonment. The Bill encountered opposition and lapsed.
180 Supreme Court, unreported, 29 July 1971.
181 3 Frewen 253.
182 Whitaker Report, p215.

court. The District Court Rules, moreover, effectively limit the period of a suspension to six months. If these defects were removed, a suspended sentence might, at the same time, be more acceptable to the judiciary and more obviously a penalty to those on whom it is imposed."[183]

(c) Adjournment Sine Die

1.99 The practice of adjourning indefinitely has been used by the Circuit Criminal Court to circumvent some of the restraints placed on it by the *Probation of Offenders Act, 1907*.[184] In effect the case is completed although no formal disposal is indicated in the court records.

(d) Fines

1.100 At common law, the court has discretion to impose fines upon conviction for any misdemeanour and there is no limit on the amount of the fine which may be imposed.[185] In cases of felony the court has no such power except where the crime is manslaughter.[186] Fines are normally provided for by statute, and many statutes provide for a higher amount to be imposed when conviction is on indictment. Statutes providing for the fining of offenders commonly state the maximum amount of the fine, and in most cases a fine or imprisonment or both may be imposed at the discretion of the court. The only guidance in the exercise of this discretion is to be found in the District Court Rules,[187] which state that the means of the offender should be taken into account when determining the size of a fine. Default in the payment of a fine will incur imprisonment or detention, and the *District Court Rules, 1948*,[188] set out the "exchange rate" between fines and prison sentences as follows:

For any penalty	The imprisonment not to exceed
not exceeding 10/-	7 days
exceeding 10/- but not exceeding £1	14 days
" £1 " £2	One month
" £2 " £5	Two months
" £5 " £10	Three months
" £10 " £30	Four months
" £30	Six months

1.101 The law in relation to fines thus appears to be much in need of reform.

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183 Whitaker Report, p46.

184 I.e. it may only apply the Act upon conviction whereas the District Court may apply the Act *prior* to conviction; Whitaker Report p217; see para 1.102, *infra*. (Probation).

185 *The People (DPP) v Gilles* [1974] IR 422. But the jurisdiction of the District Court is inherently limited; see para 1.137 *et seq*, *infra*. (District Court).

186 *Offences Against the Person Act*, 1861, s5.

187 *District Court Rules, 1948*, rule 65(1)(a). These, of course, apply only to the District Court.

188 *Ibid*, rule 65(3).

Some of this has been dealt with in the Commission's Report on *Indexation of Fines*.[189] The Whitaker Committee noted:

> "In the case of fines, the sentencing ranges available to the courts are frequently fixed in sums that are far below what would be regarded as reasonable at the present time .... Given the cost to the community of imprisonment, it would be sensible to remove from the offender the option of accepting prison and, wherever practical, to employ other means of enforcement, such as confiscation of property or attachment of income."

(e) Probation

1.102 Probation is governed by the *Probation of Offenders Act, 1907*. The Act invests in the court the discretion to discharge the offender conditionally upon entering into recognisances, with or without sureties, to be of good behaviour and to appear for sentence if called at any time during a nominated period not exceeding three years in length.[190] In the exercise of this discretion the court is to have regard to "the character, antecedents, age, health, or mental condition of the person charged, or to the trivial nature of the offence, or to the extenuating circumstances under which the offence was committed", and it must appear "inexpedient to inflict any punishment or any other than a nominal punishment" or "expedient to release the offender on probation."[191] The District Court is given discretion to dismiss the information or charge, or to release the offender on probation, and may do so at any time prior to or consequent upon conviction, provided it is satisfied that the charge is proved. Superior courts, on the other hand, do not have discretion to dismiss the information or charge, and may only use the Probation Act once a conviction has been obtained. However, the Circuit Criminal Court has circumvented this statutory limit by adjourning cases indefinitely.[192]

1.103 The court may also order the offender to pay damages for injury or compensation for loss, and to pay the costs of proceedings. The court is given the discretion to attach conditions to the recognisance that the offender be under the supervision of such person as may be named in the order during the period specified in the order and such other conditions for securing such supervision as may be specified in the order. Further conditions may be attached by virtue of s2(2), such as "prohibiting the offender from associating with thieves and other undesirable persons, or from frequenting undesirable places; the abstention from intoxicating liquor, where the offence was drunkenness or an offence committed under the influence of drink; and generally for securing that the offender should lead an honest and industrious life."

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189 LRC 37-1991.

190 The court has inherent power to pass sentence subsequently: *R v Spratling* [1911] 1 KB 77.

191 *Probation of Offenders Act, 1907, s1(1).*

192 See Whitaker Report, p217, and para 1.99, *supra*. (Adjournment *Sine Die*).

1.104 Failure to observe the conditions of a recognisance will lead to a warrant for arrest being issued against the offender. The Whitaker Committee of Inquiry into the Penal System recommended that failure to observe the conditions of a recognisance, or to find securities, should result in imprisonment in only the most serious cases. The 1907 Probation Act required revision, the Committee said, to reflect current court practices; the present range of non-custodial alternatives; and the recommendations of the Committee.[193]

1.105 The Act provides for the appointment of Probation Officers whose function is to monitor the progress of the offender on probation. The Probation Officer may apply to the court to vary the conditions of release contained in the recognisance and the court may do so if satisfied that the conduct of the offender has been such as to make further supervision unnecessary.[194]

1.106 The Court of Criminal Appeal has somewhat limited the discretion of the court in its application of the Probation Act. In *The People v Buckley*,[195] Maguire CJ disapproved of repeated application of the Act to the same offender for serious offences, saying:

> "It is difficult to see why the Probation of Offenders Act was applied more than once, and if the framers of the Act were justified in allowing an opportunity to reform, and if, as in this case, an opportunity to reform was allowed, it was not availed of. That this opportunity should have been availed of is shown by the fact that these people come before the Court again. In such cases it is farcical that the Probation Act should be applied again."

(f) Deferred sentence

1.107 A deferral may occur where a person is sentenced to a custodial term but a warrant of custody is ordered not to issue for a specific length of time. If the defendant is of good behaviour during this period the sentence is deemed to have been administered; if not, the court retains the ability to enforce the penalty.[196]

(g) Community service

1.108 The *Criminal Justice (Community Service) Act, 1983* gives the court[197] the discretion to make a community service order in respect of any offender over sixteen who has been convicted of an offence for which the appropriate sentence would otherwise be custodial. A community service order ('CSO') requires the offender to perform unpaid work for a specified number of hours between 40 and 240 hours. The court's discretion in this decision is guided by the provisions of

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193 Whitaker Report, p46.
194 *Probation of Offenders Act*, 1907, s5.
195 1 Frewen 190.
196 See Whitaker Report, p216.
197 Except the Special Criminal Court - s1(1).

s4(1):

> "A court shall not make a community service order unless the following conditions have been complied with:
>
> (a) the court is satisfied, after considering the offender's circumstances and a report about him by a probation and welfare officer (including, if the court thinks it necessary, hearing evidence from such an officer), that the offender is a suitable person to perform work under such an order and that arrangements can be made for him to perform such work, and
>
> (b) the offender has consented."

1.109 A Probation and Welfare Officer is responsible for the offender complying with the CSO. An offender who does not turn up for the work specified on the days agreed will then be brought before the courts. The judge may then activate a different form of sentence or fine the offender for not complying with the order.[198]

1.110 At present, community service is available only as an alternative to imprisonment for criminal offences, although there is much to be said in favour of extending it as an alternative to imprisonment for non-payment of fines or, indeed, non payment of compensation.[199] The Whitaker Committee noted that there is much to recommend greater use of community service, and recommended that the progress of CSOs be carefully monitored to ensure that (a) the number of hours worked is a realistic alternative sanction, (b) the work arranged is both of benefit to the community and a positive experience for the offender, and (c) they are effective in keeping offenders out of crime for at least the period covered by the order. By doing so, the CSO would be easily accepted by the community and the judiciary as a valid sanction.

(h) Medical Treatment or Therapy

1.111 Section 28(1)(a) and (b) of the *Misuse of Drugs Act, 1977* (as amended) allows the court, if having regard to the circumstances of the case the court thinks it appropriate to do so,[200] to request "a health board, probation and welfare officer" or other body or person considered by the court to be appropriate to furnish the court with:

> (a) "a medical report in writing on the convicted person together

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198 *Criminal Justice (Community Service) Act, 1983*, ss7 and 8.

199 See Hussey, *Alternatives to Custody*, (Presidential Address to Medico - Legal Society), (1989) 7 ILT 74, p76.

200 It was formerly the case that reports had to be furnished in respect of all offenders under ss3,15, and 16 of the Act. Since 3rd August 1984 the furnishing of reports is discretionary - *Misuse of Drugs Act 1984 (Commencement) Order, 1984* (SI No 205 of 1984). See generally Charleton, *Controlled Drugs and the Criminal Law*, (1988) pp149-159.

with such recommendation (if any) as to medical treatment which the person making the report consider appropriate to the needs, arising because of his being dependent on drugs, of convicted person"; and

(b) "a report in writing as to the vocational and educational circumstances and social background of the convicted person together with such recommendations (if any) as to care which the body or person making the report consider appropriate to the said needs."

Having considered such reports the court may exercise the extended sentencing powers of section 28(2).

1.112 Section 28(2) provides that a court may substitute the following in lieu of other penalties available for the relevant offences:

(a) the defendant's recognisance to participate, usually under supervision, in a specified programme of treatment, therapy, or education appropriate to his/her situation, or

(b) detention in custody in a treatment centre.

1.113 The provisions of s28(2)(b) are in any case theoretical; the reality is that no custodial treatment centre yet exists. The nearest things are centres such as Coolmine, which are residential treatment centres attended on a voluntary basis.[201]

1.114 Another form of "treatment" is to be found in Section 26 of the *Children Act, 1908* which empowers the court to order that a parent, who is convicted of certain offences under that Act and who is an "habitual drunkard", be detained in a "retreat". Again, there is not any centre for custodial treatment, although there are certain organisations which will help voluntary attenders, such as the Stanhope Street Clinic and the Rutland Centre.

1.115 Apart from these inept statutory provisions, the only course of action available to a sentencer who feels that an offender should receive *psychiatric* treatment is to sentence that person to custody with a recommendation that he be sent to the Central Mental Hospital. The *Interdepartmental Committee on Mentally Ill and Maladjusted Persons* observed:

> "... many persons are dealt with by the courts as 'normal' offenders who are either not responsible (or not fully responsible) for the conduct charged against them or who, even if fully responsible for such conduct, are in need of psychiatric or other special treatment. The inability, or

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201 See Hussey, *op cit*, p175.

the restricted ability, of the courts to order that convicted persons receive appropriate psychiatric treatment is a grave defect in the present state of the criminal law."[202]

(i) Disqualification

1.116 The *Road Traffic Acts, 1961 to 1977* give the courts the power to disqualify an offender guilty of an offence under those Acts from holding a driving licence for such period as the court thinks fit. In all cases the disqualification is ancillary to some other form of penalty. In some cases such disqualification is mandatory, but for other offences the disqualification may be imposed at the discretion of the court. For such offences the Acts set out a minimum term of disqualification to guide the court. Section 27 of the 1961 Act empowers the court to disqualify a person from holding a driving licence if the person is convicted of any offence and used a motor vehicle in the course of commission of the offence. Such discretion may only be exercised upon hearing the appropriate evidence as a separate matter, and the disqualification should not be treated as the imposition of an additional punishment for an offence under the Act of 1961.[203]

1.117 Other forms of disqualification, such as disqualification from jury service[204] or from becoming a director of a company,[205] are consequential upon being convicted and receiving some other form of penalty.

(j) Compensation

1.118 An order to pay compensation can only be imposed with statutory authority at present as an ancillary order attached to a Probation Act disposal[206], or an order for Community Service.[207] The District Court is limited in the exercise of this discretion in that the maximum amount of compensation payable is fixed at £10, unless the specific enactments relating to the particular offence set a higher limit.[208] A compensation order may also be made a condition of a suspended sentence, in which case it appears that there is no maximum limit on the amount of compensation payable, save in the District Court where the amount must not be so great as to bring the offence outside the minor offence category.[209] The Whitaker Report recommends[210] that

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202 Pri 8275 (1978), para 4; see also O' Malley, *Irish Sentencing Reform* (1988) 6 ILT 111.

203 *The People (AG) v Poyning*, [1972] IR 402; *The People (AG) v Michael Hogan*, 1 Frewen 360. In *Conroy v AG* [1965] IR 411, the Supreme Court said:

> "[Disqualification] in so far as it may be classed as a punishment at all is not a primary or direct punishment but rather an order which may, according to the circumstances of the particular individual concerned, assume, though remotely, a punitive character ... undoubtedly disqualification may have a deterrent quality but that does not make it a punishment. It is a regulation of the exercise of a statutory right in the interest of public order and safety."

204 *Juries Act, 1976*, s8.

205 *Companies Act 1963*, s184.

206 *Probation of Offenders Act, 1907*, s1(3).

207 *Criminal Justice (Community Service) Act, 1983*, s3(3)(d).

208 *Probation of Offenders Act, 1907*, s1(3).

209 See para 1.137 *et seq*, *infra*. (District Court).

compensation be given a clear statutory basis in its own right. Such reforms in England have helped to give the penalty an independent standing, by relating the amount of compensation to the degree of injury inflicted.[211]

1.119 The *Criminal Justice Bill, 1992*, recently initiated, includes detailed provisions for the payment of compensation to any person convicted of an offence. Section 6 provides *inter alia*:

> "(1) Subject to the provisions of this section, on conviction of any person of an offence, the court, instead of or in addition to dealing with him in any other way, may, unless it sees reason to the contrary, make (on application or otherwise) an order (in this Act referred to as a "compensation order") requiring him to pay compensation in respect of any personal injury or loss resulting from that offence (or any other offence that is taken into consideration by the court in determining sentence) to any person (in this section referred to as the "injured party") who has suffered such injury or loss.
>
> (2) The compensation payable under a compensation order (including a compensation order made against a parent or guardian of the convicted person and notwithstanding, in such a case, any other statutory limitation as to amount) shall be of such amount (not exceeding, in the case of such an order made by the District Court, such amount as may stand prescribed for the time being by law as the limit of that Court's jurisdiction in tort) as the court considers appropriate, having regard to any evidence and to any representations that are made by or on behalf of the convicted person or the prosecutor, and shall not exceed the amount of the damages that, in the opinion of the court, the injured party concerned would be entitled to recover in a civil action against the convicted person in respect of the injury or loss concerned.
>
> ....
>
> (5) In determining whether to make a compensation order against a person, and in determining the amount of the compensation, the court shall have regard:
>
> (a) to his means, or
>
> (b) in a case to which section 99 of the *Children Act, 1908* (which empowers a court to require a parent or guardian to pay any fine, damages or costs imposed on or awarded against a child or young person), applies, the means of the parent or guardian,

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210 Whitaker Report, p48.

211 *Criminal Justice Acts, 1972 and 1982.* This area has been the subject of a number of detailed examinations and reports in other jurisdictions. See this Commission's Report *The Confiscation of the Proceeds of Crime*, (LRC 35-1991) p67.

so far as they appear or are known to the court."

(k) Other offences taken into consideration

1.120 The court may, at its discretion, take other offences into consideration when passing sentence on a charge for which a conviction has been entered, provided the defendant pleads guilty to the other charges. S8 of the *Criminal Justice Act, 1951* reads:

> "(1) Where a person on being convicted of an offence admits himself guilty of any other offence and asks to have it taken into consideration in awarding punishment, the court may take it into consideration accordingly.
>
> (2) If the court takes an offence into consideration, a note of the fact shall be made and filed with the record of the sentence, and the accused shall not be prosecuted for that offence, unless his conviction is reversed on appeal."

1.121 When a sentencer takes another offence into consideration it appears that he or she should pronounce the appropriate sentence for that offence as well as the sentence for the offence charged, and not simply include the sentence in the sentence for the offence charged.[212]

1.122 In England, where the practice of taking other offences into consideration has no statutory basis, the court cannot, in sentencing the offender, impose a sentence beyond the maximum allowed by law for the offence of which he stands convicted simply because other offences have been taken into consideration.[213] In Ireland the provisions of section 8 cannot be applied where the offence of which the offender stands convicted carries a *mandatory* sentence;[214] nor can they be relied upon where the court has no jurisdiction to try the offender on the offences admitted to, e.g. where a person convicted of a trifling road-traffic offence in the District Court seeks to invoke the section to have a murder taken into consideration.[215]

(l) Confiscation

1.123 A number of statutes confer on the court the discretion to order the forfeiture of property connected with the commission of an offence.[216]

1.124 The Whitaker Committee saw much in favour of confiscation of the proceeds of crime for offences such as drug trafficking and white collar crime,

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212 *The People (AG) v Higgins*, unreported, Supreme Court, 22 November 1985; see para 1.151, *infra*. (Concurrent and Consecutive Sentences).

213 *R v Tremayne* (1932) 23 Cr App R 191; *R v Hobson* (1944) 29 Cr App R 30.

214 *The People (DPP) v Gray* [1984] ILRM 4.

215 *Ibid.*

216 For example, the *Misuse of Drugs Act, 1977*, s30; *Fisheries Acts, 1959-1980*; *Firearms Acts, 1925-1971*.

where offenders may profit substantially from their criminality and where the victim(s) cannot be identified:

> "It is unacceptable that offenders or their immediate families should be allowed to retain such ill-gotten gains, whether or not the offenders are given prison sentences. The courts should have the power - and access to any financial advice needed - to ensure the confiscation of assets of this kind."[217]

The Commission has examined this topic separately in its Report on *Confiscation of the Proceeds of Crime.*[218]

(m) Young Offenders

1.125 The courts are given enormous discretion in their choice of method for dealing with young offenders. A full list[219] of the ways in which a child or young person may be dealt with is given in section 107 of the *Children's Act, 1908*, which provides:

> "Where a child or young person charged with any offence is tried by any Court, and the Court is satisfied of his guilt, the Court shall take into consideration the manner in which, under the provisions of this or any other Act enabling the court to deal with the case, the case should be dealt with, namely, whether-
>
> (a) by dismissing the charge; or (b) by discharging the offender on his entering into a recognizance; or (c) by so discharging the offender and placing him under the supervision of a probation officer; or (d) by committing the offender to the care of a relative or other fit person; or (e) by sending the offender to a reformatory school; or (g) by ordering the offender to be whipped; or (h) by ordering the offender to pay a fine, damages, or costs; or (i) by ordering a parent or guardian of the offender to pay a fine, damages or costs; or (j) by ordering the parent or guardian of the offender to give security for his good behaviour; or (k) by committing the offender to custody in a place of detention provided under this Part of this Act; or (l) where the offender is a young person, by sentencing him to imprisonment; or (m) by dealing with the case in any other manner in which it may be legally dealt with;

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217 Whitaker Report, p48.

218 LRC 35, 1991.

219 Article 40.4 of the *United Nations Convention on the Rights of the Child* provides:

> "A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence."

Ireland ratified the Convention, on 28 September 1992, and it came into force in this jurisdiction on 28 October 1992.

Provided that nothing in this Section shall be construed as authorising the Court to deal with any case in any manner in which it could not deal with the case apart from this section."

1.126 Section 107 is a consolidating section - it does not legislate, but merely summarises the methods of dealing with young offenders which already exist elsewhere in the law. Thus in the case of certain methods, the court will be guided in the exercise of its discretion by the law in relation to the particular method, e.g: The *Probation of Offenders, Act 1907* in relation to options (a) or (b) *supra*.[220]

1.127 The sentencing of youthful offenders is an area of the law much in need of comprehensive review; much greater, indeed, than that which can be efficiently and fairly conducted within the ambit of this report.[221] Such analysis would most likely form part of an examination of the entire juvenile justice system, particularly when reforms in other jurisdictions have fundamentally questioned the need for any criminal stigma to attach to child offenders by introducing family involvement in reprimanding and dealing with such offenders. Suffice it to say that for the purposes of this analysis the methods of disposal of youthful offenders are so broad and varied that the court is vested with enormous discretion in the choice of method, although this discretion is commonly hampered - as was reflected by the recent turn of events which led to the sentencing of fifteen year old girls to imprisonment - by the corresponding lack of suitable alternative places of detention for such offenders.[222]

(n) Adjourned supervision

1.128 This occurs when a defendant is "remanded on establishment of guilt" and is placed under the supervision of a Probation and Welfare Officer. In effect, the offender is requested to co-operate with the Probation and Welfare Service. However the request cannot be enforced either by the court or the Probation Officer, and the practice has no statutory authority.[223]

Options as to the Extent of Sentence

1.129 When determining the *extent* of sentence, the courts are required to operate within certain parameters, i.e. (a) within the maximum, minimum or mandatory limits and (b) within the limits upon the jurisdiction of the particular court.

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220 See para 1.102, *supra*. (Probation).

221 For a more comprehensive examination of this field see: *The Reformatory and Industrial Schools Systems Report*, (1970), (Kennedy Report) and *A Report on the Law and Procedures Regarding the Prosecution and Disposal of Young Offenders (1977)*, (Mitchell Report).

222 See *Judge Renews Detention Centre Plea*, The Irish Times, 6th March 1991, and *Youth's Jail Term Illegal, says Judge*, The Irish Times, 12th February 1991; *Judge refuses to release two girls (15) from Mountjoy*, The Irish Times, 19 October 1990; and *Girl (15) sent to Mountjoy Prison for 18 months*, The Irish Times, 21 November 1990.

223 Whitaker Report, p218.

(a) Maximum, minimum and mandatory limits

Maximum sentences

1.130 The general rule of practice of the sentencing courts is that maximum sentences are reserved for only the most serious cases.[224] It is very rarely that the maximum penalty is imposed in a case. Most statutes which create an offence will lay down a maximum penalty which may be imposed. At common law there is no limit to the term of imprisonment which may be imposed,[225] however in the case of an offence such as attempt to commit, and normally in the case of conspiracy to commit, the term should not exceed the maximum term of penal servitude or imprisonment which might be imposed for the substantive offence.[226] Also, there appears to be no limit on the size of a fine which the court may impose for a misdemeanour at common law.[227] However a child is not to be fined more than £2, and a parent or guardian of a convicted child cannot be fined more than £10 in respect of the child's offence.[228]

Minimum sentences

1.131 Statutory minimum sentences are not a common feature of modern Irish criminal statutes although there have been occasions in the past when the legislature prescribed minimum sentences, usually because it was felt that sentencers might not take a sufficiently serious view of the offences.[229] Generally, such minima were imposed in combination with a maximum, e.g. *The Larceny Act, 1861* provided for terms of penal servitude for any term not exceeding seven years and not less than three years. However, it is also possible for the legislature to express sentences as minimum penalties without imposing a maximum. Another possibility is the combination of a life sentence with a minimum in which case it becomes an *indeterminate* sentence beyond a minimum base. A recent example of such a measure is contained in s4 of the *Criminal Justice Act, 1990*, which provides:

> "Where a person (other than a child or young person) is convicted of treason or of a murder or attempt to commit a murder to which *section 3*[230] applies, the court -
>
> (a) in the case of treason or murder, shall in passing sentence specify as the minimum period of imprisonment to be served by

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224 See *The People (DPP) v Johnston* 3 Frewen 276.

225 *R v Castro* 5 QBD 490; *The People (AG) v Giles* [1974] IR 422.

226 *R v Pearce [1952] 2 All ER 718; Verrier v DPP* [1967] 2 AC 195. In *The People v Giles, supra*, however, the Supreme Court saw fit to depart from this rule where the seriousness of the offending behaviour merited a severe sentence.

227 *The People (AG) v Giles, supra.*

228 *Summary Jurisdiction over Children (Ireland) Act, 1884*, s7; *Children's Act, 1908*, s99.

229 See Jackson, *Enforcing the Law* (2 ed, 1971), p205, who cites as an example the *Regulation of Railways Act, 1868* whereby it was made an offence for a railway company to provide knowingly, a special train to take parties to prize-fights or to stop an ordinary train to accommodate parties for that purpose at any station not an ordinary station punishable by a fine not exceeding £500 and not less than £200.

230 Section 3 relates to murder of: a Garda acting in the course of duty; a prison officer acting in the course of duty; a foreign head of state or member of government or diplomatic officer or murder in furtherance of an offence under ss6, 7, 8 or 9 of the *Offences Against the State Act, 1939.*

that person a period of not less than forty years,

(b) in the case of an attempt to commit murder, shall pass a sentence of imprisonment of not less than twenty years and specify a period of not less than twenty years as the minimum period of imprisonment to be served by that person."

Mandatory sentences

1.132 For some offences, statute deprives the court of all of its discretion in the determination of the extent of sentence e.g. murder, under the *Criminal Justice Act, 1990*, carries a mandatory sentence of life imprisonment.[231] Mandatory sentences are rare, as Griffin J noted in *DPP v Gray*:[232]

> "Apart from revenue and excise offences and offences under the Customs Acts, there do not appear to be many offences in respect of which only one penalty may be imposed - murder, capital murder and treason immediately come to mind."

1.133 Mandatory imprisonment for a term of life is the sentence which is to be imposed for the latter, and there appear to be no other offences in respect of which a mandatory *custodial* sentence for a lesser term is to be imposed.

Insane Offenders in Cases of Murder, Treason or Felony

1.134 If an offender is found to have been insane at the time of commission of a treason, murder or felony, then the correct verdict is one of "guilty but insane."[233] However, it has been long accepted that such a verdict constitutes in law an acquittal despite the wording of the verdict.[234] Thus, none of the sentencing alternatives described *supra* may be imposed. However the court may not discharge the accused - it is obliged to order detention, both for the offender's good and the good of the public. The order of the court in such cases is, technically speaking, not a sentence, since there has been no finding of guilt. However, we will set it out here for the sake of completeness.

1.135 Where such verdict has been returned the court must make an order within the terms of section 2(2) of the *Trial of Lunatics Act,* 1883:

> "Where such special verdict is found the court shall order the accused to be kept in custody as a criminal lunatic in such place and such manner as the court shall direct[235] till the pleasure of the Government

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231 *Criminal Justice Act, 1990*, s2.

232 [1987] ILRM 4, p13. See also *The State (Rollinson) v Kelly* [1984] IR 248.

233 S2(1) *Trial of Lunatics Act, 1883.*

234 *Application of Gallagher* [1991] IR 31. The verdict of "guilty but insane" replaced the verdict of "not guilty by reason of insanity" at the behest of Queen Victoria, displeased by the return of the latter verdict against the perpetrator an attempted assassination on her person: See O'Hanlon, *Not Guilty Because of Insanity* [1968] 3 Irish Jurist (NS) 61.

235 Usually the court directs that the accused be detained in the Central Mental Hospital, Dundrum, Co Dublin.

of Ireland shall be made known; and it shall be lawful for the Government of Ireland thereupon and from time to time to give such order for the safe custody of the said person during pleasure in such place and in such manner as to the Government of Ireland may seem fit."

1.136 Until recently it had been common for the courts to order the accused to be detained "until further order of this court."[236] That practice was expressly disapproved of by the Supreme Court in *Gallagher*[237] where it was held that the decision as to the release of an insane prisoner was a matter for the executive.[238]

(b) Limits on Jurisdiction

The District Court

1.137 The District Court has greater limits on its discretion in the determination of the extent of sentence than the superior courts. Generally, the maximum term of imprisonment which may be imposed by the District Court for any one offence is 12 months. However, in certain circumstances, a consecutive sentence extending the aggregate term to two years may be imposed under the provisions of sections 11 and 12 of the *Criminal Justice Act, 1984*. The maximum fine for indictable offences tried summarily by the District Court is set at £1,000 by section 17 of the Act.

1.138 These restrictions stem from the fact that the District Court is a court of summary jurisdiction, and may only try 'minor offences' fit to be tried summarily. The established test for distinguishing between minor offences and non-minor offences is the severity of punishment authorised to be imposed.[239] Severity is gauged by reference to "the loss of liberty or the intentional penal deprivation of property by means of fines or other direct means of deprivation."[240] Therefore the court is not only limited in the length of custodial sentence or the amount of fine it may impose, but also in the amount it may confiscate.[241]

The Circuit Court

1.139 The Circuit Court, on the other hand, does not have such inherent limits

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236 *The People (DPP) v O'Mahony* [1986] ILRM 244; *The People (DPP) v Nellan* [1990] 2 IR 267; The reason being that in *The State (O) v O'Brien* [1973] IR 50 some doubt had been cast on the constitutionality of a similar form of order which placed a young offender in detention "until the pleasure of the Government of Ireland be known as to him".

237 *Supra*, n.235.

238 However in *The People (DPP) v Ellis*, [1990] 2 IR 291, the Supreme Court held that where an order detaining an insane offender until further order of the court had been made, justice required that the order should be allowed to stand where there had been a lapse of time and acquiescence of all the parties to such an order.

239 *Melling v O'Mathghamhna* [1962] IR; *Conroy v AG* [1965] IR 411; *Re Haughey* [1971] IR 247.

240 *Conroy v AG* [1965] IR 411.

241 *Kostan v Ireland and the Attorney General*, unreported, High Court, 10 February 1978 - possible confiscation of fish and fishing gear worth an estimated £102,040 held not to be consistent with a minor offence.

upon its sentencing jurisdiction, although at present the Circuit court cannot try offences of rape,[242] treason, murder, piracy or genocide.[243] Because of this wider jurisdiction, District Courts will commonly send forward to the Circuit Court persons who have pleaded guilty in that court and who the District Judge believes are charged with offences of such seriousness as to warrant more severe sentences than the sentencing restrictions of the District Court allow.[244]

The High Court

1.140 The High Court, when it exercises its original criminal jurisdiction, is known as the Central Criminal Court,[245] and at present has exclusive jurisdiction to try prosecutions for treason and related offences, murder and related offences, piracy, genocide, certain offences under the *Offences Against the State Act, 1939*, and certain sexual offences under the *Criminal Law (Rape) (Amendment) Act, 1990*. However, there is no constitutional prohibition against the legislature conferring exclusive jurisdiction to try indictable offences on the Circuit Court or District Court thereby depriving the High Court of authority to try those cases, so long as the High Court retains its supervisory jurisdiction over the lower courts.[246]

The Special Criminal Court

1.141 The Special Criminal Court was provided for by Part V of the *Offences Against the State Act, 1939*. It was established in August 1939 and remained in existence until 1962. It was re-established in 1972[247] and has remained in existence since then. Its jurisdiction is generally exercised in respect of scheduled offences set out in the 1939 Act, i.e. all offences under the 1939 Act and all offences under the following: *Malicious Damage Act, 1861; Explosive Substances Act, 1883; Firearms Acts, 1925-1971;* and s7 of the *Conspiracy and Protection of Property Act, 1875*. The most severe sentence which may be imposed under these Acts is penal servitude for life. The Court also has jurisdiction to try any case which the Director of Public Prosecutions brings before it, certifying that, in his opinion, the ordinary courts are not adequate for trying the accused on the charge.[248]

Summary

1.142 From this discussion of the range of choice available to sentencers both as to the nature of sentence to be imposed and the extent of sentences imposed, it clearly emerges that there is little in the way of developed principles for the imposition of sentence, in the form of either legislative or judicial

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242 *Criminal Law (Rape) (Amendment) Act, 1990*, s10.
243 *Courts of Justice Act, 1924*, s49.
244 See Whitaker Report, p197.
245 *Courts (Supplemental Provisions) Act, 1961* ss11 and 25(2).
246 *Tormey v Ireland* [1985] IR 289.
247 SI 142 of 1972.
248 *Offences Against the State Act, 1939*, s46. The Director's decision is not reviewable: *Foley v DPP*, unreported, High Court, 19 June 1989; *Savage v DPP* [1982] ILRM 385.

pronouncements. *Thomas* gives a succinct summation:

> "Modern sentencing legislation, with few exceptions, confers extensive discretion on the sentencing judge, both in the range of punitive sentences which may be imposed and in the choice of alternative dispositions. Criminal statutes generally authorize terms of imprisonment far longer than are normally imposed in practice, and Parliament, in creating an increasing variety of non-custodial sentences, has generally been content to establish relatively broad conditions of eligibility without requiring sentencers to use particular measures in any specified class of case. With the exception of a few general indications of legislative preferences in the choice of sentences, statutes do not seek to influence the details of sentencing practice."[249]

1.143 Almost every type of sentence discussed above is, as we have seen, in need of some reform or other, and the legislative details of each give little more than the most general indication of the area of application of the given option. Thus, it is difficult in many cases to say whether a given set of options are simply *alternatives* to each other, (i.e. interchangeable) or whether each should be confined to a *specific* area of application.

1.144 The legislature's provision of penal policy in relation to the sentencing process shows itself to have been "haphazard" and to "lack co-ordination."[250] New measures which have been introduced have not been properly grounded in either penal theory or sentencing practice, and so no guidance can be given to the courts on the types of offence and offender for whom the measures might be appropriate.[251] The great difficulty for the legislature, however, is that there is no uniform consensus on sentencing practice because there is no systematic policy which sentencers follow.

D. REASONS FOR AND PRONOUNCEMENT OF SENTENCE

Reasons

1.145 A court, when passing sentence on an offender is not required to give any reasons for its decision. Occasionally, however, the sentencer will indicate that certain factors of the offending behaviour or of the offender's character or antecedents led the court to choose a particular approach, be it retributive, rehabilitative or deterrent. For example, the sentencer may indicate that the offender's exemplary behaviour while in custody led the court to adopt a rehabilitative approach; or that the crime in question was so prevalent as to merit a deterrent approach.[252] Rarely, if ever, however, does the court give its reasons for choosing a particular penalty or measure, beyond stating that it is

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249 Thomas, *Principles of Sentencing*, (2 ed, 1979) p3.

250 Ashworth, *Sentencing and Penal Policy*, (1983), p135, commenting on the similar state of affairs in England.

251 *Ibid.*

252 See for example the cases outlined in paras 1.45 *et seq*, *supra*. (Choice of Approach).

"satisfied" that the chosen penalty or measure is appropriate in the circumstances. Some understanding of the judicial reluctance to state reasons may be gained from the words of Mansfield LC (1705-93) who gave this general advice:[253]

> "Consider what you think justice requires and decide accordingly. But never give your reasons: for your judgment will probably be right but your reasons will certainly be wrong."

1.146 Not surprisingly, however, such reluctance to state reasons has a number of unsatisfactory consequences which we will examine at a later stage.[254]

Pronouncement

1.147 The Court is, however, obliged to ensure that the offender is given an opportunity to be made known of his obligations under the sentence. In *The State (Kiernan) v de Burca*[255] a Circuit Court judge heard an appeal from the District Court. He affirmed the fine and expenses awarded by the District Judge but did not say anything about imprisonment if the fine was not paid. Provision for this was made subsequently by the County Registrar when drafting the order. Maguire CJ, delivering the unanimous opinion of the Supreme Court, said it was "a fundamental rule that pronouncement of sentence following a conviction was an essential part of the administration of justice in the case." In *Molloy v Sheehan*[256] the Supreme Court, referring to *Kiernan's* case, restated this "fundamental rule" as "the sentence must be spoken in court."

E. COMMENCEMENT OF SENTENCE

1.148 Unless the Central Criminal Court otherwise directs, every order made by that court shall take effect from the date on which the order is made.[257] Sentences imposed in the Circuit Court shall run from the date specified in the judge's order; if no date is specified the order is bad and may be quashed in judicial review proceedings.

1.149 A sentence of penal servitude may be ordered to take effect from the date on which sentence is pronounced, or at some time *in futuro*[258] following the determination of a term of imprisonment or penal servitude;[259] but cannot be ordered to take effect from a date prior to the pronouncement of sentence.[260]

1.150 Conversely, imprisonment *can* be ordered to take effect from a date prior to the pronouncement of sentence, and commonly is, to take account of the

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253 Harmer, *Structure and Content of a Reasoned Award*, (1988) JCI Arb 163.
254 See Chapter 13, *infra*. (Reasons)
255 [1963] IR 348.
256 [1978] IR 438, per Kenny J.
257 Order 85, rule 9, *Rules of the Superior Courts* (1986).
258 *The State (Jones) v O'Donovan* [1973] IR 328; *The State (McNally) v O'Donovan* [1974] IR 272.
259 *Criminal Law (Ireland) Act, 1828*, s20.
260 *The State (Jones) v O'Donovan, supra;* see para 1.81 *et seq, supra* (Penal Servitude).

period of remand spent in custody pending trial and determination of sentence.

Concurrent and Consecutive Sentences

1.151 The question of whether custodial sentences should be ordered to run *concurrently* or *consecutively* can arise in a number of situations. The offender may have been convicted on a number of counts in the same indictment or at the same sittings; he may already be serving a sentence; or there may be a prior suspended sentence or conditional discharge which may have to be considered for activation. The general rule for imposition of concurrent sentences is that all sentences in respect of two or more offences committed in the course of a single transaction should be concurrent rather than consecutive.[261] For example, in *The State (Brien) v Kelly*,[262] where the accused pleaded guilty to five counts of rape, buggery, unlawful carnal knowledge, indecent assault and assault occasioning actual bodily harm, all of which related to the same person, place and occasion, the Supreme Court upheld the concurrent sentences of three years detention in respect of counts 1 and 2 and two years detention in respect of count 3 which were imposed by the Circuit Court. However, difficulty may often arise in establishing a sufficiently precise definition of whether or not the charges relate to a single transaction, and there appears to be no rule of law or practice which identifies the limits of the single transaction concept.[263]

1.152 When the offences arise out of the same transaction the sentencer should pronounce sentence individually for each offence and not merely take them all into consideration in determining the sentence for one. In *The People (AG) v Higgins*,[264] the accused was charged on a number of counts arising out of the same incident but varying in seriousness. The trial judge imposed sentence on him in respect of one count, taking the others into consideration. In delivering the opinion of the Supreme Court, Finlay CJ said *obiter*:

> "Having regard to the possibility that always exists of a court of appeal setting aside on some technical or other ground the conviction an a particular count, but leaving undisturbed the convictions reached on other counts on the same indictment, even though they arise out of the same incident, this would appear to be an undesirable and unsatisfactory procedure. Appropriate sentence should, in my view, be imposed on all counts in respect of which an accused person is convicted by a jury."

1.153 Where, however, the offences do not arise out of the same transaction the court has a discretion as to whether the sentences should be consecutive or concurrent. Where the offender is convicted of a subsequent offence whilst serving a sentence of imprisonment or penal servitude, he may be sentenced to a consecutive term of imprisonment or penal servitude to commence on the

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261 Thomas, *Principles of Sentencing*, pp52 *et seq.*

262 [1970] IR 69.

263 See Thomas, *Encyclopedia of Current Sentencing Practice*, Chapter A5 for examples of the emerging English principles in this regard.

264 Unreported, Supreme Court, 22 November 1985.

expiry of an existing term,[265] even though the aggregate may exceed the maximum which may be imposed for either offence. A consecutive sentence is mandatory for offences committed while on bail.[266]

1.154 On the issue of concurrent and consecutive sentences, the English Court of Appeal has developed a principle known as the *Totality Principle*. The effect of the totality principle is to require a sentencer who has passed a series of sentences, each properly calculated in relation to the offence for which it is imposed and each properly made consecutive or concurrent in accordance with the "single transaction" rule, to review the aggregate sentence and consider whether it is just and appropriate.[267] In *R v French*,[268] Lane LCJ gave the following guidance:

> "We would emphasise that in the end, whether the sentences are made consecutive or concurrent, the sentencing judge should try to ensure that the totality of the sentences is correct in the light of all the circumstances of the case."

1.155 In England, therefore, where the sentences are made consecutive, the final duty of the sentencer is "to make sure that the totality of the consecutive sentences is not excessive."[269] In the recent case of *The People (DPP) v Healy*,[270] the Irish Court of Criminal Appeal appears to have approved of a similar approach being taken by Irish sentencers where consecutive sentences are concerned. The Court was considering the effect of section 11 of the *Criminal Justice Act, 1984* which requires a consecutive sentence to be imposed for all offences committed while on bail. McCarthy J, for the Court, took the opportunity to indicate how section 11 should be approached:

> "In the application of s 11 of the Criminal Justice Act, 1984, the sentencing court should determine the sentence appropriate to the offence or offences on the indictment to which the section applies, without regard to the fact that it must be a consecutive sentence under the provisions of s11, and direct that such a sentence shall be consecutive on any sentence for a previous offence. That is not to say that, in a proper case, the sentencing court, in the case of grave offences, should not adjust the sentence downwards where not to do so would impose a manifestly unjust punishment on the accused."

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265 *Criminal Law (Ireland) Act, 1828*, s20; See also *Criminal Justice Act, 1951*, s5, as amended, which governs consecutive sentences in the District Court.

266 *Criminal Justice Act, 1984*, s11; but the aggregate cannot exceed two years imprisonment or detention where sentence is passed by the District Court. See *The People (DPP) v Michael Farrell* 3 Frewen 257. However, such a mandatory consecutive sentence may be suspended in exceptional circumstances, *per* the Court of Criminal Appeal, *The People (DPP) v Dennigan* 3 Frewen 253. See generally O'Malley, *Principles of Sentencing* [1991] 2 ICLJ 138, pp161-168.

267 See Thomas, *Principles of Sentencing*, p56.

268 (1982) 4 Cr App R (S) 57.

269 *R v Bocskei* (1970) 54 Cr App R 519.

270 [1990] 1 IR 388.

F. APPEALS AGAINST SENTENCE

1.156 An offender who is dissatisfied with the severity of a sentence imposed on him by the sentencing court may have a right of appeal to a superior court against sentence. A right of appeal may only be conferred by the Constitution or by statute[271] and it may be noted at the outset that the prosecution has no statutory right to appeal a lenient sentence.

1.157 The appellate courts for criminal appeals in Ireland consist of:

(i) The Circuit Court: On appeal from the District Court;

(ii) The Court of Criminal Appeal: On appeal from the Circuit Court;[272] the Central Criminal Court; or the Special Criminal Court; and

(iii) The Supreme Court: On appeal from the Central Criminal Court.

1.158 It will be noted that a person convicted and sentenced in the Central Criminal Court has a choice of appealing to either the Court of Criminal Appeal or the Supreme Court; but having appealed to the one he cannot appeal to the other.[273] The High Court may also hear appeals by way of *case stated* from the District Court once the District Judge has given his decision,[274] and the Supreme Court may deal with appeals by way of case stated from the Circuit Court[275] on matters pending in that court.

Appeals to the Circuit Court

1.159 The right of appeal to the Circuit Court is conferred on the appellant as of right by statute.[276] An appeal in the Circuit Court is a full re-trial (the judge sitting alone without a jury). Thus it has been held that the appeal cannot be against conviction only[277] and the court may increase the sentence notwithstanding the fact that the appellant did not appeal against sentence.[278] The Circuit Court will re-hear the case, both on the facts and the law, though in an appeal against sentence it will confine itself to the factors relevant to sentencing.[279] The prosecution has no such right to appeal against conviction or sentence.[280]

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271 *The People (AG) v Kennedy* [1946] IR 517; *The People (DPP) v O'Shea* [1982] IR 384.

272 Including an appeal against sentence where the accused pleads guilty in the District Court and is returned to the Circuit Court for sentence: *Criminal Procedure (Amendment) Act, 1973*, s1.

273 *The People (AG) v Conmey* [1975] IR 341.

274 *Summary Jurisdiction Act, 1857*, s2; *Courts (Supplemental Provisions) Act, 1961*, s51.

275 *Courts of Justice Act, 1947*, s16.

276 *Courts of Justice Act, 1928*, s18; *Criminal Justice Act, 1951*, s24; *Courts of Justice Act, 1953*, s33.

277 *The State (Aherne) v Governor of Limerick Prison* [1983] ILRM 17, 22.

278 *The State (O'Rourke) v Martin* [1984] ILRM 333. The jurisdiction of the Circuit Court on appeal is, however, limited to that of the District Court.

279 *Courts (Supplemental Provisions) Act, 1961*, s50.

280 *Foley v Clifford* [1946] Ir Jur Rep 53.

Appeals to the Court of Criminal Appeal

1.160 A person convicted on indictment has no absolute right of appeal to the Court of Criminal Appeal against conviction or sentence: leave to appeal must first be obtained.[281] Such leave may be granted by the trial judge, or, if the trial judge refuses, from the Court of Criminal Appeal by way of an application for leave to appeal.[282] The grounds on which the accused seeks leave to appeal are generally substantially the same as those of the appeal, so the Court usually treats the preliminary application as the hearing of the appeal. This is particularly the case in appeals against sentence, so that such appeals are seldom the subject of considered judgments and the decisions are delivered extemporaneously. The judgment is pronounced by only one member of the three judge court, and unless the court otherwise directs, no judgment with respect to the determination of any question may be pronounced separately by any other member.[283]

1.161 Unlike appeals to the Circuit Court, an appeal to the Court of Criminal Appeal is heard on the basis of the transcript of evidence taken at the trial of the appellant, though the court may request a report from the trial judge as to his opinions, and may requisition the original indictment, depositions, exhibits and record from the trials book. Also, unlike an appeal to the Circuit Court, an appeal to the Court of Criminal Appeal may be against *conviction only* - in which case the appellant is *dominus litis* and the court is not entitled to deal with sentence.[284] It is only in appeals against *sentence only* or against *conviction and sentence* that the court may "remit, reduce or increase or otherwise vary the sentence."[285] *Ryan and Magee* sum up the current situation in regard to appeals against sentence to the Court of Criminal Appeal thus:[286]

> "There are few reported decisions of the Irish courts dealing with the principles on which they will act in relation to appeals against sentence, since such appeals are seldom the subject of considered judgments. The Court of Criminal Appeal has, however, repeated, in line with its English counterpart, that it will not interfere with a sentence, even though the members of the Court might themselves have been more or less severe if dealing with the case themselves, unless the trial judge has erred in principle[287] - although in practice the Court may seem occasionally to make an exception to prove its rule. The fact that a co-accused may have received too lenient a sentence is not a ground for interfering with a sentence properly imposed on an appellant.[288] The Court will, however, vary the sentence if the trial judge was not informed or

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281 *Courts of Justice Act, 1924*, ss31, 63.
282 *Ibid.*
283 *Courts of Justice Act, 1924*, s28.
284 *The People (AG) v Earls* [1969] IR 414.
285 *Courts of Justice Act, 1924* s34.
286 *Op cit*, p433.
287 See Archbold §7-633 seq,; *R v Ball* 35 Cr App R 164. See the statement of the Court of Criminal Appeal in *The People (DPP) v Michael Walsh* 3 Frewen 248, discussed immediately below.
288 *The People (AG) v Poyning* [1972] IR 402. See also *The People (DPP) v Johnson* 3 Frewen 276.

misinformed as to some material factor,[289] and if there is merely a technical flaw in the sentence, the proper course is for the Court of Criminal Appeal to vary it, for example by substituting a sentence of imprisonment for one of penal servitude."[290]

In *The People (DPP) v Michael Walsh*,[291] the Court of Criminal Appeal emphasised that there exists a clear division between the function of the court in revising sentence, which is to see if an error has occurred, and the function of the Executive in granting remission. Here, a plea for leniency and mercy for the applicant in all the circumstances that had happened *since his imprisonment* were matters appropriate to a petition to the Minister for Justice.

Appeals to the Supreme Court

(i) *Under article 34.4.3 of the Constitution*

1.162 A person convicted and sentenced in the Central Criminal Court may appeal to the Supreme Court by virtue of Article 34.4.3 of the Constitution which provides that the Supreme Court shall, with such exceptions and subject to such regulations as may be prescribed by law, have appellate jurisdiction from *all* decisions of the High Court.[292]

1.163 The prosecution has a corresponding right of appeal to the Supreme Court, but the Supreme Court has held that in appeals against conviction it will not disturb a verdict properly arrived at and supported by evidence, such as an acquittal duly recorded by a jury on consideration of the evidence.[293]

1.164 Whether, in an appeal against sentence by the prosecution, the Supreme Court will disturb a sentence imposed by the Central Criminal Court - thus giving the prosecution an effective right of appeal against leniency of sentence - remains to be determined. However, some indication as to the likely response of the Supreme Court to such an appeal may be divined from the case of *The People (DPP) v Quilligan and O'Reilly (No. 2)*,[294] where a Supreme Court majority held that the jurisdiction to hear an appeal did not *ipso facto* carry with it the jurisdiction to order a re-trial, even though the trial judge had erred in law in directing an acquittal. The majority was persuaded by the fact that if a re-trial was ordered, the defendants could complain that they were not being treated equally with other persons whose acquittals had been appealed by the prosecution under the provisions of s34 of the *Criminal Procedure Act, 1967*, which allows for the prosecution to make a case stated without prejudice to the verdict. Also persuasive was the fact that the legislature had not conferred any

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289 *The People (AG) v Earls* [1969] IR 414. See also *The People (DPP) v Dennigan* 3 Frewen 253.

290 *The People (AG) v Power*, unreported, Court of Criminal Appeal, 31st July, 1975; *The State (McDonagh) v Frawley* [1978] IR 131.

291 See also *In the Case of Michael Connolly* 3 Frewen 1.

292 *The People (AG) v Conmey* [1975] IR 341; *The People (DPP) v O'Shea* [1982] IR 384. In *The People (DPP) v Conroy (No 2)* [1989] IR 160 this was invoked to appeal a sentence imposed by the Central Criminal Court.

293 *The People (DPP) v O'Shea, supra.*

294 [1989] ILRM 245.

specific jurisdiction to order a re-trial on the Supreme Court.

1.165 It can be argued, thus, that the Supreme Court could adopt a similar non-interventionist approach to prosecution appeals against sentence. Indeed the whole tenor of the Supreme Court's rulings in *Quilligan (No. 2)* and in *The People (DPP) v O'Shea*[295] would seem to suggest a dissatisfaction with the entire idea of prosecution appeals other than those which decide a point of law without disturbing the findings of the lower court. However, on a stricter reading of *Quilligan (No. 2)* it can be argued that, since there is no equivalent of s34 of the *Criminal Procedure Act, 1967* in relation to sentence, there would be no reason for other defendants to complain that they were treated unequally, and consequently, the Supreme Court could safely disturb a sentence imposed by a lower court. Also, unlike *Quilligan (No. 2)* where there could be found no inherent or legislatively conferred jurisdiction to order a re-trial, the Supreme Court *has* inherent jurisdiction to disturb a sentence imposed by a lower court, and had done so in appeals against sentence by the defence.[296] Finally, there would be less likelihood of the danger of double jeopardy, (a danger which the Supreme Court found persuasive in *Quilligan (No. 2)*), since, a review of sentence does not amount to a breach of the double jeopardy rule.[297] This is an area, thus, which would benefit from some judicial or legislative statement.[298]

(ii) Under s29 of the Courts of Justice Act, 1924

1.166 A sentence imposed by the Court of Criminal Appeal may be appealed to the Supreme Court if the Court of Criminal Appeal, the Attorney General or the DPP certifies that the decision involves a point of law of exceptional public importance.[299] An example of such an appeal is the recent case of *The People (DPP) v Tiernan*[300] where the point of law of exceptional public importance was certified by the Attorney General to be the guidelines which the court should apply in imposing a sentence for rape. Although such appeals are technically by way of case stated, since the foundation for appeal is a point of law, the Supreme Court is not limited to the point of law certified as being of exceptional public importance, but may also consider other grounds of appeal.[301]

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295 [1982] IR 384.
296 *The People (DPP) v Conroy* (No 2) *supra* n.294.
297 See *US v Di Francesco* (1980) 499 US 177.
298 We examine the issue of providing a prosecution right to appeal more fully in Chapter 14 *infra.*
299 *Courts of Justice Act, 1924*, s29.
300 [1989] ILRM 149.
301 *The People (AG) v Giles* [1974] IR 422; *The People (DPP) v Shaw* [1982] IR 1; *The People (DPP) v Kelly (No 2)* [1982] IR 90.

CHAPTER 2: SENTENCING POLICY

2.1 A sentencing policy may operate at any number of levels - however, the most fundamental issues which a sentencing policy should at least address are:

(a) *How* does the criminal justice system sentence offenders?

(b) *Why* does the criminal justice system sentence offenders?

2.2 It is central to a *consistent* and just sentencing system that a coherent sentencing policy on how the criminal justice system sentences offenders be clearly articulated, since sentencing policy governs the decisions made at two stages in the criminal process. In fact, the question of how offenders are to be sentenced is at the heart of the sentencing process and will receive the greater part of our attention in this paper. As we have seen,[1] sentencing policy shapes the decisions made by the sentencing judge when choosing the approach to adopt in individual cases, which in turn affects both the nature and extent of the sentence imposed. Incoherence in policy governing these matters can lead to inconsistent sentencing decisions being made. Secondly, sentencing policy comes into play when the legislature is formulating penal policy - such as deciding what type and amount of penalties to attach to newly created offences in criminal statutes, or creating new forms of penalty or sentencing alternatives for the courts to implement. The introduction of new measures can be effectively set at nought by the judiciary if it is not done in close co-ordination with sentencing policy; but if that policy is not coherent then they may still fail to meet their objectives if they conflict with the policies of the sentencers who individuate them.

2.3 However, consistency in sentencing is of little value if the sentences

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1 See para 1.45 *et seq*, *supra*. (The Choice of Approach).

imposed cannot legitimately be justified, and therefore decisions about how we sentence offenders must be made within the context of what we know about why we sentence offenders. No sentencing policy can be complete and useful if it is not formulated within this context.

2.4 In this chapter we identify the need for coherence in sentencing policy by examining the consequences of incoherence. Before we start, let us first clarify the nature of sentencing policy.

2.5 Sentencing policy governs the sentencing decision by providing the sentencer with a framework within which to operate by prompting him or her towards one approach or another depending on the circumstances of the case:[2] for example, a general policy might require that drug offenders should be given deterrent sentences.[3] In short, sentencing *policy* governs the choice of approach in the sentencing decision by indicating the type of approach to be adopted and providing some indication of the *type* of principles which should govern the choice of penalty or measure. It is clear, therefore, that in order to have meaning in practice, a general sentencing policy must be supplemented by specific principles governing the choice of penalty or measure which mechanically provide set answers which must be given when certain circumstances exist: for example, a specific principle might be such that sentencers following a retributive approach are required to impose a sentence of 17 years' imprisonment on any offender responsible for a violent rape, but who admits guilt at an early stage in the investigation.[4] In other words, specific *principles* govern the choice of a particular penalty or measure by providing a set of consequences which are to follow upon the existence of certain factors being established.[5]

As we shall see, an acceptable set of specific principles governing the imposition of sentence cannot be developed without there first existing a coherent general policy governing sentencing.[6] It is not within the scope of our remit to come up with a set of specific sentencing principles; rather, the aim of this paper is to propose a coherent general framework from which a set of specific principles may be developed.

2.6 Let us also make the observation at this point that in this jurisdiction neither our sentencing policy nor our specific principles governing the imposition

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2 See Galligan, *Guidelines and Just Deserts: A Critique of Recent Trends in Sentencing Reform* [1981] Crim LR 297, p310.

3 See para 1.55, *supra*. (A Deterrent Approach).

4 See para 1.43, *supra*. (Choosing the Appropriate Penalty).

5 Thus, in Minnesota, where a sentencing commission was established to examine and improve the way in which sentences of imprisonment were imposed, the Commission began by reforming sentencing *policy*, and eliminated the difficulties which surround the choice of approach in sentencing by stating that the approach to be adopted in all cases was to be "just deserts" (which, for the moment, we may describe as a modification of the retributive approach). Thus the *type* of principles which were to govern the choice of penalty or measure in all cases were to be those which follow upon the adoption of a "just deserts" approach. The Commission then undertook a reform of the specific *principles* governing the choice of sentence following a "just deserts" approach. It produced a *grid* or table consisting of a scale of offence severity on one axis and a scale of prior offence record on the other. Having established the seriousness of the offending behaviour and the prior record of the offender, the sentencer was given the length of the sentence of imprisonment which was to be imposed.

6 See para 2.33 *et seq*, *infra*. (Inability to Develop Specific Principles).

of sentence are adequately developed; as we have seen, existing sentencing policy does not always assist sentencers in deciding what approach to adopt when sentencing a particular offender, and there are few specific principles upon which a sentencer may rely to find the appropriate penalty or measure having adopted a particular approach.[7]

2.7 Let us now examine the importance of a coherent sentencing policy in a rational sentencing system.

No Policy

2.8 If no sentencing policy existed then there would be no right or wrong answers to the two questions of why and how offenders are sentenced, and the sentencing system would be bereft of any useful sentencing principles. The criminal law would consist merely of criminalising statutes with attached penalty scales and a general mandate for the courts to sentence within the prescribed ranges. The courts could sentence for any reason, in any manner, and upon any basis they saw fit.[8]

Incoherent Policy

2.9 Where two or more considerations may be relied upon to decide 'why' and 'how' offenders are sentenced, and all of these considerations are equal and interchangeable, then an incoherent sentencing policy exists. Since one consideration may lead to a sentence dramatically different to that which another may have led to, like cases may be treated differently, and justifiably so, but there is nothing to determine which consideration is the correct one and which one should prevail. The end result is inconsistency in the way in which the criminal justice system deals with offenders, exhibiting what may be perceived as disparity, and undermining confidence in the criminal justice system.

2.10 Traditionally, in Ireland and many other jurisdictions, sentencing policy has been formulated by reference to the traditional *objects of sentencing.* The traditionally recognised objects or purposes of sentencing are *retribution*, *rehabilitation*, *deterrence* and *incapacitation*, although some modern writers make reference to less well recognised objects such as reparation or *compensation* of the victim.[9] These expressions are commonly embodied in the penal codes of other jurisdictions.[10] Although sometimes there have been general attempts to prioritise certain objects by the judiciary,[11] the objects are generally interchangeable and there is usually no principle which governs how one object should be found to be more suitable than another in a given case, so our sentencing policy is best described as "incoherent." What follows is an

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7 See para 1.38, *et seq, supra.* (The Sentencing Decision).

8 See Jareborg, *Introductory Report on Disparities in Sentencing: Causes and Solutions*, Council of Europe, (1987), p10.

9 See Wasik, *The Place of Compensation in the Penal System*, [1978] Crim LR 599.

10 E.g. the American Model Penal Code §1.02(1).

11 See the general guidance of Walsh J in *The People (AG) v O' Driscoll*, para 1.49, *supra.*

examination of some of the problems presented by an incoherent sentencing policy.

Problems with Incoherent Sentencing Policy

1. *Fair notice*

2.11 In a sentencing system such as ours which has an incoherent policy governing the choice of approach by the sentencer, the resulting inconsistent decisions can do violence to notions of *Fair Notice* - as when a defendant who reasonably expects a trivial sentence receives a lengthy one, giving the defendant, as Finlay CJ described it in *Conroy (No. 2)*, a "substantial sense of grievance at unfair treatment which may be caused by apparently unequal sentences."[12] What is unfair is that in the absence of a coherent policy, the defendant and his or her counsel will have to rely on their own ingenuity in deciding what factors to bring to the attention of the sentencer which *they feel* will influence him or her to choose one approach over another. This is not an easy task, since, essentially, the "goalposts" are not defined - if sentencers themselves do not have a policy on which factors should influence their choice of approach, how, then, are defendants to inform sentencers of the factors relevant to their particular case? In *Conroy's* case,[13] for example, the Supreme Court found on appeal that the trial judge had overlooked evidence of a high standard of behaviour on the part of the offender while on remand in custody, which, if considered, should have led to the adoption of a rehabilitative approach. Conroy had the good fortune to have this factor recognised on appeal and his sentence reduced accordingly; but one may ask how many other offenders are sentenced without consideration of such factors because they and their counsel do not have "fair notice" of the importance or relevance of these factors?

2. *Conflicts with penal policy*

2.12 A sentencing judge could wittingly or unwittingly *usurp* the legislature's penal policy by imposing a trivial sanction for a crime which the legislature has presumed would call for a more severe one - say insider trading. The legislature may have allowed for a high maximum penalty in the hope that severe sentences would be imposed to deter, yet the judge may impose a trivial sentence in order to promote rehabilitation. The problem becomes more acute when the legislature introduces new penal measures (i.e. new *types* of sentence) which may have the aim of fostering one approach or aim; the courts may misuse them or completely ignore them if they do not correspond with their personal sentencing policies. The legislature and the judiciary could end up acting at crossed purposes.

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12 [1989] IR 160, 164; also *The People (AG) v Poyning* [1972] IR 402 and *The People (DPP) v Healy* [1990] IR 388; see para 1.57, *supra*. (Differing principles). Of course, where sentencing policy is incoherent it matters not that the sentences are apparently unequal if the inequality is based on differences in the circumstances of the offending behaviour and the character of the accused which may supposedly merit different approaches being adopted.

13 *Supra*.

2.13 *Ashworth* comments on the effect this problem has had on English penal policy:

> "It is clear, not only from the period 1979 - 1981 but also from 1967 onwards, that the introduction of new forms of sentence will only achieve the policy objectives of their proponents if close attention is paid to their integration into sentencing practice. In blunt terms, the courts can make or break a new penal measure. This indicates the desirability of providing guidelines for sentencers, once it has been decided exactly how the new measure ought to fit into sentencing practice. The great difficulty is that there exists no systematic knowledge about sentencing practice."[14]

He concludes:

> "It therefore follows that co-ordination of policy, from prosecution through to parole (including procedural issues such as expediting criminal trials), is essential if the criminal justice system is to be shaped so as to achieve agreed policy objectives."[15]

2.14 It is clear, therefore, that although sentencing is but one stage in the criminal process, the policies at play there may have profound repercussions on the other stages. If there is not a coherent policy in operation at the sentencing stage then it becomes increasingly unlikely that the other stages will achieve their objectives. This is of importance not simply to the other stages in the criminal justice system but to sentencing itself. If there is not a coherent policy governing sentencing practice then it is increasingly difficult for the legislature to introduce penal measures which will fit neatly into sentencing practice.[16] Certainly, it will be impossible to co-ordinate policy throughout the entire process without at first clarifying the policies of the individual components.

3. *Accommodation of abuse*

2.15 Incoherent sentencing principles can accommodate *abuse* since each judge is virtually free to impose any sentence he or she feels appropriate. A sceptic might conclude that the use of the objects to justify a chosen sentence is a convenient means of rationalising results for which the sentencer has another reason - "window dressing" as *Robinson* describes it.[17] Under this cynical view, the objects offer hidden flexibility to sentencers helped by the lack of a single overriding principle. Although we do not share in this scepticism, we agree that in our incoherent sentencing policy, the absence of a single guiding principle means that the choices made will be, at best, inconsistent.

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14 *Sentencing and Penal Policy*, (1983) pp135-38.

15 *Ibid*, p137.

16 See our conclusions on the range of choice available to Irish sentencers in para 1.142 *et seq*, *supra*. (Range of Choice - Summary).

17 Commissioner Paul Robinson of the U.S. Sentencing Commission, *Legality and Discretion in the Distribution of Criminal Sanctions*, (1988) 25 Harvard Journal on Legislation 393, p398.

2.16 Yet, while it is hoped that our sentencers would not *knowingly* allow a particular personal bias to affect their sentencing decisions, it remains questionable whether there is widespread *unconscious* bias; it is unlikely that sentencers nowadays allow their choices to be influenced by "demographic" factors such as sex, politics, religion or race,[18] but there is some evidence that the age of the sentencer[19] or the degree of urbanization of the community in which the sentencer lives,[20] may lead towards an "invisible" bias in favour of one approach over another. For example, *Hogarth* found that in Canada urban magistrates tend to favour a retributive approach more than their rural counterparts.[21] In the absence of a coherent policy, thus, there is greater room for demographic factors to have an influence on the sentencer's choice of approach to sentencing an offender, since there is no standard or accepted policy to point him or her in the direction of any single approach.

4. *Failure to achieve any object*

2.17 When several conflicting principles are pursued simultaneously, the resulting sentence may *frustrate* them all.[22] The sentence may rely too much on rehabilitation to satisfy retributive factors, yet it may not use deterrent factors enough to have any use as a preventive strategy. When the principles of sentencing are in conflict, as they are, following a little of each may achieve no purpose at all.

5. *Public distrust*

2.18 When conflicting principles are simultaneously relied upon, the *public* will almost certainly experience the sentencing system as exhibiting disparity. The public assume the system to be coherent - and probably suppose that sentences will reflect common-sense principles of *desert* (i.e. that the severity of the sentence will reflect the seriousness of the crime).[23] Thus when similar offenders who have committed similar crimes receive dissimilar sentences the public tends to see this as disparity.[24] Part of the public's concern is expressed as dissatisfaction that certain offenders (in particular violent offenders) are not dealt with harshly enough by the system,[25] or in calls for a prosecution right to appeal against a lenient sentence.[26]

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18 See Mc Conville and Baldwin, *The Influence of Race on Sentencing in England*, [1982] Crim LR 652.

19 Hood, *Sentencing and the Motoring Offender*, (1972), p140; Hogarth, *Sentencing as a Human Process*, (1971), p211.

20 Hogarth, Ch 13.

21 *Ibid.*

22 See Jareborg, *Introductory Report*, in the Council of Europe's *Disparities in Sentencing: Causes and Solutions*, (1987).

23 Walker and Hough found that in England most people surveyed believed that the best system of sentencing is one which "gives the offender what he deserves"; see Ashworth, *Criminal Justice and Deserved Sentences*, [1989] Crim LR 840.

24 Jareborg, *op cit*, p11.

25 See the reports of the controversy which arose when the then President of the Circuit Court suspended part of the sentence of a sex offender; e.g. *Sex Case Row Judge Explains His Sentence*, The Irish Independent, 6th November 1990; *Rape Sentence Is Queried by Burke*, Irish Press, 21 November 1990.

26 The calls have been answered in Ireland by the publication of the *Criminal Justice Bill, 1992*. See Chapter 14, *infra*. (Prosecution Appeal Against Sentence).

2.19 This distrust may owe part of its existence to the manner in which the news media inform the public of sentencing decisions. Generally, the media tend to devote more attention to sentences that are seemingly unusual in some way - unusually lenient or unusually harsh - which leaves the public with less opportunity to form a rounded opinion of sentencing. Ashworth remarks:

> "Newspapers tend to print headlines such as 'Rapist gets only 18 months' rather than 'First offender of exemplary previous character imprisoned for 18 months'."[27]

2.20 Most journalistic comment fails to recognise the distinction between inequality of sentence severity based on the type of offence and inequality of sentence severity based on differences in the seriousness of the offending behaviour and the character of the offender. But not all the blame for public distrust of the sentencing system must be laid at the door of the media. Sentencers themselves rarely give any indication of the factors of the offending behaviour and character of the offender which led them to impose (to continue with the above example) an 18 month sentence on the particular offender when others of a less righteous character receive 5 years. The failure to provide *reasons* may equally be construed by the public as illustrating that sentencers *themselves* are unsure of the criteria which govern their choices. Certainly the public cannot rest secure in the knowledge that there is no coherent policy which sentencers follow in making their choices.

2.21 In this context it is hardly surprising that the public does not understand the sentencing system and is critical of it. This has profound consequences for the criminal justice system, because sentencing is:

> "... the punchline of the criminal justice system. It is at this point that the law is seen to have its impact. The sentencing stage provides the most tangible, public demonstration that the criminal law is not just a declaratory model code, but is a set of rules which are to be enforced by punishment. The whole apparatus of investigation, prosecution and trial is in many respects simply a prelude to the punishment of the guilty. And similarly, a range of institutions and personnel which makes the correctional component of the criminal justice system is largely about administering the sentencing decisions of the courts. The importance of the sentencing stage can hardly be overstated."[28]

Victims

2.22 Victims of crime, too, commonly remark that the system does not respond to their dilemma. The incoherence of the principles pursued renders sentences unpredictable and very often the victims of a crime will complain that

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27 Ashworth, *Sentencing and Penal Policy*, p143.

28 Sallmann and Willis, *Criminal Justice in Australia*, (1984) p157, cited with approval by the Victorian Sentencing Committee in their Report, *Sentencing*, (1988) p15.

"justice was not done", and express distrust of the criminal justice system.

2.23 A positive response to the victim's dilemma was contained in section 5 of the *Criminal Justice Bill, 1992* which provided:

> "(1) In determining the sentence to be imposed on a person for an offence to which this section applies, a court shall take into account, and may, where necessary, receive evidence or submissions concerning, any effect (whether long-term or otherwise) of the offence on the person in respect of whom the offence was committed.
>
> (2) This section applies to:
>
> (a) a sexual offence within the meaning of the *Criminal Evidence Act, 1992*,
>
> (b) an offence involving violence or the threat of violence to a person, and
>
> (c) an offence consisting of attempting or conspiring to commit, or aiding, abetting, counselling, procuring or inciting the commission of, an offence mentioned in paragraph (a) or (b)."

2.24 If a similar section became law, courts in sentencing should make clear what proportion of their sentences in these cases is referable to the effect of the offence on the victim.

6. *Disparity and inconsistency*

Disparity

2.25 Incoherent sentencing principles can lead to what is perceived as *disparity*. Disparity, simply put, is a difference in sentencing which cannot be justified. But without a single over-riding policy or approach to say what is or isn't justified, it is very difficult to say that disparity exists. Disparity depends on one's theory of sentencing:

> "Since disparity is a notion of formal justice, it presupposes a distinction between relevant and irrelevant factors. The distinction requires substantive criteria about what is relevant and irrelevant."[29]

2.26 *Forst* comments:[30]

> "Anyone who wants to show disparity in sentencing must demonstrate

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29 Jareborg, *op cit*, p8.

30 Forst, ed, *Sentencing Reform: Experiments in Reducing Disparity*, (1982), p30.

that the different sentences meted out to persons committing the same offence under similar circumstances cannot be justified by reference to some legally relevant variables, that is, to factors that have some rational relationship to the aims of the criminal law. This is a tall order to fulfil, since the aims of the criminal law are rarely clearly articulated."

2.27 There is no single policy or approach in our system, so like cases may be treated differently, and justifiably so. Two judges suggesting different sentences for an identical case might both be right (or, for that matter, wrong) if one accepts the legitimacy of different priorities being given to different approaches to sentencing.[31] Disparity would be enormously difficult to detect because almost any factor can be of relevance to one of the alternative objects of sentencing:

> "Particular offence or offender characteristics may well justify different sentences, in terms of either type or severity, for apparently similar offences. Whether such differences will amount to disparity will depend on their compatibility, *not with one another*, but with the stated goals and policies of the sentencing process. For example, on 2 July 1987, in Limerick Circuit Court, a 24-year-old man was sentenced to 4 years imprisonment when convicted of raping a 62-year-old woman. On the same day, in Dublin Circuit Court, a 60-year-old man was sentenced to 9 years when convicted of raping a 25-year-old woman and received a 5 year concurrent sentence for indecently assaulting the same victim. Did this amount to disparity? It is impossible to say in the absence of criteria against which to evaluate them."[32]

2.28 Without a coherent policy, thus, the value of conducting research on the extent of disparity in sentencing must come into question. *Kapardis*, who conducted what many consider to be the most extensive evaluation of the evidence and research on sentencing disparity,[33] concluded that nearly every method of conducting research on disparity may be criticised on a number of grounds. In order satisfactorily to prove the existence of disparity, a research

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31 See the Canadian Sentencing Commission's Report *Sentencing: A Canadian Approach*, p73.
32 O' Malley, *Irish Sentencing Reform*, (1988) 6 ILT 111, p112.
33 *Sentencing by English Magistrates as a Human Process*, (1985).

project would have to satisfy a large number of minimum requirements[34] - which as a practical matter are virtually impossible to fulfill simultaneously. The fundamental problem is that there is simply no consensus on the factors which point to the suitability of one justification or approach in any given case which would show that the sentencing practices under investigation indicate disparity. There is not, thus, a ready means by which sentencing disparity can be proven to a satisfactory level.[35]

Inconsistency

2.29 It is nonetheless inevitable that a high level of inconsistency will occur when sentencers make the choice as to the particular approach upon which to base their choice of sentence. *Radzinowicz and Hood* observe of inconsistencies that:

> "They have been demonstrated again and again, in terms of areas, courts, of individual judges and magistrates. The North of England, for example, uses probation more sparingly, fines and imprisonment more readily than the South. Federal Courts in Brooklyn impose sentences for robbery averaging half as long again as those in Manhattan. A recent analysis revealed that the proportion of robbers in Birmingham getting more than 4 years was 6 times as high as that in Bristol. Magistrates impose far lower fines for motoring offences in some English courts than in others. We cannot immediately jump to the conclusion that the whole of these differences stems from unjustified prejudice, harshness, or ignorance on the part of the courts .... But even when allowance has been made for such factors, evidence remains of unjustified discrepancies ...."[36]

2.30 The worst type of inconsistency is inconsistency in the way in which sentencers decide on which approach to adopt when making the sentencing decision - as where one sentencer decides that a particular offender should receive a short sentence on the grounds of rehabilitation and another sentencer

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34 The minimum requirements identified by Kapardis are:

(1) define what is meant by inconsistency by: (a) stating the perspective from which the author considers it, and (b) state in which circumstances inconsistency becomes unjustifiable;
(2) provide a control for the aim that a particular sentence is intended to serve;
(3) provide a control for "input" to different sentencers, or courts, being compared, by controlling for:
  (a) types of offence dealt with (in terms of seriousness, for example);
  (b) types of offenders dealt with;
  (c) types of information about offenders made available to different sentencers (and this includes recommendations concerning disposals made by probation officers etc.);
(4) identify the sentencer's perception of the seriousness of the offences under consideration;
(5) identify the availability of facilities;
(6) identify the prevalence of the offences under consideration if comparisons are made with sentences in different areas; and by
(7) showing the validity of the methods and instruments used to obtain measures.

See Kapardis, *op cit*, p27.

35 See the Report of the Victorian Sentencing Committee, p154; and that of the Canadian Sentencing Commission, p74.

36 *The Growth of Crime*, (1977), pp212-13; 219-20.

decides that the same offender should receive a lengthy sentence on the grounds of deterrence - because it leads to unequal treatment of offenders by the criminal justice system. The existence of such inconsistency is easily determined by taking a look at the perceptions of those who sentence and the actual results of their sentencing dispositions. *Palays and Divorski* describe the results of a Canadian exercise which, in the absence of an Irish analogue, we may find compelling.[37]

2.31 The study was conducted by furnishing over 200 Provincial Court judges with the same basic facts relating to the offence and the characteristics of the offender in five hypothetical specimen cases. The judges were individually asked to indicate the sentence they would recommend in each case and the reasons for their conclusions. In all cases there was inconsistency in the sentences recommended - in many the degree of inconsistency was quite dramatic. The study revealed the way in which sentencing judges differ in their philosophical approach to sentencing - some choosing rehabilitative approaches and others choosing retributive ones. Those sentencers who were generally more lenient tended to rely on rehabilitative reasoning while those who were more severe emphasised the seriousness of the crime.

2.32 Other studies of *actual* sentencing dispositions found similar inconsistency.[38] We have every reason to believe that in Ireland, *a fortiori*, considering the similarities in sentencing structure, similar inconsistencies would be displayed here. Intuitively, the existence of inconsistency here is a certainty.

7. *Inability to develop specific principles*

2.33 An incoherent sentencing policy hinders the rationalisation of sentencing generally. Because there is no universal agreement as to the paramount aim or approach to sentencing, it is impossible to construct any other than the most general and piecemeal set of principles which should have application in any given case, or at all; and, consequently, it is very difficult to construct a purposeful repertoire of principles to assist sentencers in making the decision as to the appropriate penalty or measure.

2.34 Because sentencing remains an instinctive synthesis of the particular characteristics of the offender and the particular characteristics of the offence, it is not appropriate to lay down any standardisation or tariff of penalty for cases.[39] Thus, for example, it is impossible to say that just because the penalty for a given case far exceeds the average sentence for that offence, the sentence on hand is wrong;[40] nor, therefore, can sentencers have recourse to decided

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37 Palays and Divorski, *Judicial Decision Making: An Examination of Sentencing Disparity Among Canadian Provincial Court Judges* in Muller, Blackman and Chapman (eds), *Psychology and the Law*, (1984), summarised by the Canadian Sentencing Commission in its Report, p75.

38 See Hogarth, *op cit*; also Lovegrove, *An Empirical Study of Sentencing Disparity Among Judges in an Australian Criminal Court*, (1984) 33 International Review of Applied Psychology 161; Polk and Tait, *The Use of Imprisonment by Victorian Magistrates*, a report prepared for the Victorian Sentencing Committee, published in full as Appendix N of that committee's report.

39 *Per* Finlay CJ in *The People (DPP) v Tiernan*, para 1.62 *et seq*, *supra*. (Choice of Penalty or Measure).

40 *Ibid.*

examples or averages of sentence for that offence to assist him or her in the choice of penalty or measure.

2.35 This lack of guidance, coupled with the scant legislative guidance which exists on the use of the various sentencing options, has a number of undesirable consequences.

2.36 To begin with, sentencing judges are left to their own devices when determining the *extent* of the sentence imposed. How, one may ask, does a sentencer know that, say, three years imprisonment is appropriate for a given offender having regard to the seriousness of the offending behaviour? How does a sentencer know that 100 hours of community service is more likely to induce reform than 40 hours? Different judges may choose different degrees of severity when deciding on the extent of sentence for similar offenders or offences.

2.37 Secondly, sentencing judges, deciding on the *nature* of sentence, are given no indication of when or how to use individual sanctions open to them. How does a judge decide that, say, community service would be more appropriate than probation? There is no consensus as to whether some of the sentencing options available to the court are simply *alternatives* to other options, or whether they exist in their own right as the most appropriate penalty for a certain case. In some cases, sentencers may even regard a particular alternative as quite inappropriate and not use it for *any* offences.[41] The end result may be an over-reliance on imprisonment.[42] Also, different judges may impose different alternatives in sentencing similar offenders for similar crimes.

2.38 Thirdly, sentencing judges, the accused, counsel and the public are given no consistent indication as to the *seriousness of particular crimes*, or as to how the seriousess of crimes should be gauged. In general, the only indication of how seriously a crime is viewed by the Oireachtas is the maximum sentence which it carries.[43] But even these are inconsistent and out of date, and of little assistance in gauging offence seriousness.

2.39 Finally, the worst consequence of this dearth of principles is inconsistency, and all the problems associated with it, such as sagging public confidence, and confusion for those involved in the sentencing process. In order to reverse these problems, it is necessary that a meaningful and uniform set of principles be constructed to assist sentencers. But without first laying down the underlying policy of sentencing, this would be a pointless exercise, merely replacing an unfair level of inconsistency with an equally unfair level of consistency. This happened in the USA. There, the Federal Guidelines Commission set out a list of guidelines which laid down the *presumptive* sentence for every crime on the statute books; the presumptive sentence was to be

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41 A point made by the Supreme Court Judges of Victoria. See the Victorian Sentencing Committee's Report, *Sentencing*, (1988) p39.

42 This was strongly argued by the Canadian Sentencing Commission, *op cit*, pxxiii.

43 See para 10.1 *et seq*, *infra*. (Maximum).

followed in all cases save in exceptional circumstances. However, the presumptive sentences were set by the Commission without it first agreeing on the underlying rationale and as a result, they embody a degree of past irrationality since they were set by reference to prior averages and not by reference to any policy. Without a policy to define what makes a case un-exceptional, an enormous volume of appeals is being generated to determine whether each case is exceptional (so as to allow departure from the guidelines) or not.[44] *Galligan* points out that reasons for departure are themselves relevant to the broader policies which inform the specific rules, and therefore they are good reasons for changing or extending the rules to take account of new or unforeseen circumstances.[45] If the reason for the departure is so personal to the offender that it is incapable of being generalised and related to broader sentencing policies, then it is hard to see why it should be allowed to form part of the sentencing decision.

2.40 A coherent policy is, thus, a necessary precursor to the development and implementation of principles to assist sentencers.

Coherent Policy

2.41 A coherent sentencing policy is simply a general framework of standards which clearly articulates the object or approach to be adopted in all cases, or in any given case. It goes a long way towards eliminating the problems set out above because it lays down a defined course of action to be followed by the sentencing courts when dealing with particular offenders and offences. A defendant will have fair notice of the particular circumstances of his or her case which are relevant to the sentencing decision. The legislature and judiciary would be acting in concert because they would both be taking the same approach. There would be little possibility of abuse since there would be no room for the sentencer to take irrelevant considerations or personal bias into account. There would be no chance of failure to achieve any object because there would be no reason for the court to seek to follow more than one object simultaneously. The public would be given a clear basis for the sentencing choices made by the criminal justice system, and there would be less room for inconsistency, because the relevant characteristics of the offender and offence would be clearly identifiable in like cases, and the approach adopted in like cases would be uniform. Finally, a coherent sentencing policy would provide the framework within which a rational and consistent set of guiding principles could be constructed.

2.42 A coherent sentencing policy may be brought about in a number of ways; *Jareborg* identifies the following three:[46]

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44 See para 7.82 *et seq*, *infra*. (Sentences: The Federal System of the USA) and para 9.101 *et seq*, *infra* (US Federal Sentencing Guidelines).

45 Galligan, *op cit*.

46 *Op cit*, pp11-12.

(a) By making one type of approach or object the sole one. For example, if retribution was the only object which could be pursued, then only those factors of the offence relevant to retributive sentencing could be relied upon. There would be no room for a different sentence on the grounds of the offender's likelihood of, say, reform.

(b) By confining different approaches or objects to specific areas of application. For example, by applying only a deterrent approach to crimes involving drug trafficking. Alternatively, a specific approach could be confined to specific types of penalty - e.g. a rehabilitative approach to be adopted when deciding the amount of community service to be imposed. Similarly, specific approaches could be confined to deciding whether one type of sentence should be favoured over another - so that where, say, imprisonment or community service may be imposed, a rehabilitative approach should be taken so as to suggest that community service would be more appropriate.

(c) By ranking the approaches or objects in order of importance, so that one must be exhausted before another may be pursued. For example if rehabilitation were chosen as the dominant object, and deterrence subordinate to that, then an offender could only be given a deterrent sentence if he showed no likelihood of reform.

2.43 It should be remembered that a coherent sentencing policy is not a panacea for all the problems associated with our sentencing process - it desperately needs to be supplemented by a set of specific principles to guide sentencers in its individuation. For example, if, under a coherent policy, retribution was to be the sole object pursued in every case, two judges sentencing like offenders for like offences could still differ over the amount of punishment necessary to punish each.[47] However, coherence is a fundamental of an efficient and just sentencing system without which the remaining difficulties cannot be resolved.

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47 See para 9.97 *et seq, infra.* (Caselaw).

CHAPTER 3: THE FORMULATION OF SENTENCING POLICY

3.1 A sentencer receives little or no guidance from the Oireachtas or from judicial precedent when choosing the correct approach to adopt in relation to a particular offender and a particular offence.[1] Both the appellate courts and the Oireachtas have shown remarkable reluctance when it comes to making rules or passing laws which give helpful guidance on sentencing matters. The provision of maximum penalties alone has been of relatively little value.

3.2 The obvious route for reform is the introduction of statutory guidance for sentencers as to the factors which should influence their choice of approach in sentencing. The danger here, however, is that legislative involvement in the sentencing process may violate the constitutional separation of powers by entering the domain of the administration of justice - which is the exclusive preserve of the courts in criminal matters.

3.3 In this chapter we examine the special position of the courts in the sentencing process under the Constitution to see what interference with judicial sentencing discretion would be an unconstitutional infringement of the separation of powers.

The Evolution of Judicial Sentencing Discretion[2]

3.4 Judicial sentencing discretion has only emerged as a feature of the sentencing process in the last 150 years or so. Prior to the mid-nineteenth century, the sentencing judge was afforded no discretion in the case of a felony, for which the punishment was mandatory forfeiture of the lands and goods of the

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1 See paras 1.45 *et seq*, *supra*. (The Choice of Approach).

2 See generally Thomas, *Principles of Sentencing*, (1979), pp 6-8.

offender, and death.[3] However in some cases judges would reprieve the convicted offender with a recommendation to royal clemency, usually on condition of transportation to the colonies.

3.5 Statutory reforms enacted between 1827 and 1840 gave judges the discretion to impose a sentence of transportation instead of the death penalty, and in the 1850s this discretion was widened to the imposition of penal servitude in substitution for transportation. The Consolidation Acts of 1861 established the basis for sentencing discretion as it exists today, by investing the courts with the discretion to choose the nature and extent of the sentence within broad parameters.

3.6 The task of the sentencing judge in the late nineteenth century was simply to mete out punishment in proportion to the gravity of the offence. However a marked change in attitudes became noticeable around 1907 with the introduction of *The Probation of Offenders Act* which empowered sentencers to adopt a rehabilitative rather than a punitive approach by dealing with the offender as an individual. In 1908 the *Prevention of Crime Act* introduced more individualised measures - borstal training and preventive detention for habitual offenders - which heralded the new ideal that the sentence must not only reflect the seriousness of the offending behaviour but also the characteristics of the individual offender. Subsequent legislative measures have continued in this vein, culminating in the introduction of Community Service in 1983.[4]

Judicial Discretion, Independence of the Judiciary, and Sentencing Policy

3.7 Article 34.1 of the Constitution ensures the independence of the judicial function from interference by the other organs of state by providing that justice is to be administered in courts - and, in criminal cases, *only in courts.* The selection of the sentence to be imposed in individual circumstances has been held to constitute an intrinsically judicial function, and accordingly a function which may only be exercised by judges in courts. In *Lynham & Butler (No 2)*,[5] Kennedy CJ said:

> "[T]he judicial power is exercised in determining the guilt or innocence of persons charged with offences against the State itself, and in determining the punishments to be inflicted upon persons found guilty of the offences charged against them ...."[6]

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3 In *Deaton v AG* [1963] IR 170 Kenny J observed:

> "In the earliest days of the common law, all felonies were punishable with the death penalty and although the original classification of the offences which were felonies (the common law felonies) seems to have been made by the court, numerous other offences were made felonies by statute: all of them were punishable with the death penalty .... The judicial power does not seem to have been exercised for a period of at least 400 years prior to the enactment of the Constitution in 1922 in prescribing the punishment which had to be, or might be, imposed for a felony or misdemeanour."

4 *Criminal Justice (Community Service) Act, 1983.*

5 [1933] IR 74.

6 At p99.

The Executive

3.8 It has been stated that:

> "It is a matter of considerable constitutional importance that the courts should be wholly independent of the executive, and they are. Thus, whilst the judges, as private citizens, will be aware of the 'policy' of the government of the day, in the sense of its political purpose, aspirations and programme, these are not matters which are in any way relevant to the courts' decisions and are wholly ignored. In matters of home policy, the courts have regard only to the will of Parliament as expressed in the statutes, in subordinate legislation and in executive acts authorised by Parliament."[7]

3.9 Thus, in *Deaton v AG*,[8] where the plaintiff had been convicted under legislation which provided that sentence upon conviction for certain smuggling offences under that Act was to be either a fine of £100 or forfeiture of treble the value of the goods, including the duty payable thereon, *at the election of the Revenue Commissioners*, the Supreme Court unanimously held that the delegation of the power to choose penalty to the Revenue Commissioners contravened the separation of powers doctrine and the independence of judicial function guaranteed by Article 34.1. O Dáláigh CJ said (for the court):

> "The selection of punishment is an integral part of the administration of justice and, as such, cannot be committed to the hands of the Executive ...
>
> The Section ... remains intact, but with the words "at the election of [the Revenue Commissioners] deleted therefrom. Which of the alternative penalties prescribed by the section is proper to be imposed is, together with the issue of the guilt of time accused, a matter to be determined by the court that tries him."

3.10 Similarly, in *The State (O) v O'Brien*,[9] section 103 of the *Children Act, 1908*, which empowered the court to sentence a young offender guilty of murder to be "detained at his Majesty's pleasure", was in issue. Counsel for the accused argued that the section breached the independence requirement of Article 34.1 if the correct construction of that section was to allow an offender to be sentenced for a term to be decided by the Minister for Justice. The Supreme Court agreed that the section would be unconstitutional - if that was the correct construction - however, it was not, and the section merely meant that the courts could impose an indeterminate sentence which may be remitted in accordance with Article 13.6 by the Government. Walsh J said of the wording of s103:

> "If they were a correct adaptation, then the sentence was authorised by

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7 *British Airways Board v Laker Airways* [1984] QB 142, *per* Donaldson MR.

8 [1963] IR 170.

9 [1973] IR 50.

a section which purports to vest such an authority in the Executive, and, following *Deaton's Case*, such a statutory provision is inconsistent with the provisions of the Constitution ..."

3.11 Again, in *The State (Sheerin) v Kennedy*,[10] a provision empowering the Minister for Justice to transfer juvenile offenders from borstal to prison was found to be unconstitutional in so far as it allowed the Minister to choose whether or not such subsequent imprisonment was to be "with or without hard labour" - in effect a selection of punishment.

3.12 It is clear, therefore, that the Executive cannot choose the penalty to be imposed in an individual case, nor may it tell the courts how to sentence. Not only would it be interfering with the judicial function, but it would be impinging upon the offender's right of fair procedures, because "the individual citizen needs the safeguard of the Courts in the assessment of punishment as much as on his trial for the offence. The degree of punishment which a particular citizen is to undergo for a offence is a matter vitally affecting his liberty."[11]

The Legislature

3.13 As *Kelly* points out,[12] Article 34.1 cannot be read as guaranteeing the courts *absolute* discretion in the administration of justice. The same must be said of the sentencing decision which is part of the administration of justice. For most offences, the range of penalties which may be imposed is prescribed by the legislature by statute, which the Oireachtas can modify. Thus, in *The People (DPP) v Cahill*[13] Henchy J said:

> "It is part of the judicial function to determine the nature and extent of the sentence *whenever the general rule laid down by statute or common law gives a range of choice.*"[14]

3.14 It is accepted, therefore, that it is not a breach of Article 34.1 for the legislature to deprive the courts *completely* of their sentencing discretion by prescribing mandatory sentences.[15]. In *Deaton's case* O Dáláigh CJ, delivering the unanimous opinion of the Supreme Court, said:

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10 [1966] IR 379.

11 Per O Dáláigh CJ in *Deaton*, [1963] IR 170, 183. This should not be taken to mean that the executive has no role to play in the sentencing process. While the executive may not constitutionally tell the judiciary how to sentence, it has a important function in servicing the sentencing courts by providing facilities and information on the availability of sanctions and the effects of sentencing practices in the past. The English Home Office, in recognition of this important function, went so far as to provide a copy of its publication on *The Length of Prison Sentences* to every magistrate in the country, which summarised its findings with some general *advice* to sentencing Judges. Thus while the executive may not directly influence the judiciary in the exercise of sentencing discretion, it has an important role in ensuring that the judiciary has the best information available to it to exercise that discretion in the proper manner.

12 *The Irish Constitution*, (2 ed, 1984) p232.

13 [1980] IR 8.

14 *Ibid*, at p11. Emphasis added.

15 As we have already noted, it was the legislature who granted this discretion in the first place, and prior to the mid-1880's the courts had no sentencing discretion at all.

"The Legislature does not prescribe the penalty to be imposed in an individual citizen's case; it states the general rule, and the application of that rule is for the Courts. If the general rule is enunciated in the form of a fixed penalty then all citizens convicted of the offence must bear the same punishment."[16]

3.15 In *The State (O'Rourke) v Kelly*[17] the Supreme Court held that:

"many of the statutory provisions on proof of certain matters make it mandatory on a court to make a specified order. Such legislative provisions are within the competence of the Oireachtas."

3.16 However, these must be read in the light of *Buckley v AG*[18] where it was held that the judicial process is inviolable while in *actual operation*. In *Buckley*, a dispute arose, over the ownership of about £20,000 - the remains of a fund built up by the old Sinn Féin organisation prior to fragmentation. While an action was pending in the High Court the Oireachtas passed the *Sinn Féin Funds Act, 1947* of which s10 provided that all further proceedings in the High Court should be stayed. The Supreme Court found that s10 amounted to an unconstitutional interference by the legislature in the exercise of the judicial function.

3.17 Thus, while it would be unconstitutional for the legislature to interfere with the court's sentencing decision in an individual case,[19] it would not offend the separation of powers doctrine for the legislature to prescribe the penalty for a class of offence, or for all offences.[20]

3.18 The issue which remains to be examined, therefore, is the extent to which the legislature can make provisions which govern *how* sentencing discretion is to be exercised by the courts. What, for example, is the constitutional position of a statutory provision obliging sentencing judges, while exercising their judicial discretion to choose a penalty within the range provided by statute, to impose a sentence from that range which is most likely to deter the offender and others,[21] and not to have regard to the possibility of reform of the offender, a possibility which might have induced the sentencer to impose a more lenient sentence?

3.19 It appears that the power to restrict sentencing discretion in this manner is inherent in the legislative power to grant or deprive the courts of sentencing

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16 [1963] IR 110, 182; See also the Australian case of *Palling v Corfield* (1970) 123 CLR 52.

17 [1983] IR 58.

18 [1950] IR 67 (The *Sinn Féin Funds Case*).

19 At least when the exercise of the judicial discretion is in operation: *Buckley v Attorney General, supra*. There is nothing unconstitutional about the legislature - or, for that matter, the Executive - interfering with the sentence imposed by the courts when the discretion has been exercised, and the sentencer is *functus officio*: see *Deaton's case, supra*.

20 However mandatory sentences may offend other constitutional obligations, such as the duty to provide fair procedures; see Chapter 10, *infra*. (Maximum, Minimum and Mandatory Sentences).

21 Here we are concerned with the validity of such provisions under the constitutional separation of powers doctrine. Deterrent sentences may also be objected to on other constitutional grounds, in that they punish the offender for what he or others may or may not do in the future; see Chapter 4, *infra*.

discretion. The legislature has already restricted the discretion of the courts to choosing a penalty from within the range provided for by statutory maximum and minimum sentences, and the constitutionality of such restriction has not been questioned by the courts. Also, the legislature has, in some instances, restricted the discretion of the courts to impose certain penalties. For example, an order requiring a drug addict to participate in a specified programme of treatment or therapy under s28(2) of the *Misuse of Drugs Act, 1977*, as amended, cannot be made unless the court first considers a medical report and a social inquiry report;[22] and an order under the *Probation of Offenders Act, 1907*, cannot be made unless the court has regard to the "character, antecedents, age, health, or mental condition of the person charged, or to the trivial nature of the offence, or to the extenuating circumstances under which the offence was committed."[23] Thus it has been said that:

> "There is no constitutional rule or convention which prevents the Legislature from restricting or removing judicial discretion in sentencing: the simple fact is that Parliament has taken little interest in the matter and has rarely legislated so as to impinge on the discretion of the courts to impose any sentence beneath the statutory maximum."[24]

Judicial or Legislative Sentencing Policy?

3.20 The prevailing practice of the Irish legislature of setting the maximum penalties and leaving the courts with wide sentencing discretion amounts to a *de facto* delegation of the sentencing policy-making function by the legislature to the judiciary. Would it be preferable that the legislature leave the formulation of sentencing policy to the courts, or would it be more practically wise for the legislature to provide the courts with sentencing policy?

The Courts

3.21 It may be argued that the courts are in the best position to formulate sentencing policy because they deal with sentencing cases every day. However, the ability of the courts to formulate a coherent sentencing policy is to a large degree determined by the structure within which they must operate. In the Irish court system, where the principle of co-ordinate jurisdiction means that judges of the same court are largely free to disregard each other's sentencing decisions, it is in the appellate courts where sentencing policy is judicially shaped; in particular, in the Court of Criminal Appeal and the Supreme Court. Yet the appellate courts have found themselves to be largely unwilling and unable to formulate anything more than the most general of sentencing policies.

3.22 The appellate courts lack a sufficient volume of sentencing appeals from

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22 See para 1.111 *et seq*, *supra*. (Medical Treatment or Therapy).

23 See para 1.102 *et seq*, *supra*. (Probation).

24 Ashworth, *Reducing the Prison Population in the 1980s: the need for sentencing reforms* in *A Prison System for the 80s and beyond*, NACRO (1985) p10.

which to develop a considered and principled sentencing policy. Appeals against sentence are infrequent. *Rottman and Tormey* found that in 1981 only 8.2% of cases were appealed from the Dublin Circuit Court to the Court of Criminal Appeal; 15.6% of cases from the Special Criminal Court; and 23.1% of cases from the Central Criminal Court - a total of 70 appeals in all, out of 30,253 criminal cases heard that year.[25] What percentage of these accounted for appeals against sentence is not clear. This leads to the conclusion that only fairly severe sentences are likely to be appealed, so the appellate courts have little opportunity to examine non-serious cases.[26] The facility to appeal against "conviction only" reduces this opportunity further. Secondly, the fact that the prosecution may not appeal a lenient sentence means that the appellate courts will only have opportunity to hear a "lop-sided" set of cases. Its policies would, therefore, be based on a consideration of over-severe sentences, not on cases which were too lenient.

3.23 Moreover, the courts operate in a vacuum. They do not have the benefit of the views of criminologists, psychologists, sociologists or any of the other personnel who would be expected to have compelling arguments for or against the adoption of one policy over another. In Canada, Australia and several American jurisdictions the issues of policy have been fully examined by an independent sentencing commission, comprising persons thus qualified, and have been able to establish fully acceptable and appropriate aims and policies for sentencing.[27]

3.24 Furthermore, there is no satisfactory system of dissemination of appellate policy decisions to the lower courts and to those involved in the sentencing process. A high proportion of the sentencing judgments of the Court of Criminal Appeal are delivered extemporaneously - so it is unlikely that many other than those present at the hearing will learn of their import. But even written judgments of the Court of Criminal Appeal are not well reported. For example, the seminal judgment of Walsh J in *The People (AG) v O' Driscoll*[28] escaped reporting until the fortuitous publication of *Frewen's Judgments of the Court of Criminal Appeal* over six years later.[29] The systematic reporting of sentencing judgments would be of some assistance in the development of sentencing policy; in England, the development of detailed policy did not begin until the extensive reporting of sentencing judgments in the Court of Appeal began in the *Criminal Law Review* in 1954, followed by *Thomas's Principles of Sentencing* in 1970 (which, even then, drew on many unreported decisions) and the ultimate establishment of the *Criminal Appeal Reports (Sentencing)* some time later. But even systematic reporting may not be enough. Despite the high level of reporting in England, their principles and policy of sentencing remain underdeveloped,

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25 See Whitaker Report, pp238 and 198.

26 The English experience has been that appellate precedents on the principles governing sentencing for serious rapes, robberies and woundings are plentiful but that precedents on everyday assaults, thefts and damage are hard to find; see Ashworth, *Sentencing and Penal Policy*, (1983), p 40.

27 See Chapters 7 (Some Comparative Aspects of Sentencing Policy) and 9 (Implementing Sentencing Policy), *infra*.

28 Unreported, Court of Criminal Appeal, 3rd March, 1972.

29 1 Frewen 351.

even though it might have been thought that the principles of sentencing would undergo rapid growth on a case-by-case basis.[30] *Ashworth* puts this down to three features of judicial sentencing decision making: the use (or non-use) of precedents; the limited coverage of appellate decisions (many of which are still delivered extemporaneously); and the limited control over decisions at the trial level.[31] Many of the reported cases contain only *obiter* guidance, and many more may be distinguished upon the facts.

The Legislature

3.25 The legislature, on the other hand, has a number of conspicuous advantages which make it more suited to the formulation of coherent sentencing policy:

(i) It does not rely on the volume of cases before it to pronounce on sentencing policy;

(ii) Its policy may be made to govern some, or all, cases, and could not easily be distinguished on the basis of the facts of a previous case;

(iii) It does not operate in a *vacuum*; ie it may commission research, receive submissions, and assess the information received from *all* relevant interested bodies (including the judiciary);

(iv) It is in a better position to provide a sentencing policy which co-ordinates well with the policies governing other areas of the criminal justice system - such as the penal policy governing the *administration* of sentence;

(v) Statutory provisions are binding on *all* courts, so there is no difficulty with dissemination of decided policy.

3.26 An argument against the legislative formulation of sentencing policy is that legislative rules may introduce a high level of inflexibility. If the rules are too rigid, then they may not be able to accommodate new or unforeseen circumstances. Thus, it is argued that there must be retained some degree of judicial discretion to accommodate new or unforeseen circumstances. This argument is better raised against the legislative provision of specific *principles* for the choice of penalty or measure rather than against the legislative provision of a general sentencing *policy*. It must be remembered that a sentencing policy is simply a general framework within which a sentencer must operate - it provides a set of standards by which a sentencer has to justify the decision, thereby guiding him or her as to the correct approach to be adopted. New and unforeseen circumstances may still be accommodated within that framework, and

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30 Ashworth, *Sentencing and Penal Policy, supra*, p36.
31 *Ibid.*

their inclusion may be justified by reference to the general policy.

3.27 Essentially, therefore, a legislatively formulated sentencing policy need not remove judicial sentencing discretion; rather what it would do is *structure* judicial sentencing discretion so that coherence may be introduced into the sentencing decision.

3.28 Other jurisdictions which have successfully achieved coherence in their sentencing policies have done so through the medium of statute;[32] indeed, in England and Wales, where there exists a highly developed system of judicial pronouncements on sentencing, a legislative statement of policy was still considered necessary to achieve the necessary degree of coherence.[33]

3.29 Matters of policy are, in any case, the legitimate concern of the Legislature. *Sir James Fitzjames Stephen* is often quoted as having said that if the judiciary took on board the task of formulating sentencing policy:

> "they would be assuming a power which the Constitution does not give them."[34]

3.30 We accept *Stephen's* words as expressing the principle that the actual distribution of the policy making function between the legislature and the judiciary ought to be arranged *in the most effective manner*. We conclude that the legislature is better suited to the formulation of sentencing policy. *We therefore provisionally recommend that the legislature undertakes the task of formulating a coherent policy governing sentencing, to be set out in the form of a statute or statutes.*

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32 See Ch 5, *infra*. (Aggravating and Mitigating Factors).

33 *Ibid.*

34 *Variations in the Punishment of Crime*, (1885) 17 *Nineteenth Century*, p775.

CHAPTER 4: A COHERENT SENTENCING POLICY

Preliminaries: Justifying Aims and Principles of Distribution

4.1 What is the justification for the imposition of a criminal sanction? The objects of punishment have traditionally been classified under two broad headings:

(i) the *moral* approach, with which retributivism is traditionally associated, which concentrates on *past* activity, arguing that justice requires retribution to be exacted for blameworthy conduct; and

(ii) the *utilitarian* approach, with which rehabilitation, deterrence and incapacitation are associated, which concentrates on the *future* beneficial consequences of the imposition of sanctions, justifying them in terms of their social utility such as crime prevention or crime control.

4.2 Much perplexity has surrounded attempts to justify sentencing by focussing on a *single* justification, but, equally, much confusion surrounds the idea that a *plurality* of different values and aims should be recognised.[1] Present Irish sentencing policy epitomises the latter. Recent philosophical attempts which seek to combine morality and utility, e.g. by advocating that sanctions provide redress for the victims of crime, appear to be "more of a supplement than a replacement for the two mainstream trends."[2]

4.3 A further distinction should be mentioned. When discussing the objects of sentencing, *normative* objects, such as retribution, rehabilitation, deterrence

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1 Hart, *Punishment and Responsibility*, (1967), p3.

2 Canadian Sentencing Commission, *Sentencing Reform: A Canadian Approach*, (1987), p127.

and incapacitation, should be distinguished from *functional* objects, such as the tailoring of sanctions to suit prison capacity or the cost of imprisonment.[3] Normative objects are concerned with the desired external effects of sentencing; functional objects are relevant to the internal operation of the system.[4] It is widely accepted that the functional objects should only be considered as being subsidiary to the traditional normative objects. For example, as the issue of prison capacity becomes critical, the normative goals may take second place to functional considerations. It may be the availability of prison accommodation which eventually determines whether an offender is sentenced to imprisonment, not the competing need for a custodial sentence on one of the normative grounds.[5] This is undoubtedly a problem for sentencers in individual cases, but should not have a place in the formulation of general sentencing policy. *Ashworth* elaborates:

> "Sentencing by the courts is more than a tap by which to regulate the flow of offenders into our custodial institutions. Sentencing involves a public statement about an offender and an offence. It is a purposive activity, relating to the offence for which the offender has been convicted, the characteristics of the offender, and the aims of sentencing. It is not, and cannot be justified as, a mere response to economic constraints or planning failures... [I]t is surely incompatible with the nature and function of sentencing that it should be regulated by reference to whether a wing of one prison has collapsed, or whether the sewerage system of another prison has become inoperative... [I]n a system where proportionality is central, seasonal variations in sentencing policy according to the problems of the prison service are difficult to justify."[6]

4.4 Subsequent discussion will be confined to the normative objects of sentencing.

4.5 While the objects of sentencing concern *why* we impose criminal sanctions, principles for the *distribution* (or allocation) of sentence concern *how* those sanctions are imposed, i.e. who is to receive a sentence, what kind and how severe a sentence is to be imposed? While there must be some relationship between the "ends" and the "means" of sentencing, the linkage is not a simple one. Independent moral considerations may arise at the stage of distribution which

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3 *Ibid*, pp127-128.

4 *Ibid*, p128.

5 A recent example of this is to be seen in the difficulty District Judge Wine had in imposing an appropriate sentence on a young offender because of the lack of suitable facilities. See *Judge Renews Detention Centre Plea*, The Irish Times, 6th March 1991. Functional considerations could also be relied upon to determine the length of sentences, as *Blumstein, Sentencing Reforms: Impacts and Implications*, (1984) 68 Judicature 129, p132, observes:

> "For example, if the jurisdiction had 1,000 prison cells available for just burglars and robbers, and if they typically sentenced approximately 400 burglars and 300 robbers, then a sentencing schedule of one year for burglary and two years for robbery (which would just use that available capacity) would be preferable to longer sentences that also had a two-to-one ratio, since the longer ones would exceed available prison capacity."

6 *Sentencing and Penal Policy*, (1983), p111.

may sometimes appear to reduce the efficacy or impact of punishment.[7]

4.6 It may also be simplistic to assume that tailoring the means of distribution of criminal sanctions to suit the end or aim of any chosen object of sentencing will increase the degree to which that object's ends are attained. For example, if crime prevention by way of deterrence is the chosen end, then it may be assumed that increasing the level and frequency of sanctions imposed will achieve greater deterrence; or if incapacitation is the object, it is assumed that increasing the number of persons incarcerated will reduce the crime rate. It is now widely recognised that these "simple-minded assumptions" (to quote the Canadian Sentencing Commission)[8] have little or no basis in fact. Experience has taught us that simple increases in the severity or frequency of sanctions in order to improve the achievement of a single object seldom lead to the social benefits presumed to result from them.

4.7 But just as the objects of sentencing do not easily resolve the question of distribution, principles of distribution such as proportionality and parsimony are equally inadequate in solving the issue of justification. *Von Hirsch*, the leading exponent of the "just deserts" philosophy (which provides that sanctions should be commensurate with the blameworthiness of the offending behaviour) argues that the imposition of sanction without the support of perceptible social benefits - i.e. punishment in the purely retributivist sense - is futile:

> "it is preferable to have a general justification for the criminal sanction that is expressly consequentialist in part. This makes the warrant for the existence of punishment dependent on that institution having significant crime-preventive benefits."[9]

4.8 The search for a consequentialist justification cannot be resolved by looking to principles of distribution - as the Canadian Sentencing Commission observed:

> "The assertion that sanctions are commensurate with blameworthiness does no more to legitimise the existence of penal sanctions than the fact that income tax is proportionate to revenue justifies the practice of taxation in itself."[10]

4.9 A discussion of sentencing policy must, therefore, begin by addressing the question of the justification for imposing criminal sanctions in order to define the context in which decisions about distribution should be made. It would be wrong, however, to assume that once the problem of justification is solved (if, indeed, a solution is possible), the question of distribution is thereby also automatically resolved. While a sentencing policy must have regard to the overall

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7 Hart, *op cit*, p9.
8 *Op cit*, p130.
9 *Past or Future Crimes*, (1986) p59.
10 *Op cit*, p131.

objectives of punishment, it may also have to take into account other considerations, for example, the need to have regard to the fundamental rights of the offender and to considerations of cost and practicality.

Justifying the Imposition of Criminal Sanctions

4.10 Let us now examine the traditional objects of sentencing in order to define the context in which decisions about the distribution of sentence must take place.

(i) Retribution

4.11 Retribution stresses the moral obligation of the criminal law to punish offenders. No further ground other than moral obligation is offered to justify the imposition of punishment. Thus retribution has often been criticised as mere vengeance seeking. What good, it may be asked, does it do to hang a murderer? It only leaves two people dead instead of one. As *Bacon* once said:

> "Revenge is a kind of wild justice which, the more man's nature runs to, the more ought law to weed it out."

4.12 Utilitarians criticise retribution because of its apparent pointlessness. In *Macaulay's* words:

> "The suffering caused by punishment is, considered by itself, an evil, and ought to be inflicted only for the sake of some prepondering good."

4.13 Since pure retribution is grounded on moral justifications, its success cannot be measured in terms of its achievements, but rather on the strength of its moral arguments. However, many scholars have queried whether any attempt to find a sound moral argument in favour of retribution does not end up in a vicious circle. This is ably illustrated in the following extract from the Canadian Sentencing Commission's report:

> "The question is this: "Why should we punish a person?" An obvious answer is "Because that person has done something wrong." However, this answer raises another issue: should we actually impose legal sanctions on individuals for any kind of wrongdoing (being discourteous, lacking table manners, cheating at cards)? Obviously not. Only those who are guilty of the most serious forms of wrongdoing should be punished. What precisely are these? They are labelled criminal offences. And what, then, is a criminal offence? A criminal offence is a form of behaviour which is legally defined as subject to punishment. Such legal definitions vary from time to time (we do not burn witches anymore) and across countries. Finally, our original question - Why should we punish a person? - is given the uninformative answer: "Because that person has done something which we now believe requires

punishment.""[11]

4.14 In one sense, however, retribution may give rise to a social benefit. A retributive response to wrongdoing is a strong expression of denunciation of the offence. "[T]he criminal justice system must involve imposing on offenders punishments of sufficient severity that it is possible rationally to say that a breach of the law, when detected, is attended by significant consequences."[12] It seems, therefore, that the place of retribution in the sentencing process is a natural phenomenon - a response to a crime which fails to condemn the actor scarcely seems morally adequate.[13] To leave an act unpunished is close to condoning it since punishment acts as a re-assertion that the law has been broken and it expresses the moral indignation of the community.[14] Closely related to this idea, and again separate from the purely moral justification for retribution, is the modern *moral utility* justification, namely, that punishment is not only *permissible*, but *desirable* - i.e. it is not just an inherent element in the moral idea of law but also socially necessary in order to *maintain* law:

> "Society has an interest in crime control - that is, in ensuring that its laws are obeyed - and this provides a justification for taking punitive measures against those who have broken the law. Thus, on this modified version of modern retributivism, punishment is justified not merely because it is deserved but also because it contributes towards crime control."[15]

4.15 One of the justifications of judicial punishment, therefore, is that without state punishment, "it seems likely that victimising conduct would become so prevalent as to make life nasty and brutish, indeed."[16] This justification, sometimes described as *Montero's* aim, after the Spanish jurist who articulated it, dictates that judicial punishment is necessary "to protect offenders and suspected offenders against unofficial retaliation."[17]

4.16 The retributive theory of punishment is closely linked to the distributive principle of desert - the idea that the offender's punishment should in some way

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11 *Op cit*, p141.

12 Australian Law Reform Commission Report No. 44, *Sentencing*, (1988), p14.

13 Von Hirsch, *Past or Future Crimes: Deservedness and Dangerousness in the Sentencing of Criminals* (1986).

14 For this reason, former Chief Justice Warren Burger of the US Supreme Court considered retribution as having an important positive value. In an interview with CNN he said:

> "There was a time when I shared the view that retribution which some people call revenge, society's revenge, was totally wrong. If the [criminal] isn't apprehended, convicted, and sent away, there is a terrible neurosis, a community mass neurosis build up. That must have some outlet. And whether we like it or not, one of the outlets is that this person is found, tried, convicted, [and] sent to prison".

See Kiesel, *Crimes and Punishment: Victim Rights Movement Presses Courts, Legislature*, 70 ABA J 25, p26. (1984); Johnson, *The Application of Victim Impact Statements in Capital Cases in the Aftermath of Booth v Maryland: An Impact No More?* (1988) 13 Thurgood Marshall LR 109, p114.

15 Ashworth, *op cit*, p18.

16 Ashworth, *Criminal Justice and Deserved Sentences* [1989] Crim LR pp340, 343, and von Hirsch, *Past or Future Crimes, supra.*

17 Walker, *Sentencing in a Rational Society*, (1971), pp3-22; Canadian Sentencing Commission, *op cit*, pp111-12.

reflect the injury inflicted by him or her. The idea of subjecting the offender to the same wrong or injury which he has perpetrated seems offensive to most - even refined versions which would require the same *degree* of suffering are commonly considered repugnant; *viz* the death sentence for murderers. Therefore, modern desert theory is concerned more with *proportionality*; the degree of punishment inflicted on an offender for a serious offence should be in proportion to the reprehensibility of the criminal behaviour; more severe than that which would be imposed for less reprehensible behaviour and less severe than that which would be imposed for more reprehensible behaviour - even though none is equivalent to the degree of suffering resulting from the commission of the crime.

4.17 Retributive punishment should not impinge upon the personal rights of the offender beyond that amount necessary to exact retribution for the offence. The famous utilitarians *Beccaria*[18] and *Bentham*[19] described this as *parsimony*, i.e. imposing the minimum punishment consistent with the aims of the sentencing process. However, a problem arises in determining the minimum amount of punishment consistent with the aim of retribution. If we reject the idea of imposing on the offender an injury similar to that which he has inflicted, or a level of suffering equivalent to that caused by the offence, we are left with the very difficult task of assessing the level of punishment by reference to the degree of moral wrongdoing involved in the offence. But, as *Hart* remarks:

> "... undoubtedly there is, for modern minds, something obscure and difficult in the idea that we should think in choosing punishment of some right intrinsic relation which it must bear to the wickedness of the criminal's act ...".[20]

> ""We must start somewhere", he said, "and in practice the starting point is apt to be just the traditional or usual penalty for a given offence.""[21]

4.18 In conclusion, we find that the arguments in favour of retribution alone as a justification for the imposition of criminal sanctions are rather weak. Strict retributivism is unattractive in so far as it emphasises notions of revenge. On the whole, revenge represents a justification for the imposition of criminal sanctions which civilised society should strive to avoid. Undoubtedly, there is some room for the *moral utility* theory of retribution as a justification for the imposition of sanctions, but some limit is necessary on the claims of strict retributivism. The principle of desert places some desirable limits on the imposition of criminal sanctions. However, desert itself raises difficult issues, such as the question of *starting points* and the question of what constitutes deservedness.

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18 *Of Crimes and Punishments*, ch 23.
19 *An Introduction to the Principles and Morals of Legislation*, ch 14, para 6.
20 *Op cit*, p163.
21 *Ibid*, p162.

(ii) Rehabilitation

4.19 The rehabilitative ideal assumes that criminal behaviour is the product of antecedent causes which may be identified and controlled, and that measures may be employed to treat the convicted offender so as to effect changes in his behaviour for his own good and for the good of society. In other words crime is viewed as a disease capable of treatment and cure. This utilitarian theory of rehabilitation of offenders is by no means a new one; it is at least as old as *Plato*.[22] However, the rehabilitative ideal did not permeate the sentencing process until early in this century when new ideas for the treatment of offenders were developed. The key change in legal thought was the displacement of the retributive slogan, "Let the punishment fit the crime" by the new principle "Let the treatment fit the needs of the offender."[23] This change in attitudes was accompanied by legislative measures such as the introduction of probation in 1907[24] and the establishment of juvenile courts and borstal training in 1908.[25] The rehabilitative ideal was taken to the greatest lengths in the USA. In 1870, the National Congress on Penitentiary and Reformatory Discipline recommended complete indeterminacy in sentences, which would give the authorities unlimited time to reform prisoners.[26] In effect, convicted offenders could be detained in prison until deemed "cured". By 1949 this practice had spread to most of the states, and in the case of *Williams v New York*, the Supreme Court said:

> "Today's philosophy of individualizing sentences makes sharp distinctions, for example between first and repeated offenders. Indeterminate sentences, the ultimate termination of which are sometimes decided by non-judicial agencies, have to a large extent taken the place of the old rigidly fixed punishments. The practice of probation ... has been accepted as a wise policy .... Retribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of the criminal jurisprudence."[27]

4.20 Rehabilitative programmes reached their peak worldwide in the 1960s and 1970s. Until 1975 all fifty American states, as well as the District of Columbia and the federal jurisdiction had indeterminate sentencing systems. The judge determined the nature of the sentence and, if imprisonment was ordered, stated the maximum or minimum sentence, or both. A parole board then

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22 See *Laws*, Book IX (1970). Bentham, in *The Theory of Legislation*, wrote:

> "It is a great merit in a punishment to contribute to the *reformation of the offender*, not only through fear of being punished again, but on a change in his character and habits."

23 See Robinson and Smith, *The Effectiveness of Correctional Programs* in Gross and Von Hirsch *Sentencing* (1981), p118.

24 *Probation of Offenders Act, 1907.*

25 *Children Act, 1908.*

26 Gross and von Hirsch, *op cit*, p44.

27 (1949) 337 US 241, 248. A striking feature of the opinion of the United States Supreme Court in *Williams v New York* is the justification of a death sentence by a philosophy of reformation and rehabilitation. Silving, *Essays on Criminal Procedure*, (1964), p357 blames this on a "confusion of philosophical standards ... probably due to uncritical, often unconscious adaptation of theological ideas .... Of course reformation and rehabilitation by death fit very well into a theological concept of criminal law, but in secular law this type of argument sounds strange".

decided when the offender would be released.[28]

4.21 Since then, there has been a wide-spread and dramatic loss of faith in the rehabilitative theory, a development which has come to be known as the "decline of the rehabilitative ideal."[29] The 1970s and 1980s saw marked changes in the attitude of the law towards convicted offenders, who until then were considered to have forfeited all their rights upon conviction. "He was thought to be at the disposal of the state to be used for whatever ends might be thought to be expedient ... since he has put himself outside the law, the criminal has no basis for complaint."[30] This utilitarian attitude changed when it became recognised that the state owed duties to criminals as much as other individuals.[31] Criminal justice and punishment began to be regarded as systems concerned with the distribution, deprivation and restriction of rights, a perspective incompatible with the wide discretionary powers and indeterminate sentences associated with rehabilitation.[32] It was disregard for the rights of the individual that led to the resurgence of the Kantian opposition to such forms of punishment:

> "Juridical punishment can never be administered merely as a means for promoting another good either with regard to the criminal himself or to civil society, but must in all cases be imposed only because the individual on whom it is inflicted *has committed a crime.* For one man ought never to be dealt with merely as a means subservient to the purpose of another."[33]

4.22 It was felt that rehabilitative sentencing gives rise to unwarranted variation or inconsistency in sentences since it looks to offenders' needs for treatment rather than to the character of their crimes. The *US Committee for the Study of Incarceration* illustrated the problem thus:

> "If one of two convicted burglars is thought likely to respond to community based treatment while the other seems more amenable to a prison based program, that would be a reason for putting one on probation and imprisoning the other. The difference in the two sentences is rationalised as necessary for the protection of the public: the two burglars will be less likely to return to crime if each is given treatment

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28 Tonry, *Sentencing Guidelines and Sentencing Commissions - The Second Generation* in *Sentencing Reform*, Pease & Wasik (eds), (1987), p23. Belief in the rehabilitative ideal was affirmed in England with the establishment of a parole board by the *Criminal Justice Act, 1967*, though no such body was ever established in Ireland.

29 See e.g. Allen, *The Decline of the Rehabilitative Ideal: Penal Policy and Purpose* (1981); Paul C Weiler, *The Reform of Punishment* in *Studies on Sentencing*, Law Reform Commission of Canada, (1974) p184; Ashworth, *Criminal Justice and Deserved Sentences* [1989] Crim LR, 840, note 16; Kevin Boyle, *The Disease Concept of Crime*, (1970) 21 NILQ 274.

30 Galligan, *Guidelines and Just Deserts: A Critique of Recent Trends in Sentencing Reform* [1981] Crim LR 297, pp297-298.

31 In the US this began with the Civil Rights Movement and cases concerning the "cruel and unusual" treatment of Black Muslim prisoners; see Rothman, *Decarcerating Prisoners and Patients* in *Sentencing*, Gross and Von Hirsch (eds), (1981), pp130 *et seq.* European parallels can be seen in cases such as *Tyrer v UK* 2 EHRR 1 concerning the whipping of offenders, and most recently the new *European Convention Against Torture and Inhuman or Degrading Treatment or Punishment*, (in force in Ireland as of 1 Feb 1989) which applies to all places of detention within the State.

32 See Galligan, *op cit*, p298.

33 *Philosophy of Laws*, trans Hastie, (1887), 195.

suited to his particular need. *The explanation holds, however, only if the programs work. Unless programs can demonstrably prevent recidivism, a discrepancy in the two dispositions remains unaccounted for. It is therefore essential to ask: How effective are treatment programs?*"[34]

4.23 Concern about unwarranted variations led to extensive research into the efficacy of rehabilatitive programmes. All showed rehabilitative sentencing to have failed in fulfilling its purpose of turning offenders away from further crime.[35] In 1974, *Martinson*, in an influential article, concluded that "nothing works":

> "With few and isolated exceptions, the rehabilitative efforts that have been reported so far have had no appreciable effect on recidivism. Studies that have been done since our survey was completed do not present any major grounds for altering that original conclusion."[36]

4.24 The US Panel on the Rehabilitation of Criminal Offenders confirmed these findings:[37]

> "There is not now in the scientific literature any basis for any policy or recommendations regarding rehabilitation of criminal offenders. The data available do not present any consistent evidence of efficacy that would lead to such recommendations."

4.25 However, doubts about the reliability of research into rehabilitative effects have clouded the earlier view of the hopelessness of rehabilitative efforts. The Panel added:

> "The Panel concludes that Lipton, Martinson and Wilks were reasonably accurate and fair in their appraisal of the rehabilitation literature .... Two limitations, however, must be applied to their conclusions: first, inferences about the integrity of the treatments analysed were uncertain and the interventions involved were generally weak; second, there are suggestions to be found concerning successful rehabilitation efforts that qualify the conclusion that 'nothing works'."

4.26 In 1979 Martinson was compelled to retract some of his earlier conclusions, leaving him to remark:[38]

> "The most interesting general conclusion is that no treatment now used in criminal justice is inherently either substantially helpful or harmful. The critical factor seems to be the conditions under which the program

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34 Von Hirsch, *Doing Justice*, (1976), p12, (emphasis added).
35 *Report of the Committee of Inquiry into the Penal System*, (Whitaker Report) (pl 3391, 1985), p41.
36 *What Works - Questions and Answers About Prison Reform* [1974] Public Interest 22, p25.
37 See Canadian Sentencing Commission, *op cit*, p138.
38 Martinson, *New Findings, New Views: A Note of Caution Regarding Sentence Reform*, (1979) 7 Hofstra Law Review, 243, pp253-4.

is delivered."

4.27 Although detailed research on the matter is not yet available, it appears that Irish sentences, (custodial ones in particular), do not have any improving effect on recidivism.[39] The Whitaker Committee concluded:

> "Programmes for reform and rehabilitation have a positive value but clearly imprisonment cannot be justified merely on the grounds that it can be used to reform and rehabilitate."[40]

4.28 Also, the Whitaker Committee noted that rehabilitation programmes are very expensive, and it is questionable whether the capital investment in social correction is warranted by the "expected profit", i.e. reduced recidivism, which does not seem to be forthcoming.[41]

4.29 Some have suggested that even where the sentence is justified on some other grounds, rehabilitative programmes can lead to victimisation, because the coercive treatment of an offender may distress him or her contrary to principles of equality.[42] The issue here is whether it is justifiable to subject one offender to an onerous programme of rehabilitation simply because of his or her supposed likelihood of reform while another offender, supposedly less likely to reform, simply has to "do time" - or *vice versa*. It has also been argued that it is wrong to try to change the beliefs and attitudes of an offender by any means other than argument, the giving of reasons, or by example.[43] Again, the question here is whether the coercion involved in subjecting offenders to rehabilitative programmes amounts to an 'extra punishment' which those serving other sentences do not encounter.

4.30 Finally, a perplexing consequence of rehabilitative principles is that they can lead to longer sentences being imposed on offenders. *Allen*, one of the leading critics of rehabilitation theory, concluded:

> "... Surprisingly enough, the rehabilitative ideal has often led to increased severity of penal measures .... The tendency of proposals for wholly indeterminate sentences, a clearly identifiable fruit of the rehabilitative ideal, is unmistakably in the direction of lengthened periods of imprisonment .... Experience has demonstrated that, in practice, there is a strong tendency for the rehabilitative ideal to serve purposes that are essentially incapacitative rather than therapeutic in character."[44]

4.31 In conclusion, it is very difficult to accept rehabilitation as a justification

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39 See para 4.32 *et seq*, *infra*. (Deterrence).
40 *Op cit*, p41.
41 See Weiler, *op cit*, p124.
42 Hondreich, *Punishment, The Supposed Justifications*, (1984), pp91, 102-3.
43 *Ibid*, p103.
44 *Legal Values and the Rehabilitative Ideal*, in Gross and von Hirsch (eds) *Sentencing*, (1981) p114.

for the imposition of sentence, particularly since there is serious doubt as to whether or not rehabilitation works. Although some forms of sentence may have particular rehabilitative effects for some offenders, it is questionable whether rehabilitation can be pursued beyond those isolated effects so as to achieve particular results. In such circumstances, rehabilitation is little more than a general and limited effect of sentencing, and does not provide sufficient justification for variations in sentence. That said, however, there should be no objection in principle to the pursuit of rehabilitative programmes in dealing with sentenced offenders (except, perhaps, where such programmes are coercive) where sentence is justified on some other grounds. We are satisfied that there is a place for such programmes and would echo the recommendations of the Whitaker Committee of Inquiry that those incarcerated by society should have caring and developmental attention.[45]

(iii) Deterrence

4.32 Deterrence, like rehabilitation, is another utilitarian concept. The object of deterrent sentencing is to restrain or dissuade persons from *future* criminal action either by describing the potential punishment, or by applying the punishment in order to engender fear.

4.33 It is common in discussions on deterrent sentencing to distinguish between *general* and *individual* deterrence. General deterrence is used to describe threats directed at people who have not experienced the distasteful consequences of sentence, while individual deterrence refers to threats directed against persons who have. In some of the literature on deterrence, it is only general deterrence that is classified within the concept, it being argued that any change in the behaviour of the offender, as a result of the sanction being imposed, should be treated as rehabilitation rather than deterrence.[46] Essentially, however, general and individual deterrence are attempts to do the same thing: "the difference is merely that the former relies on imagination, the latter on memory."[47]

4.34 A second distinction is between *absolute* and *marginal* deterrence.[48] Absolute deterrence refers to the deterrent effect of the criminal justice system *as a whole*, such as the effect of a larger police force or an increase in all the maximum penalties. Marginal deterrence, on the other hand, relates to the use of deterrence in sentencing, and, as such, is the main focus of our attention. The argument in support of marginal deterrence is that an increase in a particular sentence imposed on an offender will result in an increased deterrent effect within the community.

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45 *Op cit*, p40.

46 See e.g. Gross and von Hirsch (eds) *Sentencing* (1981).

47 Nigel Walker, *The Efficacy and Morality of Deterrents*, [1979] Crim LR 129, p131.

48 See Zimring and Hawkins, *Deterrence: The Legal Threat in Crime Control*, (1973) p14; von Hirsch, *Doing Justice*, (1976), p61; Walker *Sentencing* (1985), p95; and Victorian Sentencing Commission, *Sentencing*, (1988), p69.

4.35 Deterrence, both general and individual, has been one of the traditionally accepted aims of the criminal law. Nonetheless, moral objections have been raised against the deterrent theory, in particular against *general* deterrence[49]:

> "... punishment on the basis of deterrence is inherently unjust. For if an example is made of a person to induce others to avoid criminal actions then he suffers not for what he has done but on account of other peoples' tendency to do likewise."[50]

4.36 Recently there has been a growing awareness of the limits of the individual deterrent effects of sentences.[51] Factors such as the high recidivism rate and the "undeterrability" of compulsive and impulsive offenders have called the success of the goal of individual deterrence into question. It is acknowledged that a large proportion of our prison inmates have been convicted on previous occasions.[52] American research on career criminals has indicated that the threat of penalty was not an important factor to them.[53] In fact some offenders find it easier to bear the consequences of subsequent sentences because the uncertainty and fear elements have been removed by the experience of punishment in the past. For this reason individual deterrence theories are widely discounted, and recent deterrent thought has focussed on general deterrence.

4.37 As regards the success of general deterrent strategies, however, the realisation has been that not enough is known about their effect. Little is known about the ways in which potential offenders arrive at probabilities of detection, conviction and sentence. The US *National Academy of Science's Panel on Research on Deterrence and Hesitative Effects* concluded:

> "In summary ... we cannot yet assert that the evidence warrants an affirmative conclusion regarding deterrence. We believe scientific caution must be exercised in interpreting the limited validity of the available evidence and the number of competing explanations for the results. Our reluctance to draw stronger conclusions does not imply support for a position that deterrence does not exist, since the evidence certainly favours a proposition supporting deterrence more than it favours one asserting that deterrence is absent. The major challenge for future research is to estimate the magnitude of the effects of different sanctions on various crime types, an issue on which none of the evidence available thus far provides very useful guidance."[54]

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48 Since *individual* deterrence is more properly described as a rehabilitative object (in that it attempts to reform the offender personally), the same objections as apply to rehabilitation as a distributive principle can be applied to it. See para 4.19 *et seq, supra.* (Rehabilitation).

50 Bittner and Platt, quoted by Andenaes, *Morality of Deterrence*, (1970) 37 U Chi LR 649.

51 See Zimring and Hawkins, *op cit*; Beyleveld, *A Bibliography on General Deterrence Research*, (1980).

52 The Annual Reports on *Prisons and Places of Detention* for the years 1987 and 1988 indicate that of those in custody upon conviction during each year, 2,636 out of 5,106 (51.5% approx) and 2,075 out of 4,697 (44.2% approx) respectively had served custodial sentences in the past. This may only indicate that former prisoners are more likely to be detected re-offending, but we are informed that the general feeling is, taking all forms of sentence into account, that the recidivism rate is in fact much greater.

53 Petersilia, Greenwood and Marvin, *Criminal Careers of Habitual Felons* (1978) p119.

54 *Deterrence and Incapacitation* in *Sentencing* (Gross and von Hirsch eds) (1981) pp228 *et seq.*

4.38 *Nagin* (cited with approval by both the Canadian Sentencing Commission and the Victorian Sentencing Committee) was more blunt:

> "... despite the intensity of the research effort, the empirical evidence is still not sufficient for providing a rigorous confirmation of the existence of a deterrent effect. Perhaps more important, the evidence is woefully inadequate for providing a good estimate of the magnitude of whatever effect may exist.
>
> Policy makers in the criminal justice system are done a disservice if they are left with the impression that the empirical evidence, which they themselves are frequently unable to evaluate, strongly supports the deterrence hypothesis."[55]

4.39 Other studies have come to similar conclusions.[56] The Whitaker Committee noted:

> "It is difficult to find convincing proof that imprisonment operates as a major or universal deterrent."[57]

Some of the argument against deterrence has rested on findings that many acts, particularly acts of violence, are *impulsive*, while other acts are *compulsive*, and as such cannot be influenced by deterrents.[58]

4.40 On the other hand, it has been contended that deterrence is an obvious effect of having a criminal justice system which imposes legal sanctions. Historical examples in support of this are the upsurges in looting, violence and corruption which took place in Melbourne in 1923 during a police strike, and in Denmark during German occupation when the Danish police force was interned.[59] Who can ever say how many are deterred from a first offence?

4.41 It is also possible that Parliament may decrease the general level of crime simply by choosing to increase the minimum sentence for all crimes. If deterrence occurs in such situations, it is not because of individual sentences, but because the system as a whole treats offenders more seriously.[60]

4.42 None of the empirical research alluded to contradicts the proposition that the *certainty* of punishment is more likely to have a deterrent effect than the *severity* of punishment. *Beyleveld* concluded that:

> "recorded offence rates do not vary inversely with the severity of

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55 Blumstein, Cohen and Nagin (eds) *Deterrence and Incapacitation: Estimating the Effects of Criminal Sanctions on Crime Rates* (1978) pp135, 136.

56 See Fattah, *A Study of the Deterrent Effect of Capital Punishment with Special Reference to the Canadian Situation, (1976)*; Cousineau, *Legal Sanctions and Deterrence* (1986)

57 *Op cit*, p41.

58 Walker, *op cit*, p132.

59 Victorian Sentencing Commission, *Sentencing*, (1988), p74.

60 Australian Law Reform Commission Report No. 44, *Sentencing*, (1988), p18; Andenaes, *op cit*, p651.

penalties (usually measured by the length of imprisonment) ... inverse relations between crime and severity (when found) are usually smaller than inverse crime-certainty relations."[61]

4.43 Our conclusions coincide with those of the Canadian Sentencing Commission:

> "To summarise: it is plausible to argue that a general effect of deterrence stems from the mere fact that an array of sanctions are known to be imposed with some regularity. However, it can be questioned whether legal sanctions can be used beyond their overall effect to achieve particular results (e.g., deterring a particular category of offenders, such as impaired drivers). In other words, deterrence is a general and limited consequence of sentencing. It is not a goal that can be attained with precision to accommodate particular circumstances (e.g., to suppress a wave of breaking and entering dwelling houses)."[62]

(iv) Incapacitation

4.44 Incapacitation has been defined as:

> "... the effect of isolating an identified offender from larger society, thereby preventing him or her from committing crimes in that society."[63]

There are two species of incapacitation, *collective* (or *general*), and *selective*. The former refers to a strategy which would impose a prison term on *all* persons convicted of crime, whilst the latter refers to incapacitative policies which attempt to predict which offenders are more likely to re-offend - i.e. "dangerous" offenders.[64]

4.45 It is obvious that incapacitation is an immediate and direct effect of custodial sentences since society at large is protected from the possibility of repeat offences so long as the prisoner is detained.[65] There is, consequently, little convincing argument to the effect that incapacitation cannot be achieved -

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61 *Op cit*, p306. See Canadian Sentencing Commission, *op cit*, p137.

62 *Ibid*, p138.

63 National Academy of Science's Panel on Research on Deterrent and Incapacitative Effects, *op cit.*

64 Von Hirsch, *Doing Justice*, p80. This idea is not new; it was formulated at the turn of the century by the Italian positivist school of Cesare Lombroso, Enrico Ferri and Rafaele Garofolo. It was introduced in one way or another in many continental countries. See Radzinowicz and Hood *A Dangerous Direction for Sentencing Reform*, [1978] Crim LR 713, p719. Early expressions of the philosophy in this jurisdiction may be seen in the *Criminal Law (Ireland) Act, 1828*, which provided for exemplary sentences for felonious recidivists, and in the *Prevention of Crime Act, 1908*, which provides that an "habitual criminal" may be kept in detention for lengthened periods of years if the court is of the opinion by reason of his or her criminal habits and mode of life that it is expedient for the protection of the public. Article 5(1)(c) of the European Convention on Human Rights provides that a person may be deprived of liberty in accordance with law for the purpose of bringing the person before a competent legal authority "when it is reasonably considered necessary to prevent his committing an offence." However, the exercise of such a power may not be permitted by Irish constitutional law, see para 4.49 *et seq*, *infra*.

65 See the Whitaker Report, p41.

so long, that is, as places of detention successfully contain their inmates.[66]

4.46 However, in relation to selective incapacitation, which relies on predictions of "dangerousness", there seems to be great difficulty in finding an accurate means of predicting recidivism; many offenders predicted to be dangerous turn out to be "false positives", i.e. they do not commit their expected crimes when left at large.[67] The *Floud Report*, commissioned by the Howard League for Penal Reform, conceded that the "false positive" rate for predictions under its scheme of proposals was at least 50% and possibly as high as 66%.[68] Similar rates were found for the American strategies proposed by Dr Peter Greenwood of the RAND Corporation.[69] Floud justified these inaccuracies on a principle of "just re-distribution of risk" - society is entitled to be relieved of the risk of being harmed, at the cost of mistakenly imprisoning an offender. However, the justice begins to "wear thin"[70] when the best prediction rates possible are so low.

4.47 After the Floud Report, the need for selective incapacitation was questioned. The general conclusion of the Home Office's Report *Taking Offenders Out of Circulation*[71] was that serious crimes are so infrequent that predictive sentencing lends little to policies of crime reduction. A number of criminologists have therefore concluded that incapacitative sentencing is normally unacceptable in principle and incapable of just administration in practice. *Norval Morris* remarked:

> "Since we cannot make reliable predictions of dangerous behaviour, considerations of justice forbid us to confine people against their wishes in the name of public safety for longer periods than we can justify on other grounds."[72]

4.48 *Radzinowicz and Hood* add that "the concept of 'dangerousness' is so insidious that it should never be introduced in penal legislation."[73]

4.49 It may be argued that incapacitation is at odds with our constitutional jurisprudence, since it punishes the offender without trial or conviction, contrary to the principles laid down by the Supreme Court in *The People (AG) v O'Callaghan*[74] and *Ryan v DPP*.[75] While, as we shall see, there is some

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66 The Canadian Sentencing Commission complained, however, that successful incapacitation merely transfers the problem of crime from society at large to society within the prison walls: "no environment known to man is more crime ridden than a prison": *Sentencing Reform: A Canadian Approach*, p130. We find this argument a little too general.

67 Von Hirsch, *Deservedness and Dangerousness in Sentencing Policy*, [1986] Crim LR 79. (Hereafter "*Deservedness*").

68 Floud and Young, *Dangerousness and Criminal Justice*, (1981). See *Floud*, (1982) 22 *British Journal of Criminology*.

69 Von Hirsch, *Deservedness*, p81.

70 *Ashworth, op cit.*

71 *Taking Offenders out of Circulation*, Home Office, (1981).

72 See Floud, *Dangerousness and Criminal Justice* (1982), 22 British Journal of Criminology 216.

73 Radzinowicz and Hood, *op cit*, p722.

74 [1966] IR 501.

75 [1989] IR 399.

judicial support for that view, it cannot be regarded as conclusive. The better view would appear to be that, however frail incapacitation may be, viewed in penological or sociological terms, there is no good reason for treating it as constitutionally suspect.

4.50 In this context, it is essential to bear in mind the distinction between the situations addressed in *O'Callaghan* and *Ryan* and those now under consideration. Where an accused person is refused bail because of the alleged likelihood that he or she will commit offences while at liberty, this can only be on the factual basis that he or she has in the past committed crimes while on bail or because he or she now stands charged with crimes so serious that the risk cannot be taken, in the interests of society, of leaving him or her at large pending trial. The law must assume, however, that he or she has received the appropriate punishment for the crimes he or she has already committed. Thus, the only factual justification for depriving him or her of liberty is the possibility, or even the probability, that he or she will commit crimes in the future. He or she is thus, unarguably, being punished for crimes that he or she has never committed and, *ex hypothesi*, will never commit. There is thus an irreconcilable conflict with the constitutional imperative identified by Walsh J in *O'Callaghan*, i.e. that no person should be punished in respect of any matter upon which he or she has not been convicted.[76]

4.51 In contrast, in the cases now under consideration, the sentence in question is expressly imposed as a punishment for a crime in respect of which the person has been convicted. It is, of course, true that, in such cases, the court in imposing the sentence is expressly taking into account the fact that it will defer the accused's return to a life of crime. It may be that, as we have already observed, the actual incidence of recidivism renders dubious the penological justification for this approach, but that argument goes to the supposed efficacy of the sentence and not its constitutional propriety. It may even be that the form of sentence *is* constitutionally suspect, but, if it is, it must be for reasons different from those which invalidated the deprivation of bail in *Ryan* and *O'Callaghan*, where the imprisonment of the applicants constituted a punishment for offences which they had not committed and could never commit.

4.52 The fallacy underlying the constitutional criticism of incapacitation may be illustrated by an example. Two people are convicted of taking part in an armed robbery. Criminal A with no previous convictions, admits his guilt from the outset, co-operates with the Gardai and impresses the prison authorities during his period on remand with his desire for rehabilitation. Criminal B has a lengthy record of previous convictions, refuses to co-operate in any way and maintains a defiant plea of not guilty, but is none the less convicted. Criminal A is given a six year sentence and criminal B a ten year sentence. In passing sentence on A, the judge says that a lesser sentence is being imposed in the belief that, having regard to his lack of previous convictions and his conduct since

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76 *Op cit*, p516; quoted with approval by Finlay CJ in *Ryan*, [1989] IR 399, 405.

his arrest, there is some prospect that he will abandon the life of crime which he has embarked on when he is released.

4.53 This is an example of the rehabilitative approach which we have already discussed. No one has suggested that it is constitutionally frail. Indeed, it is in total harmony with the views expressed on a number of occasions in the Court of Criminal Appeal as to the objects which should be borne in mind when sentence is being imposed. Yet, by inevitable implication, B, in the example cited, is deprived of four years of liberty, precisely because the trial judge considers that the likelihood in his case is that he will return to his life of crime. If one were to use language in a loose and vague sense, one would then say that B is being punished for a crime he has never committed. But this analysis demonstrates how misleading and imprecise that description is: it would be more accurate to say that B is punished for a crime of which he has unquestionably been convicted, but the court, in imposing sentence, is having regard to the likelihood of his future conduct on release, based on the information available to the court, including his previous convictions.

4.54 The criticism on constitutional grounds of incapacitation also fails to take into account the fact that the sentencing process necessarily excludes the rigid application of certain norms of the criminal law which can be regarded as, in other contexts, essential aspects of the constitutional guarantee of fair procedures. Thus, it is a fundamental maxim of the law that a person may not be convicted twice of the same crime: *nemo debet bis vexari pro eadem causa*. Yet this maxim is in theory violated every time a trial judge imposes a heavier sentence because of the accused's previous criminal record. In many cases, particularly where more than one defendant is before the court, there is no difficulty in identifying the additional period which the court has added to a sentence because of the accused's previous convictions. Yet he or she has already received the appropriate punishment in respect of those convictions so that it is impossible to avoid a conclusion that he or she is being punished again for the same offence. There may indeed be those who would argue that there is a basic injustice in this system and that a person is entitled to be regarded as having "a clean slate" for every purpose, including punishment for a subsequent offence, once he or she has, in the familiar cliche, "paid his debt to society."

4.55 But if that is in truth the position, then it has to be said that an enormous number of sentences which have been imposed by the courts since the foundation of the State were vitiated by a fundamental constitutional frailty. We unhesitatingly prefer the view that, in the matter of sentencing, the maxim *nemo debet bis vexari* must yield to the common good which requires that each individual should be punished according to his or her specific circumstances, including, where relevant, his previous criminal record.

4.56 As we have mentioned, there is one authority which might suggest a

different view, i.e. *The People (DPP) v Carmody*.[77] In that case, the applicants were habitual criminals, the first applicant having convictions beginning in 1968 and the second applicant having convictions dating back to 1961. The convictions were, in the main, for burglary. They had served numerous terms of imprisonment imposed by the District Court, primarily for periods up to 12 months. In the instant case, they were charged with burglary and pleaded guilty to the charges in the Circuit Court. The Circuit Court judge, Judge Murphy, imposed a sentence of six years imprisonment on each applicant, stating that the applicants were not:

> "amenable in any manner to the ordinary constrictions of the society in which they live and ... are preying on innocent people ... my primary duty is to protect those people."[78]

4.57 The Court of Criminal Appeal substituted a sentence of three years imprisonment in each case. For the court, McCarthy J, having cited the remarks of the learned trial judge, went on to quote the passage from the judgment of Walsh J in *O'Callaghan*[79] which we have already discussed. However, the learned judge also referred to the observation of Walsh J. in *The People v O'Driscoll*[80] that the objects of passing sentence are not merely to deter a particular criminal from committing a crime but to induce him or her in so far as possible to turn from a criminal to an honest life. McCarthy J also referred to section 10 of the Prevention of Crime Act providing for the preventative detention of habitual criminals and to the fact that there were no facilities in the State for providing such detention. He then added:

> "The court is satisfied that the only justification for the radical departure from the previous measures of imprisonment, mostly at District court level, was an understandable attempt to procure reform by prevention. *Absent the use of appropriate statutory provisions, however, such is not an acceptable basis for the particular sentence.*"[81]

4.58 It is not clear, accordingly, whether the Court was suggesting that an incapacitative approach was invalid having regard to the provisions of the Constitution, because of the principles laid down in *O'Callaghan*. That would seem to be one reading of the judgment. On the other hand, the reference by McCarthy J to the absence of "appropriate statutory provisions" would suggest, by implication at least, that, were such statutory provisions in place, they would not be constitutionally invalid. The judgment, with respect, does not make it clear why the courts, on whom the exclusive constitutional responsibility of imposing sentence rests, are in some sense precluded from laying down a rule which, it would seem, is within the competence of the Oireachtas to lay down. Apart altogether from that consideration, it is our view that the authority of the

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77 [1988] ILRM 370.
78 *Ibid*, p371.
79 See para 4.50, *supra*.
80 1 *Frewen* 351, p359.
81 *Ibid*, p371. (emphasis added).

judgment is weakened by the fact that it does not address the arguable distinction that exists between the withholding of bail from an innocent person and the imposition of sentence on a guilty person and which, as we have already suggested, is a crucial distinction between the *Ryan* situation and the *Carmody* situation.

4.59 As we have pointed out, a number of criminologists have concluded that incapacitative sentencing is normally unacceptable in principle and incapable of just administration in practice. We would reiterate our view, however, that, if the burden of criminological opinion was to contrary effect, there would be no constitutional objection to the courts adopting an incapacitative approach where that was appropriate.

4.60 Another disturbing feature of incapacitative ideology is the fact that theories of selective incapacitation for serious offenders accept the notion of there being a certain class of offenders meriting different treatment to other offenders.[82] It is unjust, if not unconstitutional to put someone in jail on the basis of a judgment about a class, however accurate, because that denies his or her claim to equal respect as an individual.[83] It is even more heinous if the judgment is based (as it was proposed in some American schemes) not on the criminality of the offender at all, but on factors such as employment history or drug addiction.[84] This notion can be strongly argued to be repugnant to our Constitution which places primary emphasis on the rights of the individual.[85]

(v) Compensation

4.61 The object of compensating the victim requires the offender to make reparation or to pay compensation for injury caused to his or her victim in circumstances where the conduct of the offender is criminal.[86] It seems that the payment of compensation by the offender to the victim or the victim's kin formed the basis of the early criminal law. Payments were scaled in accordance with the seriousness of the injury and the social standing of the parties involved.[87] As State involvement in the criminal law grew, so too did the notion that crime was an injury against the State rather than against the individual victim. So the State began to claim an increasing proportion of the compensation.[88] Gradually, two distinct and separate types of proceedings arose out of criminal conduct; *criminal* proceedings, by the State for infraction of a public duty, and *civil* proceedings by the victim for infringement of a private right. Compensation of the victim became the principal remedy of the law of torts, which aims to achieve *restitutio*

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82 O'Malley, *Bail and Predictions of Dangerousness*, (1989) ILT 41.

83 Dworkin, *Taking Rights Seriously*, (1978), p13.

84 Von Hirsch, *Deservedness*, p80. Greenwood's seven predictive factors are: (1) Prior convictions of instant offence type; (2) Incarceration for more than half the preceding two years; (3) Conviction before the age of 16; (4) Time served in a juvenile facility; (5) Drug use during the preceding two years; (6) Drug use as a juvenile; (7) Employment for less than half of the preceding two years.

85 O'Malley, *op cit*, p44.

86 See the Report of the Victorian Sentencing Committee, p108.

87 Pollock and Maitland, *History of English Law*, p451; see Wasik, *The Place of Compensation in the Penal System* [1978] Crim LR 599.

88 *Ibid.*

in integrum, while the criminal law concerned itself with more penal considerations.

4.62 In recent times it has been thought to be absurd that the State should undertake to protect the public from crime and then, when crime occurs, take the entire payment but offer no effective[89] remedy to the victim.[90] Consequently, some statutory provisions were enacted to enable sentencers to order the offender to pay compensation to the victim.[91] These, however, have been piecemeal and of little practical value to victims.[92] In practice the courts have introduced the idea of compensation into the terms and conditions of other orders, such as postponed sentences, even though this practice has no statutory basis.[93]

4.63 Compensation seeks to justify sentencing on the basis that it addresses the primary concerns of the victim of crime. These are thought to be:[94]

(a) gaining recognition for the fact that the victim has suffered harm to life, liberty or property in consequence of the offence; and

(b) having the harm redressed.

The theory is, thus, both punitive and utilitarian; it seeks to punish the offender[95] and to provide some benefits to the victim.

4.64 The theory is, however, beset by a number of practical difficulties which call the efficacy of compensation theories into question. To begin with, compensation depends on the economic means of the offender.[96] The danger, thus, is that the offender will not have the means to compensate the victim. Secondly, not all crimes are against readily identifiable victims, e.g. traffic

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89 Civil remedies against offenders are generally felt to be ineffective means of achieving compensation. The principal defects of the civil remedies are that the offender might never be apprehended, or may be impecunious, or the victim may lack the determination or ability to enforce his means of redress for the infringement of the private right; see the Council of Europe, *Compensation for the Victims of Crime*, (1975) p3 *et seq*.

90 See Schafer, *Victimology: The Victim and his Criminal*, (1977), p20; Wasik, *op cit.*

91 See para 1.118, *supra*. (Compensation).

92 Outside the sentencing courts, however, compensation *schemes* have been set up by the State in response to the argument that the State owes *some* duty (whether legal or moral) to the victims of crime to ensure that they are adequately compensated. The State, rather than the offender, pays the compensation. Originally these schemes gave the victims statutory rights to compensation - see e.g. the *Malicious Injuries Act, 1861* - but nowadays the giving of legal rights to compensation is avoided. The Criminal Injuries Compensation Tribunal, established in 1974, operates on such a non-legal basis.

93 See para 1.118, *supra*. (Compensation).

94 See the Australian Law Reform Commission's Discussion Paper *Sentencing: Procedure* (ALRC DP 29), p18.

95 That requiring the offender to compensate the victim can punish the offender was recognised by Bentham:

> 'Exacted at the expense of the evil doer, compensation necessitates suffering: exacted in consideration of, and in proportion to, the evil done by him, that suffering, by the whole amount of it, operates as punishment.'

Collected Works, Book 1, Ch IV, p23.

96 We shall not deal here with the compensation of victims from the confiscated proceeds of crime. This has been dealt with elsewhere; see this Commission's *Report on the Confiscation of the Proceeds of Crime*, (LRC 35-1991); see also para 1.122 *et seq*, *supra* (Confiscation and para 1.117 *et seq*, *supra* (Compensation).

offences. In many cases, therefore, it is difficult to determine *who* should be compensated. Thirdly, compensation theory fails to take into account the fact that the criminal law has other concerns such as ensuring that the law is observed.

4.65 Since compensation depends on the economic means of the offender, principles of sentencing which have compensation of the victim as their basis carry the danger of discriminating between wealthy and less wealthy offenders - wealthy offenders being in a better position to escape punishment because of their economic status.[97] The end result of this is disparity in the way in which offenders are treated. Another problem is the fact that under a compensation approach a detailed examination of the extent of the loss or injury suffered by the victim has to be conducted. This can lead to significant delays in the criminal justice process, requiring the criminal justice system to enforce what are essentially civil proceedings. Some jurisdictions have confined the use of compensation orders to situations in which no civil proceedings against the offender are contemplated by the victim.[98]

4.66 Sentencing, as a means of providng compensation, has a number of drawbacks. It is doubtful if sentencing can adequately achieve this objective in the great majority of cases. Sentencing is a haphazard means of securing compensation because the offender may, after all, be impecunious. It is, nonetheless, an undeniable fact that compensation of the victim is desirable where it may be achieved[99] and we are at one with the Whitaker Committee on this. On the whole, however, there is only limited scope for this, and there is still the danger that wealthy or well heeled offenders may be able to buy their way out of justice.

Summary

4.67 Our examination of the way in which the traditional objects of sentencing answer the question "*why* does the criminal justice system sentence offenders?" leads us to a number of conclusions. The capacity of the utilitarian concepts of *rehabilitation, deterrence, incapacitation,* and, *compensation* (in so far as it is utilitarian) to achieve their objectives has been thrown into doubt by the results of research. On the other hand, retributive justifications for the imposition of criminal sanctions do not rest on a secure foundation. What we are left with are doubts about the traditional, utilitarian justifications for sentencing, one weak moral justification the success of which cannot be appraised and a general feeling, which cannot be substantiated, that the imposition of criminal sanctions may have some effect on crime prevention and crime control because of

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97 See the Report of the Victorian Sentencing Committee, p109. A similar argument can be made against the use of fines.

98 *Ibid.* For these reasons the English *Advisory Council on the Penal System* recommended that compensation should *not* be ordered:

(i) where enforcement appears impracticable because of the offender's lack of means; or
(ii) where there is a need to resolve difficult issues of liability or quantum.

99 See the Report of the Whitaker *Committee of Enquiry into the Penal System*, p48.

deterrent or incapacitative effects. We know a lot about what punishment cannot achieve, but we know a lot less about what it can achieve. There is no simple answer to the question "why does the criminal justice system sentence offenders?". It is in this context that decisions about the distribution of sentence will have to take place.

4.68 These conclusions suggest restraint in the distribution of sentence. Since criminal sanctions involve pain and deprivation, they should be used all the more sparingly if we are uncertain of their benefits either to society or to its individual members.[100]

4.69 It should also be remembered that the capacity of sentencing to achieve its objectives will be conditioned by other elements within the overall criminal justice system. Sentencing is only one stage in a number of stages concerned with the enforcement of the criminal law, each of which has its own decision making processes and its own personnel to make those decisions. Sentencers have little control over what happens to offenders in the pre-sentencing and post-sentencing stages of the criminal justice system, such as deciding when to initiate prosecution, or deciding when a prisoner should be released from prison. This places dramatic limits on what sentencing may achieve: for example, if a sentencer imposes a severe sentence in order to deter the offender, the sentence might later be deprived of deterrent effect by an executive decision to grant a full temporary release in order to rehabilitate (or, perhaps, simply to abate prison overcrowding).[101]

4.70 Another limit on the capacity of sentencing is the low percentage of offenders it actually deals with. To begin with, it is not known what percentage of the offences which actually occur are reported to the prosecuting authorities, although it is not unreasonable to assume that a sizeable proportion of offences against the person go unreported - with the exception of high visibility, serious crimes such as murder.[102]

4.71 Nor will every offender who is detected come before the courts at the sentencing stage. The prosecutorial agencies may decide not to prosecute the matter, and even if they do, there may not be a conviction.

4.72 The fact that the application of the sentencing process is limited to a very small proportion of actual offenders casts further doubt on the idea that sentencing functions to protect the public and to prevent crime.[103] The goal

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100 See the Canadian Sentencing Commission, *op cit*, p145.

101 See Ch 15, *Infra*. (Penal Policy).

102 Manning found from a study of police work in the United States and England that the amount of unreported crime was between four and nine times higher than the official rates, depending on the nature of the offence; Manning, *Police Work*, (1977). The Canadian Sentencing Commission report the results of a Canadian Urban Victimisation Survey in 1982 which found that only one-third of assaults, sexual assaults, thefts, and vandalism were reported to the police; See *Sentencing Reform: A Canadian Approach*, note 16, p124.

103 The Canadian Sentencing Commission concluded that the percentage of offenders actually dealt with by the sentencing process could be as low as 3%, taking unreported crime into account: see p119 of that Commission's Report.

of protecting the public from offenders and preventing crime is better viewed as the preserve of the entire criminal justice system, achieved through the work of the investigatory and policing agencies such as the Garda Síochána and the various Governmental agencies concerned with the control and regulation of agriculture, fisheries and health etc. rather than as the primary responsibility of the courts.

Principles of Distribution

(i) **"Just Deserts"**

4.73 The principle of desert as a means of restricting the distribution of sentence in accordance with principles of fundamental justice and parsimony has proved attractive in jurisdictions in which reform of the sentencing process has taken place. This principle has become known as "just deserts". Interest in the "just deserts" theory as a fundamental basis for sentencing reform has increased since the 1970s with the publication of several works on deservedness,[104] and it has become influential in sentencing reform in the United States,[105] Canada,[106] Australian Federal Jurisdiction[107] and Victoria,[108] Sweden,[109] Finland,[110] and, lately, Britain.[111] Such reform has begun with the recognition of "just-deserts" as an integral part of criminal sanction, regardless of its ultimate purpose, and has followed the "just deserts" premise that punishment should be imposed only in a just and fair manner. The main advantages of "just deserts" centre around the concept of *justice* (which, admittedly, can be somewhat nebulous in character). The following principal characteristics of the "just deserts" principle are generally accepted as promoting the aim of justice:[112]

(i) legal order;

(ii) equal protection of individuals;

(iii) fairness;

(iv) satisfaction to victims of offences and to others;

(v) culpability determined by the exercise of free choice.

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104 Notably Andrew von Hirsch's *Doing Justice* (1976) and *Past or Future Crimes?* (1986).

105 See para 7.82 *et seq*, *infra*. (The Federal System of the USA).

106 See Sentencing Reform: A Canadian Approach, Canadian Sentencing Commission, (1987).

107 See ALRC No. 44 (1988) *Sentencing*, p14.

108 See Victorian Sentencing Committee, *Sentencing*, (1983).

109 See Fängelsestraffkomittén, *Påföld för Brott*, (1986).

110 See Penal Code of Finland, Chapter 6, revised in 1976.

111 White Paper Crime, Justice and Protecting the Public, 1990, cm 965, p5: "The Government's aim is to ensure that convicted criminals in England and Wales are punished justly and suitably according to the seriousness of their offences; in other words that they get their just desserts (*sic*)."

112 Hondreich, *Punishment: The Supposed Justifications*, (1984), pp35-37; see also the report of the Victorian Sentencing Committee, p92 and ALRC DP 29, p19.

4.74 In a recent English survey, *Walker* and *Hough* found that the most popular type of sentencing system was one which "gives the offender what he deserves."[113] Thus it is argued that a sentencing system based on "just deserts" is likely to improve public support for and confidence in sentencing and the criminal justice system.[114]

4.75 The "just deserts" principle of distribution requires the severity of the sentence to be in proportion to the *seriousness* of the offending behaviour. "Just deserts" has sometimes been suspected of simply being retribution revamped. But *Andrew von Hirsch*, the leading exponent of the philosophy, explains the difference thus:

> "The principle of commensurate-deserts addresses the question of *allocation* of punishments - that is, how much to punish convicted offenders. This allocation question is distinct from the issue of the *general justification* of punishment - namely, why the institution of punishment should exist at all."[115]

4.76 Seriousness, under the "just deserts" theory, is gauged by reference to two factors:[116]

(a) the *harm* caused or risked by the offending conduct, and

(b) the *culpability* of the offender in committing the crime.

"Just Deserts" - Harm, Culpability

4.77 The role of *harm* in gauging the seriousness of the offending conduct is nothing new: for example, the maximum penalty for murder has always been set at a higher level than that for assault because of the greater harm which results from the former. By focussing on the degree of harm, the "just deserts" theory directs sentencers to give more consideration to the harmfulness of the offending conduct within the scale of maximum or minimum penalties. This in turn should stimulate the development of more sophisticated doctrines on how to assess harm. In some jurisdictions, reforms have gone so far as to pre-determine these

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113 Public Attitudes to Sentencing (1988), cited by Ashworth in *Criminal Justice and Deserved Sentences*, p251. 44% of respondents favoured a desert based sentencing system.

114 Ashworth, *op cit*. See also ALRC 44 *op cit*, p14; Canadian Sentencing Commission's report *op cit*. Chs 3 and 4; and Victorian Sentencing Committee's report *op cit*, p15.

115 *Neoclassicism, Proportionality, and the Rationale for Punishment: Thoughts on the Scandinavian Debate*, 29 Crime and Delinquency 211. Emphasis added.

116 See e.g. von Hirsch, *Past or Future Crimes*, Ch 6; The *US Committee for the Study of Incarceration* said of "just deserts" that:

> "The principle looks retrospectively to the seriousness of the offender's past crime or crimes. Seriousness depends both on the harm done (or risked) by the act and on the degree of the actor's culpability. (When we speak of seriousness of "the crime", we wish to stress that we are *not* looking exclusively to the act, but also to how much the actor can be held to blame for the act and its consequences.)"

Op cit; see also Ch 5, *Infra*. (Aggravating and Mitigating Factors).

relationships for the sentencing judges by getting sentencing commissions to produce elaborate grids or tables of appropriate sentences for given offences. Some research has already shown that the degree of harm caused or risked can be gauged by reference to the public perception of the seriousness of such conduct.[117] Others have countered that the harmfulness of criminal conduct should not be measured by what people *think* it is, but by what it really is.[118] A simple criterion might be the amount of violence involved - but one can see the limitations of this when economic crimes (which do not, normally, involve violence) are considered.

4.78 *Von Hirsch* suggests a broader criterion well suited to both the judicial assessment of harm and the assessment of harm by a sentencing commission: harms may be graded according to the degree to which they restrict peoples' ability to direct the course of their own lives.[119] Thus, for example, murder is the gravest harm, since it deprives the victim completely of his or her choices; and economic crimes are also accounted for, because they threaten peoples' choice of livelihood.[120] Of course, this test needs to be developed to deal with crimes such as tax evasion which injure collective interests - but it is doubtless a start.

4.79 Culpability is already a factor of some importance in the criminal law. Culpability refers to the factors of intent, motive and circumstance that determine how much the offender should be held responsible for his or her actions, and, as such, affects the assessment of harm: "The consequences that should be considered in gauging the harmfullness of an act should be those that can fairly be attributed to the actor's choice."[121] The substantive criminal law already provides some principles for the assessment of punishment on the basis of culpability - duress, provocation, and ignorance of the law are not normally defences to liability for the crime itself, but are frequently availed of as *excuses* in mitigation of the severity of sentence.[122] By explicitly emphasising culpability, the "just deserts" theory calls upon the sentencing courts (or sentencing commissions in jurisdictions where such bodies have been set up to establish sentencing guidelines) to calibrate the individual sentence more carefully according to the degree of harmfulness which may fairly be attributed to the offender's choice.[123]

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117 E.g: Sparks, Genn & Dodd, *Surveying Victims: A Study of the Measurement of Criminal Victimisation*, (1977), Ch 7.

118 Von Hirsch, *supra*, p45; Sparks, Genn & Dodd lamented tha fact that although their survey of some 500 Londoners showed that public opinion was "agreeably rational" and illustrated a broad consensus, the example they gave of the sale of marijuana to a 15-year-old received a higher harm score, on average, than rape. This, they suggested, "resulted from a general ignorance among our sample as to the nature of marijuana". Ashworth, *Sentencing and Penal Policy*, comments: "This directly raises the issue of the assumptions upon which the answers were founded".

119 Von Hirsch, *op cit*; also Feinberg, *Harm to Others*, (1984).

120 See von Hirsch, *Principles for Choosing Sanctions: Sweden's Proposed Sentencing Statute*, (1987) 13 New England Journal on Civil and Criminal Confinement 171.

121 Von Hirsch, *Past or Future Crimes*, p65.

122 See Wasik, *Excuses at the Sentencing Stage* [1983] Crim LR 450.

123 In many jurisdictions the courts have been given extra assistance in the form of statutory lists of aggravating or mitigating factors which specifically address the mental state of the actor and the assessment of culpability. See Ch 7, *infra*. (Some Comparative Aspects of Sentencing Policy).

4.80 An important characteristic of the "just deserts" theory is the assertion that the principle of *proportionality* must be given priority in deciding the level of sentence. Two forms of proportionality are involved in "just deserts".

4.81 The first, *cardinal proportionality*, is concerned that the absolute level of the penalty scale should not be disproportionate to the magnitude of the offending behaviour. The US Committee for the Study of Incarceration observed that:

> "The principle of commensurate deserts imposes, in the first place, an ordering of penalties. Punishments are to be arranged so that their relative painfulness corresponds with the comparative seriousness of offences."[124]

4.82 The Australian Law Reform Commission added that:

> "A criminal justice system which delivered punishments that were excessively harsh would be as ineffective and unjust as one which delivered punishments that were too lenient. In the latter case, the law is likely to be simply disregarded. In the former, informal means may well be taken to avoid subjecting offenders to the excessively harsh punishments. The level of severity of punishment must strike a balance between these two extremes .... Striking that balance necessarily involves selecting a punishment that conforms to the so-called 'principle of parsimony' or 'economy' - the punishment chosen should not exceed that which is necessary in the circumstances."[125]

4.83 The second limb of the proportionality requirement, *ordinal proportionality*, requires that a sentence should be determined by comparison with similar criminal acts and compared to crimes of a more or a less serious nature. The sentence "ought to reflect the relative reprehensibleness of those acts .... [O]rdinal proportionality is concerned with preserving a correspondence between relative seriousness of behaviour and relative severity of sentence ...."[126] The Committee for the Study of Incarceration observed that:

> "Spacing is likewise important: penalties ought not, for example, to be crowded together so closely as to obscure distinctions in seriousness among offences. The principle also requires that infractions of equal seriousness be punished with equal severity. For a given category of offence, therefore, a specific penalty level should be set that is applicable to all instances, except when special aggravating or mitigating circumstances can be shown to have existed.... Commensurate deserts restricts severe punishments to serious crimes. The penalty scale ought not be inflated so much that non-serious crimes also receive severe

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124 Victorian Sentencing Committee, p91.
125 ALRC No. 44, *op cit*, pp14, 15.
126 Ashworth, *op cit*, p344.

> penalties (severe, that is, ... in [a] sense of being very unpleasant, given the prevailing tolerances for suffering). Severe punishments for non-serious offences overstate blame: the offender is being treated as more reprehensible than the harmfulness of his acts (and the extent of his culpability) justify. This objection holds even if the whole scale has been elevated so much that the penalty ranks low in comparative harshness alongside other penalties. Irrespective of other penalties, when an offender has been visited with much suffering the implicit condemnation is great ...."[127]

4.84 It is the requirement of ordinal proportionality which elevates the "just deserts" principle from the status of a mere *limiting* principle to that of a *determining* principle.[128] A limiting principle sets the upper limit of the penalty which may be imposed, but does not define its extent below that. For example, the pure retributive principle of *desert* is a limiting principle. It requires that punishment should not exceed the seriousness of the crime - but it does not prevent punishment from being less severe than that merited by the crime. "Just deserts", on the other hand, is a determining principle, because it actually *defines* the magnitude of the penalty; i.e. it must not be less severe than other penalties for less serious crimes. The US Committee for the Study of Incarceration commented:

> "Imposing only a slight penalty for a serious offence treats the offender as less blameworthy than he deserves. Understating the blame depreciates the values that are involved: disproportionately lenient punishment for murder implies that human life - the victim's life - is not worthy of much concern; excessively mild penalties for official corruption denigrate the importance of an equitable political process. The commensurateness principle, in our view, bars excessive leniency as well as disproportionate severity."[129]

Implementing a "Just Deserts" System

(a) Fixing the Levels

4.85 First, there is the task of fixing the levels of proportionality which are required by the theory. There are three means by which these levels can be determined:

(a) *prescriptive*, i.e. decided anew without reference to what is current in sentencing theory; or

(b) *descriptive*, i.e. decided by reference to what is current in judicial sentencing practice; or

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127 Victorian Sentencing Committee, p91.
128 See von Hirsch, *Past or Future Crimes*, *op cit*, Chapter 4.
129 See von Hirsch, *Doing Justice*, (1976), p73.

(c) a *combination* of both.

4.86 Since there is no fixed notion of how to fix the overall level of penalties so as to achieve cardinal proportionality, then, in order to fix a "starting point", difficult decisions have to be made. The "just deserts" principle proceeds on the assumption that one can arrive at a degree of consensus concerning these issues.[130] Some have argued strongly in favour of a reduction in the severity of the penal sanctions as part of their "just deserts" approach, whilst others have employed a greater use of custodial sentences as part of theirs.[131] In the USA deterrence has been relevant in determining the appropriate scale.[132] Commonly, confusion has arisen between the "just deserts" philosophy and the underlying justifying aims which some jurisdictions have continued to employ. Some jurisdictions have, pragmatically, adopted a descriptive system.

4.87 Next is the matter of ordinal proportionality. Since the "just deserts" theory requires that a serious offence not be punished more leniently than a less serious one, (i) a *hierarchy of crimes* has to be constructed i.e. crimes will have to be ranked in order of seriousness, and (ii) a *hierarchy of penalties*, i.e. all sanctions should be ranked in order of severity. Such hierarchies can be constructed either before a "just deserts" sentencing regime is effected, or they can be developed by the courts once such a system is put into operation.

4.88 Independently developing a hierarchy of penalties is not, as it may seem to be, such a difficult task; it could, theoretically, be measured by reference to public opinion.[133] The approach of jurisdictions such as Michigan[134] has been to use a "descriptive" rather than a "prescriptive" system of measurement to arrange a hierarchical ordering. This approach plainly necessitates the rigorous examination of current practice and the compilation of statistics - but the task is by no means impossible.

4.89 In a hierarchy of penalties, *all* the sentencing options would have to be viewed in terms of the degree to which they deprive the offender of his rights. Imprisonment, naturally enough, would be the most serious penalty. The fine, would be well suited for offences in the middle of the range of seriousness where imprisonment is considered to be too severe.[135] Similarly, community service may be viewed as a lesser sanction in that it deprives the offender of leisure and

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130 There is no doubt even from public surveys which have been done that a high degree of consensus can be achieved, but it has been by no means uniform.

131 Tonry, *Sentencing Reform Impacts*, (1987) p4.

132 Von Hirsch, *Doing Justice*, p94.

133 This Commission has already referred (in its report, *The Indexation of Fines* (LRC 37-1991) to a number of surveys indicating that the public perception of the severity of sanctions is relatively consistent. However the practicalities of determining public opinion put great constraints on such a system. See the experimental studies of Kapardis and Tarrington, *An Experimental Study of Sentencing by Magistrates* 1981 Law and Human Behaviour 107, and Sebba and Nathan, *Further Exploration in the Scaling of Penalties* (1984) 24 BJ Crim 221, referred to in *Indexation of Fines* p17, note 12.

134 See McComb, *An Overview of the Second Edition of the Michigan Sentencing Guidelines*, Michigan Bar Journal, September 1988, p863, and para 9.43 *et seq*, *infra*. (Michigan).

135 Wasik and von Hirsch, *Non-Custodial Penalties and the Principles of Desert*, [1988] Crim LR 555.

exacts unpaid labour.[136] Discharges would then suit the least serious offences. As for probation, the punitive element can be found in the conditions which are imposed. However, it would not be easy to accommodate the suspended prison sentence, since, in terms of discomfort to the offender, it has most in common with the conditional discharge; yet it involves a giant step in severity for the act of default. Clearly a sentencing framework based on deserts can incorporate extensive use of non-custodial sentences. "They would no longer be associated primarily with rehabilitative aims nor be regarded merely as substitutes for incarceration.[137] They would instead be seen as penalties in their own right, ranged on a scale below immediate custody, and involving varying degrees of punitiveness."[138] The Whitaker Report shows much in favour of such a principle. It says of probation orders:

> "since they restrict the offender's freedom of choice and have specific guarantees of compliance they must be regarded as a form of punishment ...."[139]

4.90 The task of constructing a hierarchy of crimes is complicated by the large range of crimes. Nonetheless, in the United States, sentencing commissions which have been given this task have been able to formulate rankings of seriousness for their guidelines without generating controversy, which may indicate that the task is a manageable one if approached rationally.[140] A feature of the US rankings has been the construction of a sentencing "grid" or table.[141] A disadvantage of these grids is their inflexibility, and their occasional failure to take important circumstances into account when addressing the seriousness of offending behaviour. The Australian Law Reform Commission was, thus, less than enthusiastic about such ranking of offences according to seriousness:

> "In the Commission's view, it is not possible to impose a rigid structure for this purpose. Individual variations, especially of the circumstances and characteristics of offenders, cannot be exhaustively listed. For this reason, the Commission accepts that the present role of the courts in exercising the sentencing discretion should remain."[142]

4.91 This is also the procedure envisaged by the British Government in its recent sentencing reform.[143]

4.92 However, in order to give the courts a starting point from which to

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136 It appears that the "most sophisticated community service programme, operated by the Vera Institute of Justice in New York, treats the sanction in this fashion - as a sanction that is punitive but less severe than imprisonment"; *ibid*, p567.

137 Argued strongly by the Canadian Sentencing Commission, Sentencing Reform, 1987, Ch 12.

138 Wasik and von Hirsch, *op cit*, p572.

139 *Op cit*, p32.

140 See Ch 9, *infra*. (Implementing Sentencing Policy: Presumptive Guidelines, Stating Points and Judicial Guidance).

141 *Ibid*.

142 ALRC, 44, Sentencing, p17.

143 See *Criminal Justice Bill, 1990*, and White Paper.

develop a structure for determining the seriousness of a given offence, many jurisdictions have reviewed their set of maximum penalties so as to produce a working hierarchy of maxima. This hierarchy gives sentencers some idea of the seriousness of an offence compared to other offences, and assists them in choosing the level of severity of sentence by giving them an example of the sentence suitable for the worst example of that offence.[144]

4.93 The Canadian Sentencing Commission undertook the ranking in order of seriousness of the over 300 offences in their *Criminal Code, Narcotic Control Act*, and *Food and Drugs Act*. The Commission said:

> "Ranking all the criminal offences under consideration by this Commission was a complex and time-consuming exercise. As in determining the scale of maximum penalties, reference had to be made to policy, theory and data on sentencing practice.
>
> The ranking also drew upon the diverse experiences of the Commissioners, the findings of public opinion research, similar exercises by sentencing commissions in other jurisdictions, and research on the penalty structures in other countries. Thus it was a multi-stage process in which the subsequent ranking was refined to reflect these diverse sources of information. The final step involved a comparison between the ultimate ranking by the Commissioners and rankings derived from members of the public. This revealed a high degree of consistency between the two populations. Hence, although one can never say with empirical certainty that a certain crime is worse than another in all circumstances, some consensus exists on the perceived seriousness of different offences."[145]

4.94 In its Discussion Paper, *Sentencing: Penalties*, the Australian Law Reform Commission agreed with the hierarchical ranking of maximum penalties in terms of offence seriousness:

> "Offences should be divided into specified categories according to seriousness. This ranking should take into account both public perception and sentencing practice. It is tentatively proposed that there be eight categories of offences. The proposed hierarchy is not comprehensive."[146]

4.95 In its final report, the Commission upheld this view, adding that:

> "In the long run, a review of this kind would make a significant contribution to the development of coherent and consistent sentencing

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144 See para 10.12, *et seq*, *Infra*. (Review of Maxima in Other Jurisdictions).
145 Canadian Sentencing Commission, *op cit*, p205.
146 ALRC, DP 30, 1987 para 122-130.

policy and practice."[147]

(b) Prior criminal record

4.96 Another issue which has to be addressed in developing a "just deserts" approach is whether or not a prior criminal record is to be considered a relevant factor in determining the deservedness of a particular sanction by a particular offender. Most penal systems impose less punishment on first offenders than on those who have previous convictions. Yet desert theorists have argued that considering the prior offence record is not germane to an offenders deserts - the person has been punished already for his earlier convictions; therefore the existence of prior record is irrelevant.[148]

4.97 The issue of prior record show up the tension between the philosophies of due process (in the form of "just deserts") and crime control. A crime control approach might approve of incapacitating recidivists by imposing longer custodial sentences on them, but departures of this kind challenge the philosophical underpinnings of "just deserts".[149] Nonetheless, within certain limitations, prior record may be relevant to the culpability of the offender for the offending behaviour, particularly if the prior offence is sufficiently close in nature, seriousness and time to the the offence for which the offender is being sentenced. Many desert theorists, thus, continue to concede a limited role to prior criminal record.[150] This issue will be examined in detail in Chapter 6.

(c) Mitigation

4.98 Since the "just deserts" theory relies only on the seriousness of the offending behaviour to determine the extent or severity of sentence, the only factors which will be relevant in mitigation will be those which reduce the seriousness of the offending behaviour. Thus, if "just deserts" were to be adopted as the sole or dominant principle by which sentence could be determined, many of the traditional grounds of mitigation of *sentence*[151] would be lost; e.g. the impact the sentence may have on third parties dependent on the offender. This may pose a problem if the traditional factors which mitigate sentence are still thought to be important in their own right.

4.99 The solution to this problem in most jurisdictions which have adopted a "just deserts" approach has been to give sentencers a list of exceptional factors which may be considered in mitigating the sentence of the offender.[152] The task of compiling such a list is not a difficult one, but it does require some

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147 ALRC 44, Sentencing, (1988) p33. See further para 10.12, *et seq*, *infra*. (Review of Maxima in Other Jurisdictions).

148 Fletcher, *Rethinking Criminal Law* (1978), pp460 *et seq*; Singer, *Just Deserts: Sentencing Based on Equality*, (1979), ch 5.

149 Ashworth, *op cit*, p347.

150 See the discussion on prior criminal record in Ch 6, *infra*. (Prior Criminal Record).

151 On the distinction between factors which mitigate seriousness and factors which mitigate sentence see para 1.71 *et seq*, *supra* (The Mitigation Decision).

152 See Chap 5, *infra* (Aggravating and Mitigating Factors).

careful thought, particularly in this jurisdiction where there is not available a ready consensus or set of precedents which set out the factors commonly taken into account by our sentencers.[153] These issues are dealt with in detail in the next chapter.

(d) Promoting the justifying aims

4.100 Finally, there lies the deepest criticism of the "just deserts" theory, i.e. that it is an uncaring means of dealing with offenders, because it ignores the causes of crime and shows little interest in constructive ways of tackling crime.[154] This is an echo of the traditional criticism of retribution, made, usually, by those who confuse "just deserts" with retributivism. However, it is true that "just deserts" provides no justification for the imposition of sentence, and its principles give little recognition to policies of crime prevention and control. For this reason "just deserts" should be seen only as a foundation for distribution of sentences, and not a rationale for the criminal justice system as a whole. For example, correctional institutions may continue to maintain rehabilitative programmes in their treatment of offenders (provided there are sufficient arguments in their favour) within the "just deserts" sentencing framework.[155] Other objects may also be pursued.

4.101 As we have already stated, the "just deserts" theory does not exclude consideration of the traditional objects, which may be considered so long as they do not violate the requirements of cardinal and ordinal proportionality. Certain hybrid schemes have been developed with the purpose of linking the "just deserts" approach with traditional justification for punishment.

(ii) Hybrid Principles

4.102 Hybrid principles involve the consideration of more than one principle of distribution. To be coherent, however, they require a structure or a system of priorities which resolves conflicts which may arise between conflicting principles. *Jareborg* describes two means by which this can be achieved:[156] (i) giving different principles priority in different areas of application, say for different types of crime, or for different types of penalty; or (ii) ranking different principles in order of priority.

4.103 Recent years have seen a growing interest in the construction of hybrid models for the distribution of sentence, although as yet these experiments have for the most part,[157] not influenced sentencing reform. Foremost amongst these theories are those of *Professor Paul Robinson*, former commissioner with

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153 See para 5.51 *et seq*, *infra* (Factors which Mitigate Offence Seriousness).

154 Ashworth, *op cit*, p348.

155 See para 4.102 *et seq*, *infra* (Hybrid Principles).

156 *Op cit*, p12; see para 2.41 *et seq*, *supra* (Coherent Policy).

157 The "Choice of Method" hybrid, discussed below, has, however, found some application in jurisdictions where sentencing reform has taken place; see Ch 5, *infra* (Aggravating and Mitigating Factors).

the US Sentencing Commission.[158]

4.104 This scheme recognises the dominance of the "just deserts" theory as the most suitable single principle for distribution, but he observes that pure "just deserts" principles may impose sanctions which occasionally *cost* more than the crime they prevent, and fail to impose sanctions where opportunities for efficient crime prevention are great. His hybrid scheme identifies the "alignments of conflict" which may arise in sentencing as (a) "just deserts" *vs* deterrence and incapacitation; (b) deterrence vs "just deserts" and incapacitation; and (c) incapacitation *vs* "just deserts" and deterrence.[159] Robinson then puts forward a number of mechanisms that may be adopted to define which purpose should be followed when a conflict of purposes arises in any given situation.[160]

4.105 Perhaps the most appealing of Robinson's mechanisms is the "method of sanction",[161] under which, so long as just deserts is followed to decide the extent of sentence (i.e. severity), other objects may be considered to decide the *nature of punishment* (i.e. the method by which punishment is carried out). If, for example, a brief period of imprisonment is about as severe as a stiff noncustodial sentence, the choice between these penalties might be made on the grounds of incapacitation.

> "If one month in the state prison is the punitive equivalent to five months of weekends in the local jail, then desert is satisfied even if the more blameworthy offender gets probation, with a condition of seven months of weekends in jail, while the less blameworthy offender goes to prison for one month."[162]

4.106 One vital requirement is noted:

> "It is critical, of course, that the sanction equivalencies be properly set.

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158 See *Hybrid Principles for the Distribution of Criminal Sanction* (1988) 82 Northwestern LR 19, with commentaries by Blumstein, Stein, von Hirsch and Zimring.

159 *Ibid*, p26. Rehabilitation is left out for the sake of simplicity, because of doubts about its efficacy, but can be re-introduced into the theory without difficulty if needs be.

160 One mechanism involves establishing priorities. Under a 'simple priority' approach different types of principle are ranked, and the primary principle controls whenever a conflict arises. The obvious problem with this method is that there is great doubt about the success of achieving some of the underlying goals such as incapacitation or deterrence.

Another approach, the 'contingent priority' mechanism, tries to counter some of the arguments against the efficacy of utilitarian principles by giving a given principle priority in certain situations only when a defined level of efficacy or reliability is guaranteed; e.g. deterrence might only be given priority if the situation is one in which empirical evidence supports a minimum rate of effectiveness of deterrence. But it must be remembered that giving priority to crime control strategies that call for the imposition of unequal punishment on those convicted of equally serious conduct - e.g. selective incapacitation or *in terrorem* punishment - violates the 'just deserts' principle of ordinal proportionality.

A third mechanism relies on the distinction between determining and limiting principles of distribution. Robinson explains: 'One might, for example, treat one of the utilitarian purposes, such as deterrence, as a limiting purpose and thus use it not to formulate doctrines of distribution, but to exclude certain formulations generated by a desert pricple - such as those that exceed a net social cost.' Again, however, there are difficulties in measuring the efficacy of the utilitarian principles in finding sentences which do not exceed 'net social cost'.

161 Robinson, *op cit*, pp34-36.

162 *Ibid*, p35.

Some empirical research has been done on perceptions of relative seriousness of sanctions[163] but the work is still in its infancy."

4.107 In some situations, however, it may be unnecessary to establish sanction equivalencies. For example a very lengthy or life sentence can clearly satisfy the goals of retribution or incapacitation, but there is simply no rehabilitative alternative.[164] What are we to do, for example, with a murderer desperately in need of rehabilitation?[165] The limitations of the choice of method hybrid should, thus, be noted - it does not propose to provide utilitarian solutions to all sentencing decisions; it merely uses utilitarian knowledge to answer questions which have no answer in "just deserts" principles.

4.108 The separation of the *extent* of sentence from its *nature* has a number of advantages. For one thing, broad judicial discretion can be maintained in determining the nature of sentence within a narrow framework of judicial discretion as to the extent of sentence (such as guideline sentencing grids),[166] thus satisfying those who object to the deprivation of judicial discretion at the sentencing stage. Secondly, leaving the decision as to the nature of sentence to the judiciary is justified because principles for selecting the appropriate method of sentence are as yet less obvious than principles for determining its extent. Thirdly, by allowing the *nature* issue to rely on the *known* effects of certain types of sentence, sentencing can make use of the knowledge that *is* available about the utilitarian effects of sentencing, even though such knowledge might not be sufficient to provide a basis for the use of utilitarian principles of distribution. Thus the choice of method hybrid is flexible enough to include consideration of aims such as redress for the community or the individual victims of crime.

Provisional Recommendations

4.109 We now make the following provisional recommendations.

We provisionally recommend that the legislature sets out by way of statute a clear statement that the sentence to be imposed on an offender be determined by reference to the "just deserts" principle of sentencing, and that the legislation should include the following provisions:

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163 *Buchner*, for example, makes comparisons between the severity of sentences according to the perceptions of judges (for example, 3-23 months in the county prison is approximately equal to 9 years probation). See *Scale of Sentence Severity*, (1979) 70 J Crim L & Criminology 182; see also Erickson & Gibbs, *On the Perceived Severity of Legal Penalties*, (1979) 70 J Crim L & Criminology 102 (field surveys in four Arizona cities on public perceptions of severity of various sanctions); Sebba, *Some Explorations in the Scaling of Penalties*, (1978) 15 J Res Crime & Delinq 247 (tentative findings of exploratory study measuring the relative severity of various penalties); and note 136 *supra*.

164 See Schwartz, *Sentencing Guidelines Under Legislative or Judicial Hegemony* 67 Virginia LR, condensed in Tonry and Zimmring (eds) *Reform and Punishment* (1983) pp71 *et seq*.

165 A similar problem was observed by two German criminologists, Horn and Schoech, when considering a vaguely similar scheme for Germany; see para 7.122 *et seq*, *infra* (Sentencing Policy on the Continent). Also, it is not always possible to say that of two or more equivalent sanctions, the one is more, say, rehabilitative, than the other(s).

166 See para 9.24 *infra* (The Guidelines Movement in the US States).

The severity of the sentence to be imposed on a person found guilty of an offence should be measured in proportion to the seriousness of the offending behaviour.

The seriousness of offending behaviour should be measured by reference to:

(a) The harm caused or risked by the offender in committing the offence; and

(b) The culpability of the offender in committing the offence.

In determining the severity of the sentence to be imposed, the sentencer should not have regard to:

The rehabilitation of the offender; or

The deterrence of the offender or others from committing further crime; or

The incapacitation of the offender from committing further crime.

4.110 *We provisionally recommend that the legislation employ a choice of method hybrid for the determination of which of two or more competing sanctions of equal severity should be imposed. The following provisions should be included:*

(a) A sentencer, in choosing between two sanctions of equal severity, may have regard to:

the rehabilitation of the offender;

the deterrence of the offender or others from committing further crime;

the incapacitation of the offender from committing further crime;

the provision of redress to the victims of the offence or to the community;

and should choose the sanction which is more likely to achieve rehabilitation, deterrence, incapacitation or redress as the case may be;

(b) *a sentence of imprisonment should always be regarded as a sanction of last resort, and should only be imposed:*

when no other form of sentence, being equal in severity, would incapacitate sufficiently the offender from committing further crime; or

when there is no other form of sentence which is equal in severity and which would reflect the seriousness of the offending behaviour; or

when the offender has shown wilful non-compliance with the terms of another form of sentence and there is no other form of sentence which, being equal in severity, would compel compliance.

CHAPTER 5: AGGRAVATING AND MITIGATING FACTORS

5.1 In Chapter 1[1] we noted a distinction between two types of factors which may have an aggravating or mitigating effect on the severity of the sentence to be imposed. These we classed as

(a) factors which aggravate or mitigate the offence; and

(b) factors which mitigate sentence.

5.2 The former concern the circumstances of the *offending behaviour*, such as the type of harm caused and the degree of intent of the offender; but the latter concern the personal circumstances of the *offender* which do not relate to the offending behaviour, such as the impact the sentence may have on the offender or on others dependent on him or her. In this Chapter we examine both types of aggravating or mitigating factors to determine their role in the "just deserts" sentencing system proposed by this paper.

5.3 It should be stressed that the factors which we are examining here are factors which should be considered by the sentencer when determining the *severity* of the sentence to be imposed. When a factor is found to be irrelevant to this decision, that is *not* to say that it is irrelevant to all of the decisions to be made in sentencing - it may still be of relevance when determining the *type* of sentence to be imposed where there is available to the sentencer a range of sentence types of equivalent severity. For example, if the fact that the sentence would deprive the offender's family of parental support is considered not to be relevant to sentence severity, it may nonetheless be a valid factor in persuading the sentencer to choose community service over imprisonment where the terms

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1 See para 1.71 *et seq*, *supra* (The Mitigation Decision).

of each sentence are thought to be equivalent.

An important distinction

5.4 We should begin by explaining the importance of the distinction between factors which aggravate or mitigate the offence and factors which mitigate sentence.

5.5 To begin with, they arise at different stages of the sentencing decision. Factors which aggravate or mitigate the offence arise for consideration when the sentencer is deciding the seriousness of the offending conduct for which the offender is to be held responsible. Although this may include a consideration of the state of mind or the *culpability* of the offender during the commission of the offence, the sentencer is, at this stage, primarily concerned with the offending behaviour rather than with the offender personally.

5.6 Factors which mitigate sentence arise later. When the sentencer considers these factors, he or she has decided the seriousness of the offending conduct for which the offender is responsible, but now asks if there is any reason why the offender should not suffer the full punishment which should attach to such responsibility or blameworthiness. Mitigation of sentence is the making of a concession: the sentencer is saying "although you are undoubtedly responsible for the offending conduct and should be punished for it, I am letting you off a little because of your personal circumstances."

5.7 If there is confusion between the two types of factors a problem arises. If the confused sentencer takes factors which mitigate sentence into account at the "determination of seriousness" stage then the offender will be found to be less responsible or blameworthy than he or she actually is. The following example may help to make this clear.

5.8 Let us say that an offender is being sentenced for a rape in which he was the ringleader of a group of offenders and in which he, but not the others, used a great deal of violence. Let us also say that the offender is a single parent and there is no other relative or friend who can look after the child. If the sentencer, when determining the seriousness of the offence, takes into account not only the fact that the offender acted as ringleader and used violence as factors which aggravate the offence *but also* the fact that the offender leaves behind a child with no one to care for it as a factor which mitigates the offence, then the offence will be considered to be less serious than it actually was; the offender's conduct could even end up being viewed as less serious than that of his co-offenders who played lesser roles in the rape and who did not use violence.

5.9 At the end of the day it may not matter to the sentence whether the personal factors entered into the calculation of the seriousness of the offence or whether they were kept until later as factors which mitigate sentence - the final sentence will probably be substantially the same. What does matter, however, is that the sentencing process fails to recognise the full extent of the offender's

blameworthiness and to make him or her accountable for it when factors which mitigate sentence are mistaken for factors which mitigate the offence. There is much to be said, therefore, for a sentencing provision of some sort which would direct the attention of sentencers to the distinction between factors which aggravate or mitigate the offence and factors which mitigate sentence.

5.10 Secondly, the distinction between factors which aggravate or mitigate the offence and factors which mitigate sentence must be clearly maintained when considering their respective roles in a "just deserts" sentencing system.

5.11 In current sentencing practice, where sentences may be imposed on the basis of rehabilitative, deterrent, or incapacitative principles, aggravation of offence and mitigation of both kinds may sometimes be dispensed with, as *Thomas* explains:

> "(A)llowance for mitigation is not considered to be an entitlement of the offender. The sentencer may withhold a reduction which might normally be expected if some recognised penal objective such as general deterrence or the preventive confinement of a dangerous offender, requires the imposition of the whole of the permissible sentence."[2]

5.12 The determination of sentence following rehabilitative, deterrent or incapacitative principles does not require any consideration of the seriousness of the offending behaviour - and, thus, does not involve any consideration of factors which aggravate or mitigate the offence - since these types of sentence are based on the likelihood of the offender or others re-offending rather than on the gravity of the offence.

5.13 However, in a "just deserts" system, the principle of proportionality between offence and sentence serves as the *foundation* of every sentence. Thus, factors which aggravate or mitigate *the offence* logically have a prior claim on the sentencer's attention since they form part of the determination of proportionality itself.[3] Therefore, contrary to *Thomas's* assessment of current sentencing practice, in a "just deserts" system allowance for mitigation of the offence *should* be regarded as an entitlement of the offender. Furthermore, making allowance for factors which aggravate the offence should also be regarded as an essential element in the sentencing decision. If a factor which aggravates or mitigates the offence is not taken into consideration by the sentencer the oversight should form a valid ground for appeal against sentence because of disproportionality - either by the offender where the sentence is disproportionately severe because a factor which mitigates the offence has been excluded, or by the prosecution where the sentence is disproportionately lenient because a factor which aggravates the offence has been excluded.[4] There would be much benefit in some sort of provision which would make it clear to sentencers that consideration of the

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2 *Principles of Sentencing*, (1979), p194; see *R v Inwood* (1974) 60 Cr App R 70.
3 Wasik, *Excuses at the Sentencing Stage* [1983] Crim LR 450, 463.
4 See Ch 14, *infra* (Prosecution Appeals).

factors which aggravate or mitigate the offence is *essential in every sentencing decision* and that it is no longer the case that allowance for these factors is at the discretion of the sentencer.

5.14 However, different considerations apply to factors which mitigate *sentence*. Since they are not concerned with the offending behaviour but rather with the offender's personal characteristics or circumstances, then, ostensibly, they are of no relevance in a "just deserts" system where sentence is determined by reference to the offence rather than the personal circumstances of the offender. As *Gross* observes:[5]

> "... it is plain enough that none of them have (sic) any bearing on how culpable was the criminal conduct, for which punishment is to be imposed ..."

5.15 The net result of this conclusion is that factors such as pleading guilty, showing remorse, attempting to make redress to the victim or even the fact that the sentence will have very adverse consequences on others dependent on the offender should not have any effect on sentence.

5.16 This may be thought to be undesirable.[6] However, factors which mitigate sentence *can* be incorporated into a "just deserts" system if they can be explained on the grounds of humane considerations or sound penal policy.[7] In other words, some of the factors which are personal to the offender can still be taken into account in determining sentence severity, *by way of exception* to the "just deserts" principle of proportionality between offence and sentence, if it is thought that they are still desirable because they promote expediency or the smooth running of the sentencing system or because there may be a need to show mercy in the circumstances.

5.17 It should be stressed that factors which mitigate sentence, if they are to be retained in a "just deserts" system, should be given very careful consideration. Since they are exceptions to proportionality, they carry with them the danger that proportionality might be ousted in favour of utilitarian considerations. For example, if the likelihood of successful re-integration into society is seen to be a good reason for allowing mitigation of sentence then "just deserts" is replaced at the mitigation stage by rehabilitative principles and the whole point of having a "just deserts" sentencing system is overturned.

5.18 In considering which factors may be relied on in mitigation of sentence, therefore, we must be certain that there are very good grounds for making an exception to the overall policy of proportionality between the offence and the sentence. Not only must there be sound logical arguments in their favour, but

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5 *A Theory of Criminal Justice*, (1979), p449.

6 Or even, perhaps, *unconstitutional:* in *The State (Healy) v Donoghue* [1976] IR 325 Henchy J stated *obiter* that the Constitution guarantees that an offender will receive a sentence "proportionate to his degree of guilt *and his relevant personal circumstances*". However the importance of this depends upon how relevant is determined.

7 Wasik, *op cit*, p463.

also, where allowance is made in order to provide some other benefits; such as expediency or the smooth running of the criminal justice system, there should be satisfactory evidence that those benefits will result.

5.19 Also, since factors which mitigate sentence are not inherent elements in the determination of a sentence proportionate to the offence but are *exceptions*, then the question arises as to whether they should be an entitlement of the offender in every case, or whether they remain at the discretion of the sentencer in line with *Thomas's* assessment above. If they are discretionary then it is all the more important that sentencers should not confuse factors which aggravate or mitigate the offence with them because inherent elements of the offence may be excluded.

5.20 There is a clear need, therefore, for a careful delimitation of the factors which may be taken into account on mitigation of sentence.

Let us now consider the respective roles of each type of factor.

A. Aggravation and Mitigation of the Offence

5.21 A trend which may be noted in the criminal law, in Ireland and in other jurisdictions,[8] over the last one-hundred years has been the gradual moving away from a specific and rigid definition of crimes in statutes which create criminal offences. The *Larceny Act, 1916*, for example, specifies in great detail a vast range of offences of theft, such as simple larceny; larceny of cattle and other animals; larceny of wills and written instruments; larceny of things attached or growing on land; larceny of goods in the process of manufacture; abstraction of electricity; larceny of ore from mines; larceny of postal packets; etc. Each of these offences carries with it its own range of penalties.

5.22 Modern statutes tend to be more general;[9] and for a number of reasons, such as to improve the efficacy and efficiency of the investigatory and prosecutorial process; to ensure that cases do not fail on technicalities; and to increase the speed of the processing of cases. However, a consequence of this modern trend is a much wider variation in the degree of seriousness of offences within the broad definition of the offence. Modern statutes tend to prescribe a high maximum penalty which is to be imposed for the most serious variation of the offence, and which is far in excess of the least serious variation coming within the definition of the offence.[10]

5.23 The older statutes, by their restricted definitions of crimes, had less need for factors which aggravate and mitigate seriousness, because, by definition, their

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8 See the Report of the Victorian Sentencing Committee, p239.

9 More obviously in other jurisdictions, which have undertaken a revision of their criminal statutes - e.g. the English *Theft Act, 1968* - than in Ireland where such revision has not, for the most part, taken place. (But see the Commission's Consultation Paper on *Dishonesty*, (LRC 43-1992).

10 And, as appears to be the case in Ireland, far in excess of the *average* sentence for the most usual variation of the crime: See para 10.12 *et seq*, *infra* (Review of Maxima in Other Jurisdictions).

specific variations encompassed the factors which made them more serious or less serious than the other variations, such as abuse of a position of trust by a clerk or servant[11] or by a tenant or lodger;[12] or causing harm not only to the immediate victim but to the entire community by stealing from the mail.[13] Modern statutes, on the other hand, leave the development of aggravating and mitigating circumstances to the courts. We noted earlier,[14] however, that the courts have not clearly articulated those principles in a manner which is readily accessible to those involved in the sentencing process or to the public at large. There is, therefore, a need to articulate clearly the relevant aggravating and mitigating factors to be taken into account by the courts when imposing sentence.

5.24 In a sentencing system where the primary principle for the distribution of sentence is "just deserts", the principal concern of the sentencing courts is to impose a sentence which is proportionate to the *seriousness* of the offending behaviour. However the concept of seriousness is not simply a matter of assessing the gravity of the offending behaviour - rather it involves both an assessment of the *harm* caused by the offender in committing the offence and an assessment of the *culpability* of the offender in causing that harm.[15] The aim of a clearly articulated set of aggravating and mitigating factors should thus be to provide sentencers with a guiding framework of the factors by reference to which harm and culpability may be assessed. Such a framework is necessary to ensure a consistency of approach and a consistency of proportion in which these factors are considered and applied in the sentencing of offenders. *Ashworth* comments:[16]

> "Without some framework of agreed categories, relativities and priorities, it is difficult to see how the principle of fairness which requires like cases to be treated alike could have practical application".

5.25 It should be observed, however, that simply providing a framework of factors which aggravate or mitigate seriousness cannot make sentencing into a precise balancing exercise: it cannot be simply a matter of arithmetic calculation by adding up all the aggravating factors and subtracting all the mitigating factors and arriving at an appropriate sentence.[17] By providing guidance as to the factors which aggravate and mitigate seriousness, it is contemplated that a certain degree of consistency of approach in the sentencing of offenders should unfold. The provision of such a framework should direct the courts' attention to the development of more specific principles for the consideration of such factors, such as the weight to be attached to various factors in different situations. Thus sentencers will still have to decide the *weight* to be attached to each factor, and then apply the relevant developed principles to arrive at a just sentence in all the

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11 *Larceny Act, 1916*, s17.
12 *Ibid*, s16.
13 *Ibid*, s12.
14 Para 1.171 *et seq, supra* (The Mitigation Decision).
15 See para 4.77 *et seq, supra*. ("Just Deserts" - Harm, Culpability).
16 *Sentencing and Penal Policy*, (1983) p141.
17 See the Report of the Victorian Sentencing Committee, p142.

circumstances of the case. The weighting of factors in different situations will, no doubt, present some awkward questions for sentencers to resolve, as *Ashworth* observed:[18]

> "The great temptation, when asked whether stealing goods worth £100 from a supermarket by shoplifting should be ranked higher or lower than a theft of £10 by a person in a position of trust, is to say: 'it depends'. And so it does. But it does *not* depend on an infinite number of factors, and in effect the question is answered every day by courts all over the country. My guess, in the absence of sufficiently detailed statistics, is that the very few small thefts by persons in positions of trust, who are invariably first offenders, are regarded as more serious than the ordinary run of supermarket thefts by first, second or even third-time offenders. There is certainly some appellate authority which suggests that the In/Out line between custodial and non-custodial sentences is reached sooner by the 'breach of trust' offender ... It therefore appears that the position of trust generally outweighs the value of property stolen, although there must be points at which the value of the property taken in breach of trust is so small, or the property stolen in an ordinary case is so high, as to place limits on the general proposition. Fixing those points will be awkward, but in an evolving process of guidance that should not give rise to embarrassment."

5.26 In other jurisdictions, where sentencing reform has sought to provide sentencers with a guiding framework of the factors which aggravate or mitigate the offence, the framework has taken the form of a *list* of examples of the types of factor relevant to the question of offence seriousness.

5.27 It need hardly be said that such a list *cannot* be exclusive - it is impossible to foresee every factor which may affect the harm of an offence and the culpability of an offender in every circumstance. It is thus necessary to allow the courts to develop unenumerated factors which increase or decrease the seriousness of the offence. It is imperative, however, that any such unenumerated factors be consistent with the overall theme of "just deserts" and the aims and purposes of sentencing.[19] By referring to the examples given in the list of specified factors, sentencers may derive some indication as to whether or not an unspecified factor would be so consistent.

5.28 The advantage of providing such a list, apart from the fact that it provides sentencers with a readymade list of the most common factors which aggravate or mitigate the offence, is that it gives sentencers a clear indication of the *type* of factors relevant to the question of offence seriousness. This should direct sentencers attention to the distinction between factors which aggravate or mitigate the offence and factors which mitigate sentence, and should also be of assistance in the development of other unenumerated factors.

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18 *Devising Sentencing Guidance for England* in Pease and Wasik (eds.) *Sentencing Reform*, (1987), p86.

19 Otherwise mitigating and aggravating factors could be used as a "back-door" to oust the "just deserts" principle.

Constructing the list

5.29 We tried as far as possible to select factors which aggravate or mitigate seriousness from decided examples of such factors in Irish cases; although this was thwarted somewhat by the dearth of reported considered sentencing decisions of the Irish courts. Our chief sources were the writings of eminent criminologists and penologists;[20] the recommendations of sentencing commissions and committees of other jurisdictions who have proposed similar measures;[21] and the reform measures of other jurisdictions which have adopted a similar approach as part of their "just deserts" reforms of sentencing.[22] We were also aided in this task by the answers of a number of members of the Council of Europe to questionnaires on the area of aggravation and mitigation.[23]

5.30 Our examination of these sources brought to light a broad consensus on a number of factors which aggravate or mitigate the seriousness of offending behaviour. We shall now examine these in more detail.

Factors which aggravate offence seriousness

5.31 The following factors are widely (though not universally) regarded as aggravating the seriousness of an offence:[24]

- Premeditation or planning;
- Offending as part of a group organised for crime;
- Offending for profit or renumeration;
- Exploitation of a weak or defenceless victim;
- Abuse or exploitation of a position of confidence or trust;
- Inducing a weaker or younger person to participate in the commission of the offence;
- Threatening to use or actually using violence or a weapon;
- Use of excessive cruelty;

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20 Ashworth, *Sentencing and Penal Policy*, and *Devising Sentencing Guidance for England;* Thomas, *Encyclopedia of Current Sentencing Practice.*

21 The Canadian Sentencing Commission's Report *Sentencing: A Canadian Approach* (1987); The Victorian Sentencing Committee's Report *Sentencing* (1988); The Australian Law Reform Commission's Report *Sentencing* (1988) and its Discussion Paper *Sentencing: Procedure* (1987).

22 Chapter 29 of the Swedish Penal Code, Brottsforebyggande radet, (1990); Chapter 6 of the Finnish Penal Code, (1976).

23 *Summary of Answers to the Questionnaire Contained in Appendix II of the Document PC-R-SN*, PC-R-SN (90)6, (1990), Council of Europe Select Committee of Experts on Sentencing.

24 Prior criminal record has been excluded from this list since it merits individual and special attention; see Ch 6, *infra* (Prior Criminal Record).

- Knowledge that the victim's access to justice may be impeded;
- Participation in a campaign of offences on multiple victims or of multiple offences;
- Causing substantial economic loss for the victim;
- Causing, threatening or risking death or serious injury;
- Committing the offence for pleasure or excitement;
- Acting as ringleader in the commission of an offence;
- Offence by a law enforcement officer;
- Offending while under the influence of alcohol or drugs;
- Offending against a law enforcement officer.

5.32 What follows is a discussion on each of the factors listed above. Since the list draws on many sources, it may be noted that some of the factors mentioned are simply variations on the themes of some others. Where appropriate, therefore, we will deal with a number of factors together.

Premeditation or planning, offending as a member of a group organised for crime, or participation in a campaign of offences on multiple victims or of multiple offences[25]

5.33 Since the determination of seriousness relies on an assessment of the culpability of the offender it is axiomatic that the greater the planning or premeditation, the greater the culpability of the offender because it is more likely that the offence was deliberate and intentional. "The offender who plans his offence is not only coolly defying the law but is going to some lengths to ensure that he succeeds and, sometimes, that he is not detected. He clearly and unequivocally places his interests above the constraints imposed by society on him and all others."[26] The same concerns apply to offences committed by a member of a group organised for crime, and to offences committed as part of a campaign or sustained course of offending.[27] In some cases it may be difficult to obtain sufficient evidence that the activities were part of organised crime, but there is no doubt that organised crime is one of the most calculated, deliberate and defiant types of offending and should be treated as an aggravating factor.

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25 Appears as an aggravating factor in all of the sources referred to above. Premeditation was accepted as an aggravating factor in *The People (DPP) v Tiernan* [1988] IR 250, as were carrying out the offence as part of a gang and committing the offence on more than one occasion.

26 Ashworth, *Sentencing and Penal Policy*, p152.

27 Although there should be limits on the degree to which the existence of prior convictions can be used as a factor which aggravates sentence; see para 6, *infra* (Prior Criminal Record).

Offending for profit or remuneration[28]

5.34 It may be argued that committing an offence for profit or remuneration aggravates the seriousness of offending behaviour because it indicates a higher level of *mens rea* on the part of the offender. However, this would depend on the circumstances of the case: it probably indicates a level of intent higher than recklessness, but it may equally be seen as an excusing or mitigating factor where the offence would otherwise have been committed for gratification or pleasure. The great danger of including it in a set of enumerated aggravating factors is that it would be made an aggravating factor in all cases without due consideration being given to what it indicates about the culpability of the offender. We do not, therefore, feel that it should appear in our list.

Exploitation of a weak or defenceless victim, or knowledge that the victim's access to justice may be impeded[29]

5.35 Offences against weak, defenceless or vulnerable persons are, in principle, worse than crimes against persons who might have a real, in principle, opportunity of defending themselves or escaping the consequences of the offending behaviour because there is disparity between the positions of the offender and the victim. There remains the question, however, of whether an offender should also be more culpable when unaware of the weak or defenceless position of the victim. Nonetheless we are satisfied that knowingly exploiting the weak or defenceless position of others represents an aggravating factor to be taken into account when sentencing.

Abuse or exploitation of a position of confidence or trust, or offences by law enforcement officers[30]

5.36 The rationale underlying this factor is the concern that persons who occupy a position of confidence or trust are in such positions on condition that they maintain that confidence or trust. If the offender takes advantage of that position to further personal ends then he or she not only commits the offence charged but breaches the trust placed in him or her by society and by the victims of the offence.[31] Such breaches are also usually deliberate, thus they indicate a high degree of intent.[32] The same may be said of offences committed by law enforcement officers; it is essential for the upholding of law and order that the special position of trust which they hold be maintained.[33]

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28 Appears as an aggravating factor in the Finnish and Australian reforms and is recognised in some of the member states of the Council of Europe.

29 Appears in the Swedish, Canadian, Victorian, Australian and Minnesotan Reforms and is recognised as an aggravating factor in many member states of the Council of Europe.

30 Appears in the Swedish, Canadian, Victorian and Minnesotan reforms and is recognised as an aggravating factor in many member states of the Council of Europe.

31 See Ashworth, *op cit*, pp194-195; The Victorian Sentencing Committee's Report, pp253-254.

32 *Ibid.*

33 *Ibid*, p159.

Threatened or actual use of violence or a weapon, or causing, threatening, or risking death or serious injury, or excessive cruelty[34]

5.37 There is little doubt that crimes of violence are the ones which cause society the greatest concern. Violent crimes which cause or risk death, serious injury, or cruelty carry grave consequences for the victim, thus the *harm* caused or risked is great. Where violence occurs not simply as a constituent of the offence but as an additional element - as, say, where violence is used in the course of a theft - the *culpability* of the offender is increased since the use of violence in such cases is regarded as wanton infliction of personal injury to further the offender's criminal activity; some would argue that the culpability of the offender on such occasions outweighs the culpability of an offender who engages simply in a violent offence which is not used in the course or furtherance of another offence:

> "an impulsive killing in the course of a robbery might be thought to be more serious than a planned and premeditated murder in an impossible domestic situation."[35]

5.38 At the end of the day it remains a question of the weight to be attached to the factors which aggravate in each offence, when one is concerned with the relative seriousness of the use of violence, alone or compared to the use of violence in furtherance of other offences. Nonetheless, it is clear that offenders who use violence to further an offence should be considered more culpable than others who commit the same offence without violence. Not only are they flagrantly defying the law, but they are also prepared to defy it still further to ensure success or non detection.

5.39 Similar concerns apply to threats of violence, since they add to the likelihood that the offender intended to defy the law by committing the offence and to ensure its success.

5.40 The carrying, threatened use or use of a weapon should also be viewed as a factor which aggravates culpability. Carrying a weapon indicates that the offender contemplated the use of violence and had prepared himself or herself for it, unless there is a credible excuse of self-protection against an anticipated

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34 Threatened or actual use of violence or a weapon appears in the Canadian and Australian proposals and is recognised as an aggravating factor in many of the member states of the Council of Europe. Causing, threatening or risking death or serious injury appears in the Victorian proposals. The use of violence was also treated as a factor which aggravated the seriousness of a rape in *The People (DPP) v Tieman* [1988] IR 250, p253. The use of cruelty appears in the Canadian, Victorian and Minnesotan reforms.

35 Hadden, *Offences of Violence: The Law and the Facts* [1968] Crim LR 535; See Ashworth, *op cit*, p160.

attack.[36] Secondly, carrying a weapon makes it more likely that violence will result[37] - thus the *harm* risked by the offender is greater and the seriousness of the offence is aggravated. A third reason is that a person faced by an offender with a weapon is at a great disadvantage and this disparity should be viewed as more serious than offences where the parties meet on equal terms.[38]

Causing or risking substantial economic loss for the victim[39]

5.41 The same concerns which relate to causing or risking physical or emotional injury apply to causing or risking economic loss; though on a lesser scale. Again the *harm* involved may be great, and the *culpability* of the offender may be heightened by the intention to cause grave economic harm to the victim.

Committing the offence for pleasure or excitement[40]

5.42 Inherent in this factor is the notion that offenders who commit offences merely for "thrills" or for "kicks" show complete disregard of accepted community standards and the law. Theirs is the most wanton and flagrant breach of the law imaginable, and their conduct is deliberate, calculated, wholly unjustifiable and inexcusable.[41]

Acting as ringleader in the commission of an offence, or inducing a weaker or younger person to participate in the commission of the offence[42]

5.43 There are two reasons why acting as ringleader and inducing others weaker or younger (or, perhaps, even persons who are not weaker or younger) to participate in the commission of an offence should be viewed as an aggravating factor. First of all, leadership infers a degree of planning and premeditation, and therefore greater intention, to break the law of offending and to succeed in its commission. Secondly, by acting as ringleader and instigating others to join in the commission of the offence it is the ringleader who is the major cause of the

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36 Ashworth, *op cit*, p164. Cox recognised that there were a number of factors which a sentencer ought to consider "for the purpose of resolving whether and to what extent there was deliberation in the use of the weapon":

> "How came it into the hands of the defendant? Had he been using it for some lawful purpose? Was it in his hand at the moment of the assault? Or was it snatched up as it lay near? Or was it taken from some other place of deposit? Was the possession of it prompted by any supposed requirement for defence, or was it purely aggressive"?

Cox, *The Principles of Punishment*, (1877) pp96-97 cited by Ashworth.

37 *Ibid.*

38 *Ibid.*

39 Appears in the Canadian, Victorian and Australian reforms and is also recognised by many member states of the Council of Europe.

40 Appears in the Victorian Proposals.

41 Cf para 5.50, *infra* (Other Factors which Aggravate Offence Seriousness). The Commission is currently examining privacy; the rationale for regarding pleasure/excitement as an aggravating factor may not be valid where victimless crimes are in question.

42 Playing a leading role in the commission of an offence appears as an aggravating factor in the Victorian and Australian reforms, and is recognised as an aggravating factor in many member states of the Council of Europe. Inducing a weaker or younger person to participate is a Swedish factor. In *The People (DPP) v Conroy (No 2)* [1989] IR 160, p165 the Irish Supreme Court recognised that acting as ringleader and inducing others to engage in the commission of the offence are factors which aggravate the seriousness of an offence.

offending behaviour. The ringleader is thus responsible for greater *harm* since he or she has encouraged others to offend.

Offending while under the influence of alcohol or drugs[43]

5.44 This is not a widely recognised aggravating factor, and understandably so. Intoxication is commonly treated by the substantive criminal law as evidence of the absence of intent, knowledge or recklessness.[44] How, then, may it be viewed as an aggravating factor? The answer may lie in an assessment of the degree of intoxication. An offender who is partially intoxicated, and has some knowledge of his or her actions, but nonetheless offends may be viewed as being in the same situation as an impulsive offender who realises what he or she is doing but loses his or her inhibitions. The fault, however, does not lie so much in the commission of the offence as in allowing himself or herself to become so intoxicated so as to be unable to control his or her actions. One solution is to sentence the offender as a *reckless* offender for knowingly risking to cause harm by becoming intoxicated, whether the harm was obvious to the offender or not;[45] however there remains the dilemma as to whether the offender *really* was so intoxicated so as to be unable to control his or her actions, or was partially intoxicated and therefore closer to an impulsive offender. *Ashworth* concludes:

> "The upshot of this argument is that intoxication is in general neither an aggravating nor a mitigating factor, and the main reason for this is that the ordinary mitigating effect of weakened self-control and less appreciation of the situation is counterbalanced by the aggravating effect of the general social propositions about the use of intoxicants".[46]

At this time we do not feel that the use of alcohol or drugs should appear in our list of aggravating factors.[47]

Offending against a law enforcement officer[48]

5.45 The traditional rationale for the imposition of more severe penalties on

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43 Appears as a factor which may be aggravating *or* mitigating in the Australian Reforms. The Council of Europe's Sentencing Committee found that among the member states of the Council of Europe:

> "there was a difference in approach in respect of offences committed under the influence of alcohol; in some countries it was not considered to be a mitigating factor but it could mitigate the sentence so that treatment would be imposed. In other states it would block the defence of mistake of facts or would be considered to be a genuine mitigating factor. Other countries would consider that the offender could not have acted maliciously. In one state it was made an offence to commit an offence after having been drinking. In yet another state the judge was free to decide whether it would be considered to be aggravating or mitigating depending on the circumstances of the case."

Summary Report of the Fourth Meeting, PC-R-SN (91) 1.

44 *R v Davis* (1881) 14 Cox CC 563.

45 See *R v Caldwell* 73 Cr App R 13, [1981] 1 All ER 961; Ashworth, *op cit*, p172.

46 *Ibid*, p173.

47 The Commission is currently examining the broader issue of intoxication as a defence to a criminal charge.

48 Recognised by the Council of Europe's Sentencing Committee as a factor which aggravates offence seriousness in some of the member states of the Council of Europe.

offenders who commit offences against law enforcement officers was the protection of the police by means of deterrence. This justification is wholly at odds with our earlier proposals.[49]

5.46 However, there is an independent reason why such offences should be viewed as more serious which *is* in keeping with the policy adumbrated above: the Gardai and other law enforcement officers are charged with the task of enforcing law; assaulting a law enforcement officer is therefore, within the scale of values of the legal system, worse because of the implied rejection of the authority of the law. It is important to note, however, that the offender must know, suspect, or be reckless as to whether the victim is a law enforcement officer-otherwise this argument loses its force.[50]

5.47 This factor may even be extended beyond law enforcement officers to include ordinary citizens involved in the enforcement of the law: e.g. a private citizen who tries to apprehend an offender in the commission of the offence. The same rationale applies -rejection of the authority of the law.[51]

Other factors which aggravate offence seriousness

5.48 We should stress once again that a list of factors which aggravate the seriousness of the offending conduct cannot be exclusive. There may be other factors which emerge from time to time which could justifiably be treated as aggravating the offence. For this reason, we believe that there should remain a residual discretion in the courts to expand the category of aggravating factors, and this discretion should be given recognition in a statutory provision.

5.49 We would add that some limitation should be placed on the extent of this discretion to ensure that the factors so developed are in keeping with the overall policy of sentencing in a "just deserts" system. The factors developed must:

(i) aggravate the harm caused or risked by the offending conduct; or

(ii) aggravate the culpability of the offender for the offending conduct.

5.50 Furthermore, it may be desirable that the legislature would from time to time add to or amend the list of aggravating factors, where necessary, to reflect changes in social attitudes to certain crimes. We contemplate that, if a Judicial Studies Board is brought into being, which we recommend,[52] there should be some consultation with it to determine whether the proposed changes are consistent with the principles and purposes of sentencing.

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49 See paras 4.107 *et seq*, *supra* (Provisional Recommendations).
50 Cf *The People (DPP) v Murray* [1977] IR 360.
51 Ashworth, *op cit*, p159.
52 See Ch 16, *infra* (Sentencing Studies).

Factors which Mitigate Offence Seriousness

5.51 The following factors are widely (though, again, not universally) accepted as mitigating the seriousness of offending behaviour:

- Duress;
- Provocation;
- Impulse;
- Reduced mental capacity;
- Strong temptation;
- Offender motivated by strong human sympathy;
- Offender very young or very old;
- Offender played only a minor role in the commission of the offence;
- No serious injury resulted or was intended;
- Offender made voluntary attempts to alleviate the effects of the offence;
- Excusing circumstances which, although not constituting a defence to liability, tend to justify or excuse the offence;
- Offender shows no sustained motivation to break the law;
- Ignorance of the law;
- Mistake of fact.

5.52 We shall now examine these factors in more detail. Where appropriate, we shall, again, deal with similar factors under the same heading.

Duress[53]

5.53 Duress is already a defence to criminal liability at the trial stage. Duress removes the offender's voluntariness' and overbears his or her will. If the defence of duress succeeds at the trial stage when there will, of course, be no need to consider it at the sentencing stage since there will be no sentencing stage. However, if the defence fails, there may still be evidence that the offence was

53 Duress features as a mitigating factor in the Finnish, Canadian, Australian, and Minnesotan reforms.

committed under considerable pressure not amounting to the defence of duress. This pressure may be considered at the sentencing stage as a factor which reduces the culpability of the offender. This was recognised by the English Court of Appeal in *R v Taonis,*[54] where an offender, convicted of unlawful importation of cannabis, had been forced into acting as courier of the drugs because of threats to beat and torture the woman he was living with and that he would be falsely accused of having stolen a considerable sum of money. In reducing the sentence from four years' imprisonment to two, Scarman LJ commented:

> "The experience (the defendant) has gone through was described in the Court below as truly terrifying. He did -of course as a matter of strict law - have the opportunity of going to the police. There was an interval of time during which he certainly was not under direct physical threat or pressure, and ... he could have gone to the police. He would have been very wise to have done so. In the light of the circumstances which I have mentioned, this court takes the view that the sentence was altogether too severe. We feel that the learned trial judge failed to give full or proper weight to the duress".

5.54 It is clear that duress should be treated as a factor which mitigates the culpability of the offender for an offence.

Provocation[55]

5.55 Provocation is recognised as a defence to murder in Irish law, reducing the crime to "voluntary manslaughter".[56] However, for other crimes, the issue of provocation does not arise until the sentencing stage. At the sentencing stage, provocation may be viewed as a factor which reduces the culpability of the offender, depending on the relative strength of the provocation itself and the degree to which the offender's retaliation was sudden and impulsive.[57] The weight and priority to be attached to each of these components is a matter which the courts will have to determine,[58] but it is at least clear that swift and impulsive retaliation is far less blameworthy than planned and premeditated revenge, and that offences motivated by strong provocation are less blameworthy than unprovoked offences because it is the provocation, rather than an intention to flagrantly disobey the authority of the law, which is the primary motivation for the offending conduct.

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54 (1974) 59 Cr App R 160.

55 Provocation features as a mitigating factor in the Swedish, Canadian, Victorian, Australian and Minnesotan reforms and is recognised in many of the member states of the Council of Europe.

56 See O'Siochain, *The Criminal Law of Ireland*, (6 ed, 1977) pp101-104.

57 Ashworth, *op cit*, p167; Victorian Sentencing Committee, *Sentencing*, (1988), p262.

58 See Ashworth, *op cit*, pp167-171, for a discussion on some of the finer points of provocation which will have to be ironed out with the development of more specific principles. Some guidance may be obtained from the decided principles which govern provocation as an excuse to murder, but it appears that these cases are by no means coherent or consistent themselves: *Ibid.*

Impulse, or no sustained motivation to break the law[59]

5.56 Impulsive reactions are generally the least blameworthy kind of intentional act since there has not been a careful decision to defy the law. Impulse is, thus, the corollary of planning and premeditation which acts as an aggravating factor. However, impulse can only be a significant mitigating factor if the offender was unaware of the impulsive reaction about to take place - if, say, the offender had a history of violent reactions and knew of the types of situation likely to trigger off these reactions, then he or she may be regarded as more culpable.[60]

Reduced mental capacity, strong temptation, or offender motivated by strong human sympathy[61]

5.57 The central theme of this group of factors is the idea that an offender whose judgment is impaired should be considered to be less culpable than a person of normal judgment. Thus, persons of reduced mental capacity cannot be said to be fully responsible for their offences and some allowance should be made in mitigation in recognition of their reduced intent.

5.58 An offence committed after an offender succumbs to temptation may be regarded as morally less culpable than an offence committed without temptation. *Bentham* wrote:[62]

> "Authors of celebrity ... have said, that the greatness of the temptation is a reason for lessening the punishment; because it lessens the fault; because the more powerful the seduction, the less reason there is for concluding that the offender is depraved".

5.59 In general, the existence of temptation reduces the seriousness of the offence because it explains why the offence was committed and displays that the offender was less motivated to break the law than to succumb to the temptation. Of course there are limits to this general proposition - for example, temptation should not mitigate the culpability of an offender who exploits a position of confidence or trust because temptation is inherent in such positions.[63] Nonetheless, there are certain situations in which temptation may be regarded as a factor which mitigates the seriousness of offending behaviour.

5.60 Where an offence is motivated out of strong human sympathy -as where, say, a relative of a terminally ill patient switches off the life-support machine - the offender should be viewed as less culpable than a person who offends for less altruistic reasons. Again, it will be a question of degree as to when and how

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59 Impulse features as a mitigating factor in some of the member states of the Council of Europe. Lack of sustained motive to break the law appears in the Victorian proposals.

60 Ashworth, *Sentencing and Penal Policy*, (1983), p153.

61 All three appear in the Finnish and Swedish reforms. Reduced mental capacity appears in the Canadian, Victorian, Australian and Minnesotan reforms and is recognised as a factor which mitigates the offence by many of the member states of the Council of Europe.

62 *Principles of Penal Law*, Vol 1, p400.

63 Ashworth, *op cit*, pp200-201.

much mitigation should be allowed, but undoubtedly there are some situations in which strong human sympathy should be a mitigating factor.

Offender very young or very old[64]

5.61 The question here is whether or not the young or old offender's judgment was impaired through lack of development or senility. Where the judgment of a young or old offender is impaired then he or she may be viewed as less culpable, just as an adult offender who suffers from a mental impairment would be regarded as less culpable than a younger offender of full mental capacity. We would stress that youth or old age does not *per se* mitigate seriousness - it is still a question of whether or not the *culpability* of the offender should be reduced because of impaired judgment. In *People (DPP) v Simon Maguire and Patrick McDonagh,*[65] the Court of Criminal Appeal appeared to treat youth as a factor mitigating offence seriousness rather than sentence, but in any event declined to alter the sentence imposed on this ground.

Offender played only a minor role in the commission of the offence[66]

5.62 However, in *People (DPP) v Dennigan,*[67] the CCA took the opposite view, refusing to allow the youth of the applicant as a mitigation of the seriousness of the offence, but permitting it nonetheless to be taken into account in deciding the ultimate sentence.

5.63 In certain circumstances, the fact that an offender played a minor role in the commission of the offence may mean that he or she is less culpable than some of the others who participated in the offence. Fringe members of a group should be treated as less culpable than offenders who participate more fully or lead the others. Also, where a group forms spontaneously to commit an offence, it may sometimes be the crowd atmosphere and heightened excitement which drove the offender to participate in the commission of the offence rather than a desire to flout the law.[68]

No serious injury resulted or was intended[69]

5.64 The Victorian Sentencing Committee chose to add this to their list of mitigating factors as a corollary to the principle that serious penalties ought to attend on those who engage in violent or serious crimes. When no serious injury results, the *harm* is less; and when serious injury is not *intended*, the culpability is less than when it *is* intended.

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64 Features in the Canadian, Victorian and Australian reforms and is recognised in many of the member states of the Council of Europe.

65 3 Frewen 265.

66 Features in the Canadian, Victorian and Minnesotan reforms and as "Accessory Participation" in some of the member states of the Council of Europe.

67 3 Frewen 253.

68 Ashworth, *op cit*, p198.

69 Features as a mitigating factor in the Victorian reform proposals.

Offender made voluntary attempts to alleviate the effects of the offence[70]

5.65 Traditionally, this factor entered into the sentencing decision as an indicator of the offender's likelihood of reform or re-integration into society. Since these are of no relevance to sentence severity in a "just deserts" system, making allowance for voluntary attempts to alleviate the effects of the offence cannot be justified on these grounds.

5.66 How does a voluntary attempt to alleviate the effects of the offence mitigate the seriousness of the offending conduct? The answer depends on when the attempt to alleviate the effects takes place. If it is before or during the offence (say, where the offender gives a warning) then it may reduce the *culpability* of the offender as it shows that he or she did not fully intend all the consequences of the offence. If it occurs *after* the offence then it is difficult to see how it affects the offence *at all*; but this depends on where one draws the line between the period of "the offence" and "after the offence" - sometimes the harmful consequences of an offence may continue for weeks or months, as in rape where the victim may suffer severe psychological and emotional injury in addition to physical injury. If the offender is to be held responsible for *all* these harmful consequences of the offence then surely any attempt to alleviate them should mitigate the *harm* of the offence, even though the attempt at alleviating takes place a long time after the offending conduct. This explanation admittedly requires some stretching of the ordinary sense of "the offence".

5.67 A simpler solution would be to exclude allowance for voluntary attempts to alleviate the effects of the offence made *after* the offending conduct from the question of offence seriousness, but instead, to consider it later in mitigation of *sentence*, since it makes sound penal sense to encourage offenders to make redress or to compensate their victims whenever possible.[71]

5.68 Therefore, we conclude that voluntary attempts to alleviate the effects of the offence made before or during the offending conduct should go to mitigation *of the offence.* Those made *after* the offending conduct should to to mitigation *of sentence.*

The existence of excusing circumstances which, although not constituting a defence to liability, tend to justify or excuse the offender's conduct[72]

5.69 This factor follows the logic of earlier factors such as duress and provocation, and includes excuses such as ignorance of the law; mistake of fact and necessity, entrapment or abandonment.[73] In each case, the factor indicates that the offender was less culpable because through ignorance, mistake, necessity or for some other reason, he or she did not fully intend to flout the law or to

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70 Features in the Finnish, Canadian and Victorian reforms.

71 See para 5.90 *et seq, infra.*

72 Appears expressly in the Victorian and Minnesotan reforms.

73 See Wasik, *Excuses at the Sentencing Stage* [1983] Crim LR 450. Mistake as to the age of the girl in a case of unlawful carnal knowledge of a girl under fifteen was held to be a mitigating factor in *The People (AG) v Kearns* [1949] IR 385.

commit the offence.

Other factors which mitigate offence seriousness

5.70 Once again, the courts should retain a residual discretion to develop other factors which mitigate the seriousness of the offending conduct, subject to the limitations that such factors must:

(i) Mitigate the *harm* caused or risked by the offending conduct; or

(ii) Mitigate the culpability of the offender for the offending conduct.

5.71 Also, we envisage that any legislative additions or amendments to the list would involve some consultation with the proposed Judicial Studies Board to ensure that the changes are in keeping with the overall policy of sentencing.[74]

B. *Mitigation of Sentence*

5.72 Part of the tradition of Irish sentencing, and, indeed, of sentencing in other jurisdictions, lies in the discretion allowed to the sentencing judge to take a whole range of mitigating factors into account in reducing the level of severity of the sentence to be imposed. These include the age of the offender youth/old age poor health; where he or she has shown genuine remorse for the offending behaviour; where he or she has suffered extreme social deprivation; where the offence followed a period of family disturbance or financial worry; where the consequences of the offence on the offender have already been considerable; and so on.[75]

5.73 On a strict view of "just deserts", these factors should be of no relevance in the sentencing decision since they have no bearing on the *harm* and *culpability* of the offender in the commission of the offence[76] - although some may appear to have a bearing on culpability in so far as they are put forward as the antecedent causes for the commission of the offence, these justifications are tied to rehabilitative sentences rather than to seriousness based sentences.[77] Some desert theorists, *Von Hirsch* included, argue that the exclusion of these "past non-criminal choices" is justified since "just deserts" forbids that sentencing should be affected by social judgments upon and about offenders: thus the Minnesotan guidelines expressly preclude reliance on race, sex, employment, educational attainment, marital status, residence or living arrangements as aggravating or mitigating circumstances. *Von Hirsch* would contend that it is fairer to ignore such issues so as to preserve the equality before the law which "just deserts" ensures. If an offender loses his or her job because of conviction and sentence

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74 See para 5.48 *et seq*, *supra* (Other Factors which Aggravate Offence Seriousness).

75 See Ashworth, *Devising Sentencing Guidance for England* in *Sentencing Reform*, Pease and Wasik(eds), (1987), p93.

76 Von Hirsch, *Constructing Guidelines for Sentencing*, (1982) 5 Hamline Law Review 164, 204.

77 Ashworth, *op cit*, p93.

while an unemployed offender suffers no such deprivation, it is argued that the offender who loses work cannot complain that it was the *law* which treated him or her unfairly. Only by excluding such personal and social factors can true equality before the *law* be achieved.[78]

5.74 However, exclusion of personal and social factors may lead to other injustices. It has been observed that:

> "Disparity among sentences is inequitable when it cannot be justified in principle, which is just the case when it results from disregard of the principle of proportion between crime and punishment. For this reason, biases and theories of criminal liability whose influence subverts considerations of culpability and frustrates the principle of proportionality have no proper place in sentencing deliberations. But there is another principle that must also be observed upon pain of inequitable disparity. Sometimes there are good reasons for reducing the sentence which the principle of proportional punishment would otherwise warrant, and what we might call the principle of mitigation of sentence requires us to give them effect. The principle is founded, once again, on considerations of justifiable punishment and involves certain humane considerations as well as certain practical requirements of sound policy. Disregard of this principle is therefore morally wrong and may also turn out to be imprudent administration of a system of criminal justice. If the principle is disregarded some of the time but not all of the time, there are inequitable disparities among sentences that stand independently as instances of injustice".[79]

5.75 In other words, humanitarian considerations, expediency and sound penal policy may sometimes require that we make exceptions to the "just deserts" principle of proportionality between offence and sentence by way of mitigation of sentence. *Gross* explains:

> "In the first place there are sometimes larger considerations of justice whose influence makes itself felt. In fairness to him, what a man has done that redounds to his credit ought sometimes to be admitted to counterbalance the crime that now redounds to his discredit.
>
> The acts of a good citizen and even a virtuous human being often have a proper place and count in his favour in deciding on his sentence. Still, not every kind of creditable activity is properly taken into consideration, and we find it difficult to decide where to draw the line.
>
> Apart from justice, there is mercy. If justice is without rigor, justice is undone; and yet the harshness often accompanying rigorous justice may be tempered without causing justice to be undone. But merciful

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78 Ashworth, *Sentencing and Penal Policy*, (1983) p297.
79 *A Theory of Criminal Justice*, (1979), pp448-449.

dispensation is not available on the easiest terms. Mercy is always given without there being a claim of right to it, and so it is exceedingly difficult to distinguish the compassion of common decency that ought to influence a sentence from the tender regard that is a precious human sentiment but has no place in the deliberations of a sentencing judge.

Sometimes compassion is not a matter of mercy but a matter of right. When suffering would be cruel, the sentence must be mitigated to prevent that. When compassion founds a claim of right, the issue, again, is a difficult one, since it is not easy to mark the point where cruelty ends and humane suffering begins.

Finally, there are reasons of expediency that seem to warrant mitigation. We wish to encourage those apprehended to co-operate in bringing others to justice, and so we reward their co-operation with lighter sentences than they would otherwise receive. But mere expediency cannot alone establish that a concession is right, and we are constantly reminded by bargains made only for administrative convenience that there are difficult questions to be answered in deciding just what kinds of sentencing bargains are proper."[80]

5.76 It is no easy matter to decide what should count as a good reason for allowing mitigation of sentence once we go beyond the relatively certain considerations of culpability and harm of the offence. However, since mitigation of sentence operates as an exception to the general principle of proportionality it is possible to consider what conditions may *exclude* a factor from justifiably mitigating sentence. *Gross,* again. remarks:

"Because standards are uncertain, good reasons turn out to be problematic and considerations that ought not be admitted at all often influence the sentencing judge toward a more lenient sentence. Two general exclusionary conditions for mitigating considerations provide a foundation for suitable sentencing standards.

In the first place it is important to decide whether a proposed mitigating consideration would impair the utility of the sentence. Would what seems a good reason for reducing the sentence, if given weight, allow the guilty man in some measure to get away with his crime? If so, it is not really a good reason since the lighter sentence is then futile as a measure in support of law. But in fact sentences that promote the evils of impunity are now common place in American courts, for it is usual to give lighter sentences to those who plead guilty only because they then relieve the court and the prosecutor of the burden of a trial. It is the very essence of a fair bargain between prosecutor and the accused that the accused gets away in some measure with his crime ...

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80 *Ibid*, pp451-452.

> Besides impairing the utility of punishment, leniency might be inequitable. When that is the case, whatever consideration it is that has dictated leniency cannot be a good reason for reducing the sentence. Inequitable disparity results when there is special treatment for some that cannot be justified by principles that apply to all, and since everyone is entitled to equal standing before the law, such treatment cannot be tolerated ..."[81]

5.77 Bearing these exclusionary conditions in mind, we will now examine some of the factors which are widely accepted as mitigating the severity of the sentence to be imposed on an offender. The aim of this examination is to determine which factors could appear in a list as a general guiding framework of the factors and considerations which ought to allow derogation from the principle of proportionality of sentence severity to seriousness of offending conduct. The factors discussed are drawn from the sources referred to in the discussion on aggravation and mitigation of seriousness *supra*.[82]

5.78 The following are widely accepted as factors which mitigate sentence:

- The offender has pleaded guilty to the offence charged;
- The offender has assisted in the investigation of the offence or of other offences;
- The offender has shown remorse for the offending conduct, or has denounced his or her conduct;
- The sentence would result in damage to the offender's future employment or career;
- The sentence would result in financial or emotional damage to the offender's dependents;
- The offender has attempted to remedy the harmful consequences of the offence;
- The offender has suffered severe personal injury in consequence of the offence;
- The offender, through age or ill health, would be occasioned unreasonable hardship by a sentence imposed in proportion to the seriousness of the offence;
- Delay or other grievances in bringing the matter to trial;

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81 *Ibid*, pp453-454.

82 Para 5.29 *et seq*, *supra*. (Constructing the List).

Let us examine each of these in more detail.

The offender has pleaded guilty[83]

5.79 The fact that an offender pleads guilty has no bearing on the circumstances of the offence or the offender's personal characteristics. Making allowance for a discount for a plea of guilty is a purely practical concern based on the need to discourage court delays. This has the advantage of:[84]

(a) encouraging shorter trials;

(b) lightening the courts' workload thus relieving delays and backlogs;

(c) saving the cost of legal aid, other expenses, and the inconvenience of trial; and

(d) saving victims and witnesses from the trauma involved in giving evidence at trial.

5.80 By allowing the offender a discount for pleading guilty, the sentencing court can also "compensate" or give the offender some recognition for the fact that he or she has foregone the right to trial on a presumption of innocence.[85]

5.81 In Ireland, a guilty plea is almost always taken into account as a factor reducing sentence.[86]

5.82 See further *The People (DPP) v Moloney,*[87] *The People (DPP) v Johnston,*[88] and *The People (DPP) v Maguire and McDonagh,*[89] where a plea of guilty merited a 6 year reduction in a 20 year sentence of imprisonment for manslaughter.

5.83 On the other hand, allowing a discount for a plea of guilty can be criticised as taking an "easy way out" of the search for other ways of tackling the problems of delay and backlog in the courts. Also, some fear that it may increase the risk that innocent persons will plead guilty.[90] Some consider that an offender who chooses not to plead guilty and is convicted is, in effect, *penalised* because he has not availed of the opportunity to gain the discount.

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83 Appears expressly in the Australian and Victorian proposals.

84 See the Report of the Australian Law Reform Commission, *Sentencing*, (1988), p93.

85 In *Tiernan, supra*, the Chief Justice referred to the fact that the offender had pleaded guilty in "circumstances where it was possible to infer that he might have had some chance of escaping conviction for want of identification on trial": [1988] IR 250, 256.

86 In *The People (DPP) v Tiernan* [1988] IR 250 the Supreme Court agreed that a plea of guilty "is a relevant factor to be considered in the imposition of sentence and may constitute, to a greater or lesser extent, in any form of offence, a mitigating circumstance"; *per* Finlay CJ, *Ibid*, p255. The English Court of Appeal, too, agrees, that some discount should be allowed for a plea of guilty: see *R v Meade* (1982) 4 Cr App R (S) 193; *R v Skilton and Blackburn* (1982) 4 Cr App R (S) 339; *R v Williams* [1991] Crim LR 150

87 3 Frewen 267.

88 3 Frewen 276.

89 3 Frewen 265.

90 See the Australian Law Reform Commission, *op cit*, p93.

This perception led three members of the Australian Law Reform Commission to dissent on the view that a plea of guilty should merit a discount[91] - however the majority was of the view that the benefits of the discount outweigh its disadvantages and thus the discount should be allowed, provided it was stressed that the courts must *not* take failure to plead guilty as a factor which *aggravates* the sentence for a convicted offender.[92] We, too, would enter the *caveat* that the fact that an offender has pleaded not guilty to a charge and has thereafter been found guilty should not justify the imposition of a sentence more severe than the seriousness of the offending behaviour would warrant.[93] With this in mind, we believe that, on the whole, there are good grounds for making an allowance for a discount in sentence when the offender has pleaded guilty.

The offender has assisted in the investigation of the offence or of other offences[94]

5.84 This was recognised as a factor in mitigation of sentence by the CCA in *The People (DPP) v Moloney*.[95] The Court observed, however, that failure to assist in investigations could not in any circumstances amount to an aggravating factor.

5.85 Again, the concern here is that assisting in the investigation by either turning oneself in or by assisting in the investigations of other offences, should help expedite the course of justice. An added advantage is the fact that witnesses and, in particular, victims, may be spared the trauma of a long wait before the matter comes before the courts. Also, as the Australian Law Reform Commission pointed out,[96] allowing a discount in sentence for assistance in investigation may also give recognition to the offender for the fact that he or she may have put himself or herself in difficult circumstances and may face the threat of violence and hostility from other offenders -especially while in prison.

5.86 A serious danger which should not be overlooked is the danger that assisting information may be *recycled*, i.e. used at the initial stages to secure a lesser charge and again before sentence to secure a further discount. This

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91 The President, Commissioner Greenwell and Commissioner Zdenkowski.

92 *Ibid*, p96.

93 This point has been made time and again by the English Court of Appeal: see *R v Spinks* (1980) 2 Cr App R (S) 335; *R v Scott* (1983) 5 Cr App R (S) 90; *R v Evans* (1986) 8 Cr App R (S) 197; *R v Hercules* (1987) 9 Cr App R (S) 291.

94 Features as a factor which mitigates sentence in the Victorian and Australian proposals. Some of the member states of the Council of Europe recognise a similar factor described as "disclosing the offence". In *The People (DPP) v Tiernan* [1988] IR 250 Finlay CJ had no doubt that "an admission of guilt made at an early stage of the investigation of the crime ... can be a significant mitigating factor". See also *The People (DPP) v Johnston* 3 Frewen 276. In *In Re Kevin O'Kelly* 1 Frewen 366 WalshJ said that the court should have regard to the fact that Mr O'Kelly has been "as helpful as he could" to the Court. See also *R v Wright*, unreported, October 18 1974, *Current Sentencing Practice* C8.2(c); *R v Lowe* (1977) 66 Cr App R 122; *R v Davies and Gorman* (1978) 66 Cr App R 319; *R v Rose and Sapiano* (1980) 2 Cr App R (S) 239; *R v Sinfield* (1981) 2 Cr App R (S) 258; *R v Thomas* (1985) 7 Cr App R (S) 95; *R v King* (1985) 7 Cr App R (S) 227; *R v Preston and McAleny* (1987) 9 Cr App R (S) 155; and *R v Wood* (1987) Cr App R (S) 238 in which the English Court of Appeal has consistently held that a discount should be allowed where the offender has assisted in the investigation of other offences - particularly where the other offences are grave.

95 3 Frewen 267.

96 See ALRC 44, p94.

danger would be removed by the implementation of this Paper's proposals regarding plea negotiations.[97]

The offender has shown remorse for the offending conduct, or has denounced his or her conduct[98]

5.87 It is difficult to justify allowance for a discount in sentence simply because the offender shows remorse or denounces his or her offending conduct, especially if the offender has done nothing else to show remorse other than to simply express remorse. An inherent difficulty with this factor is that an expression of remorse *per se* is very difficult to prove or disprove whilst at the same time being very easy to make.

5.88 The traditional justification for allowing a discount for an expression of remorse - ie. that it indicates a likelihood of successful re-integration into society - does not hold any water in a "just deserts" system. This, in addition to the difficulties in establishing whether the offender's remorse is genuine, leads us to conclude that remorse should not *per se* merit a discount in sentence.

5.89 On the other hand, if remorse is expressed by means of a guilty plea, or by disclosure of the offence to the investigatory authorities, accompanied by an admission of complicity, or by making voluntary attempts to redress the wrong, it at once becomes both credible *and* beneficial. In these circumstances we feel that remorse is something which should be taken into account in determining the amount or size of the discount for the plea, disclosure, or attempt at redress, rather than as a mitigating factor *per se.*

The offender has attempted to remedy the harmful consequences of the offence[99]

5.90 There is growing public concern that the criminal justice system should, as far as possible, ensure that the victims of crime are adequately compensated for the loss or damage they have suffered as a result of crime. Earlier in this paper we recommended that a sentencer, when choosing between two or more sanctions of equal severity, should take redress or compensation of the victim into account.[100] Under this heading we examine whether there is any satisfactory justification for allowing a discount in sentence when the offender has attempted to compensate the victim.

5.91 To begin with, it is accepted by most that compensation or redress of the

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97 See Ch 12, *infra.* (Plea Discussions and Agreements).

98 Features as a mitigating factor in the Victorian and Australian proposals, and was mentioned by Finlay CJ in *The People (DPP) v Tieman* [1988] IR 250. See *R v Norman* unreported, 15 May 1975; *Current Sentencing Practice*, C8.2(a), where the English Court of Appeal allowed a discount for remorse shown *over and above the discount for a guilty plea.*

99 Features in the Finnish, Swedish, Canadian and Victorian proposals and reforms. See also *R v Crosby and Hayes* (1974) 60 Cr App R 234; *R v Stapleton and Lawrie* unreported, February 4, 1977; *Current Sentencing Practice* C6.2(b).

100 See para 4.110, *supra.* (Provisional Recommendations).

victim should be encouraged whenever possible.[101] The main justification for allowing a discount in sentence is, therefore, that it would appear to be a good means of encouraging offenders to make redress.

5.92 One of the major difficulties which has to be surmounted, however, stems from the fact that it may be far easier for some offenders to make redress or compensation than others, and, thus, it may be far easier for some offenders to 'buy' a discount in sentence than for others. If a discount is allowed then it will put wealthy offenders in a better position to escape full punishment than others, and the end result will be disparity in the way offenders are sentenced.

5.93 A solution to the problem of disparity, which appears to have gained some recognition in England, is to ignore the amount or size of the compensation when determining the size or amount of the discount. In *R v Stapleton and Lawrie*,[102] for instance, the appellants offered to pay as much compensation as they could while a co-defendant, of substantially the same complicity in the offences, offered to pay a much greater amount, £3,500, without any great difficulty. At first instance the appellants were sentenced to 30 months' imprisonment while the co-defendant was sentenced to 15 months' on the basis that he had offered to pay a large sum of compensation. The Court of Appeal rejected this basis, saying:

> "In any event, we would have thought it was right that all these accused should be dealt with equally. When one looks at the sentences actually imposed and looks at the compensation point and the very infelicitous way in which it was expressed in sentencing the accused, it is clear that the difference in sentences actually passed cannot stand".

5.94 The Court of Appeal accordingly reduced the appellants' sentences to 15 months' imprisonment.

5.95 A factor which seems to be of some importance in the English system is the *felicitousness* of the attempt or offer of compensation or redress.

5.96 There may, thus, be some merit in allowing a greater discount to an offender who, although of little or no income, goes to great lengths within his or her means to effect compensation or redress; but, this would mean that a wealthy offender would have less opportunity to earn such a discount.

5.97 Undoubtedly, therefore, allowing a discount for attempts at compensation or redress would provide many problems for the courts in deciding the *weight* to attach to that factor in mitigation of sentence. We are satisfied, however, that provided the courts are wary of the danger of disparity in the sentencing of offenders there would be some merit in allowing a discount in sentence for attempts by the offender to redress the harmful consequences of the

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101 See the Report of the Whitaker *Committee of Inquiry into the Penal System*, (PI 3391, 1985) pp47,48.
102 *Supra.*

offence.

The sentence would result in damage to the offender's future employment or career.[103]

The offender has suffered severe personal injury in consequence of the offence.[104]

The offender, through age or ill health, would be occasioned unreasonable hardship by a sentence imposed in proportion to the seriousness of the offence.[105]

Delay or other grievances in bringing the matter to trial.[106]

5.98 These four factors are similar in nature and may well be dealt with together.

5.99 The primary justification for allowing a discount in sentence where any of these factors exists is *equality of impact.* The principle of equal impact is based on the argument that while it is just to impose the same sentence on two equally culpable offenders for two equally grave offences, it is unjust to do so if the two offenders have such differing 'sensibilities' in that the sentence would have a significantly different effect on each of them.[107] *Bentham* explained the principle thus:

> "Rule 6. It is further to be observed, that owing to the different manners and degrees in which persons under different circumstances are affected by the same exciting cause, a punishment which is the same in name will not always either really produce, or even so much as appear to others to produce, in two different persons the same degree of pain: therefore
>
> That the quantity actually inflicted on each individual offender may correspond to the quantity intended for similar offenders in general, the several circumstances influencing sensibility ought always to be taken into account."[108]

5.100 The principle has received the greatest attention in relation to monetary penalties - The *District Court Rules, 1948,* for example, require sentencers imposing fines in the District Court to take the *means* of the offender into

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103 Appears in the Victorian and Australian proposals.
104 Appears in the Swedish reforms.
105 Appears in the Swedish, Victorian and Australian proposals and reforms, and is mentioned as a factor which is recognised by some states of the Council of Europe.
106 Features in the Swedish and Australian reforms and proposals.
107 Ashworth, *Sentencing and Penal Policy,* (1983), p277.
108 *Principles of Morals and Legislation* (Hart and Burns, eds, 1970) Ch XIV, para 14, cited by Ashworth, *op cit,* p277.

account when determining the size of the fine.[109] But the principle may also have more widespread application - thus a sentencer may reduce a sentence of imprisonment for an offender whose life expectancy is short.[110] Similarly, in *The People (DPP) v O'Leary*[111] a 30-year old soldier was given a 3-year suspended sentence for having unlawful carnal knowledge of an 11-year-old girl. In sentencing the soldier the court referred to the fact that the accussed had an excellent employment record but would lose his job if he received a prior sentence, and in *The People (DPP) v O'Sullivan*[112] the accused was given a suspended sentence on the basis that he suffered from a very severe muscular wasting disease which caused him great pain and discomfort most of the time.

5.101 However, there are many reasons why the principle of equal impact should *not* be given a role in *every* case. For one thing, it may be objected to on the grounds that it "enjoins the impossible"[113] since the sentencer "can take this into account only in the crudest of ways: for instance, by reducing a poor man's fine or an old man's prison term. He is in the position of having to adjust something he cannot measure".[114] Secondly, the effect of the principle upon sentencing practice may be misunderstood by the public and other offenders.[115] Thirdly, is the fundamental objection to the principle of equal impact-that offenders ought to have been aware of the consequences of conviction and sentence when they committed their offences. In other words, the offender ought to think about the extra consequences when committing the offence. Finally, over-reliance on the principle of equal impact may lead to injustice. *Von Hirsch* argues that in an attempt to produce equality of impact a court might place a middle-class offender on probation and send an offender from the ghetto to prison, even though the cases are otherwise comparable:

> "More drastic measures thus come to be imposed chiefly on those of lower status who are deemed to have 'less to lose' - but only because they have lost so much already through their deprived social situation."[116]

5.102 Mercy may, nevertheless, require that some recognition should be given to the principle of equal impact where to do otherwise would lead to grave injustice. We shall now examine the four circumstances outlined *supra* to see if they present good grounds for invoking the principle of equal impact.

5.103 Where an offender's employment or career appears to be in jeopardy because of a sentence, making allowance for a discount in sentence to

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109 Rule 65(1)(a); see para 1.100 *et seq*, *supra*. (Fines). See also this Commission's (Report) on *The Indexation of Fines*, (LRC 37-1991).

110 See *R v Wilkinson* unreported, November 14, 1974; *Current Sentencing Practice* C2.2(b); where the English Court of Appeal remarked that 'no court willingly sentences a man of 60 to spend a large part of the remainder of his life in prison'.

111 Irish Times, 12 January 1990; See O'Malley, *Principle of Sentencing* (1991) 12 ILT 138, p153.

112 Irish Times, 15 May 1990; and O'Malley *supra*.

113 Ashworth, *op cit*, p278.

114 Walker, *Punishment, Danger and Stigma*, (1980) p81, cited by Ashworth, *supra*.

115 Ashworth, *op cit*, p278.

116 *Doing Justice*, (1976), p90.

compensate for the additional deprivation suffered in the loss of job would seem to make good sense.[117] However, making such allowance is apt to create grave injustice where an offender who has "less to lose" (i.e. is unemployed) suffers greater deprivation because he does not have a job. In fact the English Court of Appeal would maintain that those who hold high positions are expected to maintain higher standards, so that their punishment should certainly be no less.[118] Allowance for a discount in sentence when the offender's job is in jeopardy leads to the introduction of social inequality into sentencing. We would have grave reservations about making such an allowance.

5.104 Where the offender suffers severe personal injury in consequence of the offence, or, say, where a bank-robber is shot and seriously injured during the course of the offence, it is questionable whether his sentence should be reduced to take the additional suffering consequent upon the offence into account. Ordinarily, where the offender suffers extra consequences, there should not be any mitigation of sentence since the offender should have thought about them beforehand. However, where the consequences are *severe*, as, say, where the offender's hand is severed in the affray in which he or she participated,[119] there may be good grounds for a reduction in sentence. Again, we would have grave reservations about allowing such a discount in any but the most exceptional circumstances.

5.105 Where an offender, through age or ill-health, would be occasioned unreasonable hardship by a sentence imposed in proportion to the offence, it may be right to allow some reduction in sentence. For example, a term of imprisonment may have a much worse effect on an elderly offender suffering from Parkinson's disease than on a younger offender in good health. In *R v Varden*[120] the English Court of Appeal upheld a reduction in sentence on a seventy-one year old offender of low intelligence because his advanced age would probably make a term of imprisonment more unpleasant for him.[121] Similarly, the youth of an offender may also be treated as a reason for mitigation. As *Walker* has pointed out, "to spend part of one's youth in prison is worse than spending part of one's middle age there."[122]

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117 Indeed, in *Cox v Ireland* unreported, Supreme Court, 11 July 1991, section 34 of the *Offence Against the State Act, 1939*, which provided for the forfeiture of employment and other benefits in the public sector by a person convicted in Special Criminal Court was found to be unconstitutional. The Supreme Court's decision is predicated upon the principle that the loss of such benefits was an 'additional hardship' which persons not employed in the public sector did not have to endure upon conviction in the special criminal court.

118 Ashworth, *op cit*, p281; but *cf R v Richards* (1980) 2 Cr App R (S) 119, and *R v Rees and Moss* (1982) 4 Cr App R (S) 71.

119 This happened in *R v Barbery* (1975) 62 Cr App R 248. The Court of Appeal reduced the sentence. In *R v Rimmer* unreported, August 13, 1975, the appellant was convicted of causing death by dangerous driving. He suffered severe injuries himself which required him to spend six months in hospital. The Court of Appeal reduced the sentence but '[n]ot without a good deal of hesitation'. Notably, in *The People (DPP) v Creighton* Irish Times, 21 February 1991, the court reduced an eleven year sentence for rape and buggery of a teenage girl to one of eight years on the grounds that he accused had been subject to a severe attack from the victim's relatives after the offence.

120 [1981] Crim LR 272.

121 See O'Malley, *Principles of Sentencing*, p154, who discusses the case of *Power*, Irish Times, 14 December 1990. Power, a 39 year old man, was released from prison after only 3 weeks and his sentence suspended thereafter two psychiatrists certified him to be a 'classic claustrophobic.' See also *R v Jones* (1980) 2 App R (S) 134.

122 *Punishment, Danger and Stigma*, (1980) p123, cited by Ashworth, *supra*.

5.106 Similar concerns apply when the offender suffers from a physical disability.[123]

5.107 It must be stressed once again that allowance for such factors should be the exception rather than the rule. Ordinarily the offender's individual reaction to the sentence is not something which should affect its severity.

5.108 Finally, it remains to be asked whether delay or other grievances in bringing the matter to trial should count as factors which mitigate sentence. The question here is whether such delay or grievance can be viewed as, in itself, punishment. If one considers that sentencers commonly order custodial sentences to run from the date on which the offender was first kept on remand in custody pending trial and sentence,[124] then such an allowance might appear to be justifiable on similar grounds - however, if the delay or grievance led to an extra period of detention on remand in custody and that period is taken to form part of the sentence, then there is no reason why any further reduction should be allowed by way of mitigation. Furthermore, if the delay resulted in the offender being at liberty for an extra period of time then he will have *benefited* rather than suffered, so there is no reason why a reduction in sentence should be allowed in these circumstances either. On the whole, therefore, we see no reason why delay or grievances in bringing the matter to trial should merit a discount in sentence except in the most extraordinary of circumstances, say, where an offender is remanded in custody for a considerable length of time pending sentence but receives only a fine as sentence.

5.109 We conclude that the invocation of the principle of equal impact out of merciful considerations should only be allowed in the most exceptional circumstances, and where possible should be avoided unless the sentence proportionate to the seriousness of the offence would result in manifest hardship or injustice. We contemplate that in many cases hardship and injustice may be avoided by imposing a *type* of sentence which would be less likely to inflame the offender's sensibilities - provided the sentence chosen is still proportionate to the seriousness of the offending behaviour. For example, where an offence is in the lower range of equivalent sentence types, hardship on an offender who is in bad-health may be avoided by imposing a fine rather than a short custodial sentence.

5.110 It is, thus, only where hardship or injustice cannot be avoided by choosing an agreeable sentencing option that the principle of equal impact should be given scope.

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123 See *R v Herasymenko*, unreported, 12 December, 1975; *Current Sentencing Practice* C5.2(b).

124 See para 1.148 *et seq*, *supra*. (Commencement of Sentence).

The sentence would result in financial or emotional damage to the offender's dependents[125]

5.111 This factor is not so much an example of the principle of equal impact as an extension of the principle. Here it is not the offender's "sensibilities" but those of his or her family which are being relied upon.

5.112 Thus, in *Coughlan*[126] a woman who pleaded guilty to the manslaughter of her husband who had brutally assaulted her while she was in labour received a 5-year suspended sentence of penal servitude. Butler J highlighted the constitutional aspect of the case:

> "in considering what penalty to impose, I must remember that she is the surviving parent, and the Constitution confer rights on the family and rights on the children."

In one respect, therefore, it can be said that the constitution required steps to be taken, including the mitigation of sentence, in situations where the constitutional rights of the offenders family would be jeopardised by a sentence. This argument is not seen explored fully by the courts to date.[127]

5.113 One objection to this factor is that the offender ought to have thought about the consequences before committing the offence.[128] The English Court of Appeal has generally taken this approach,[129] and the objection is compelling in the sentencing of all but impulsive offenders. On at least one occasion, however, the Irish courts have had regard to "family support" and "being a good family provider" as elements in the sentencing decision.[130] We would have serious reservations about allowing such a discount in sentence in all but the most exceptional cases, as where the sentence would deprive the offender's children of all parental care.[131] Furthermore, the introduction of the role of the offender as a good family provider might be thought to discriminate against poorer offenders. Again, hardship may be avoided in cases at the lower end of offence seriousness by the imposition of non-custodial sentencing alternatives.

"Moral" accounting

5.114 A principle which appears to have gained some recognition among English sentencers, although it is unclear whether it is followed here, is that of allowing

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125 Features expressly in the Victorian and Australian proposals, and is mentioned as a factor which is recognised as one which may mitigate sentence in some of the member states of the Council of Europe.

126 Irish Times, 30 May 1979; see O'Malley, *supra*, n.111, p157.

127 In *Dunne* Irish Times 29 October 1988, cited by *O'Malley supra*, this aspect was ignored by the court even though both parents were being imprisoned for 14 years leaving a 17-year old child to look after a 9-year old child on social welfare payments of £42.90 a week.

128 However, if we are looking at this issue from the point of view of the offender's family who cannot be faulted for his or her lack of consideration - this argument is less than compelling.

129 See Ashworth, *op cit*, p279. *R v Ingham*, unreported, October 3, 1974; *Current Sentencing Practice*, C4.2(a).

130 See the Report of a sentence direction by Carney J in 'Judge Criticised Press Report incest case', Irish Times, 14 July 1992.

131 *R v Franklyn* (1981) 3 Cr App R (S) 65; *R v Vaughan* (1982) 4 Cr App R (S) 83; *R v Parkinson*, unreported, November 4, 1976; *Current Sentencing Practice* C4.2(d).

an offender a discount in sentence in recognition of some outstanding good deed done by him or her in the past. Where the court states that it is reducing the sentence which it would otherwise have passed, so as to take account of, say, the fact that the offender has saved a child from drowning, it may be seen as somehow "settling the offender's 'moral' account" - in other words, the offender may not have exhausted all possible credit for the past good deed.[132]

5.115 Any element of "moral" accounting would be anathema to the "just deserts" principle of proportionality between offence and sentence and opens up considerable scope for bias to enter into sentencing. The principle cannot easily be justified in terms of the offender's "moral" standing; *Walker* quips that he has not come across a case "in which a judge *increased* a man's sentence because he had evaded conscription, let a swimmer drown, or refused his sister a kidney."[133] There is also the question of where to draw the line: when does a good deed fall below the level at which a discount may be gained in sentence?

5.116 On the other hand society might lose respect for a sentencing system which failed to take account of spectacular social acts.[134] There is no ready means of determining whether this is so. We have strong reservations about making allowances for past good deeds when it comes to sentencing - after all, it may be said that the function of sentencing is not to give recognition for past good deeds but rather to impose punishment for present bad ones. We would welcome views on the matter.

Conclusions and Provisional Recommendations

5.117 We conclude that there is some need for a statutory provision which would emphasise the importance of the distinction between factors which aggravate or mitigate the *offence* (which would be considered in all cases) and factors which mitigate *sentence* (which should also be considered in all cases, but should only be allowed when necessary). There is also a need for some kind of framework which would guide sentencers as to the matters relevant to the aggravation and mitigation of offence seriousness and to the mitigation of sentence so that the courts may develop such principles in a consistent and coherent manner, and which would promote consistency of approach by sentencers in the sentencing of offenders.

5.118 We envisage that such a framework would be best effected by means of a list of examples of the most common factors which affect offence and sentence. The list should be non-exclusive and should allow sentencers to develop and rely on other factors, so long as such other factors are consistent with the policies and principles of sentencing proposed in this Paper. *We would invite views as to*

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132 Ashworth, *Sentencing and Penal Policy*, p306. See the cases of *R v Keightley*, unreported, December 20, 1971;*Current Sentencing Practice* C2.2(h), (the offender saved a child from drowning); *R v Playfair*, unreported, March 10, 1972, *Ibid*, (the offender saved a police officer from certain death); and *R v Reid* (1982) 4 Cr App R (S) (the offender attempted to rescue three children from a burning house).

133 *Op cit*, p125

134 *Ibid.*

whether there is a danger that the provision of such a list would oblige the courts to have regard to the language of the list and would result in too literal an approach.[135]

5.119 *We provisionally recommend the introduction of a statutory provision governing sentencing which would highlight the following concerns:*

> *In assessing the harm, culpability and circumstances which tend to aggravate the offence, the sentencer shall give special consideration to:*
>
> *1. Whether the offence was planned or premeditated;*
>
> *2. Whether the offender committed the offence as a member of a group organised for crime;*
>
> *3. Whether the offence formed part of a campaign of offences;*
>
> *4. Whether the offender exploited the position of a weak or defenceless victim or exploited the knowledge that the victim's access to justice might have been impeded;*
>
> *5. Whether the offender exploited a position of confidence or trust, including offences committed by law enforcement officers;*
>
> *6. Whether the offender threatened to use or actually used violence, or used, threatened to use, or carried, a weapon;*
>
> *7. Whether the offender caused, threatened to cause, or risked the death or serious injury of another person, or used or threatened to use excessive cruelty;*
>
> *8. Whether the offender caused or risked substantial economic loss to the victim of the offence;*
>
> *9. Whether the offence was committed for pleasure or excitement;*

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135 Two members of the Australian Law Reform Commission did not agree that a list of factors of this kind should be prescribed by legislation. While agreeing that, in particular cases, some or all of the matters mentioned may be relevant, and that a more structured and consistent approach to sentencing is needed, they were of the view that such a statutorily prescribed list may be the least satisfactory way of achieving the desired approach. If its directory character was emphasised, it would provide very little assistance. If, on the other hand, the courts sought to give substance to the list, they would be obliged to have regard to the language of the legislation. This could lead to a very literal approach:

> "What is needed here is the development of principle, not an exercise in statutory interpretation. This report recommends that a statement of reasons for sentence should be given. If the proposal is implemented, the development of consistent sentencing principles may be better achieved through the processes of the common law".

This report, too, recommends that a statement of reasons for sentence should be given: see Ch 13, *Infra* (Reasons).

10. *Whether the offender played a leading role in the commission of the offence, or induced others to participate in the commission of the offence;*

11. *Whether the offence was committed on a law enforcement officer;*

12. *Any other circumstances which:*

    (a) *increase the harm caused or risked by the offender, or which*

    (b) *increase the culpability of the offender for the offence.*

5.120 In assessing the harm, culpability and circumstances which tend to mitigate the offence, the sentencer shall give special consideration to:

1. *Whether the offence was committed under circumstances of duress not amounting to a defence to criminal liability;*

2. *Whether the offender was provoked;*

3. *Whether the offence was committed on impulse, or the offender showed no sustained motivation to break the law;*

4. *Whether the offender, through age or ill-health or otherwise, was of reduced mental capacity when committing the offence;*

5. *Whether the offence was occasioned as a result of strong temptation;*

6. *Whether the offender was motivated by strong compassion or human sympathy;*

7. *Whether the offender played only a minor role in the commission of the offence;*

8. *Whether no serious injury resulted nor was intended;*

9. *Whether the offender made voluntary attempts to prevent the effects of the offence;*

10. *Whether there exist excusing circumstances which, although not amounting to a defence to criminal liability, tend to extenuate the offender's culpability, such as ignorance of the law, mistake of fact, or necessity.*

11. *Any other circumstances which:*

(a) reduce the harm caused or risked by the offender, or

(b) reduce the culpability of the offender for the offence.

5.121 Having arrived at a sentence which is proportionate in severity to the seriousness of the offence, the sentencer should give reasonable consideration to whether there are any special reasons, by way of exception to the general principle of proportionality between offence and sentence, why a sentence of lesser severity should be imposed, such as where:

1. *The offender has pleaded guilty to the offence;*

2. *The offender has assisted in the investigation of the offence or in the investigation of other offences;*

3. *The offender has attempted to remedy the harmful consequences of the offence;*

4. *The sentence, whether by reason of severe personal injury suffered by the offender in consequence of the offence, age, ill-health, or otherwise, would result in manifest hardship or injustice to the offender or his or her dependents.*

5.122 *We would welcome views on the matter of whether the sentencer should be empowered to allow some reduction in sentence for the fact that the offender has done some spectacular good deed in the past.*

5.123 We provisionally recommend that the statutory lists of aggravating and mitigating factors be reviewed by the legislature from time to time in order to take new developments into account and that any alterations or amendments be made in consultation with the proposed Judicial Studies board in order to ensure that they do not undermine or conflict with sentencing policy.

CHAPTER 6: PRIOR CRIMINAL RECORD

6.1 We have singled out the issue of prior criminal record for special attention because of the prominent position it occupies in the sentencing decision.[1] It has historically been a feature of judicial sentencing practice, and certainly there is an instinctive tendency to attribute some significance to past record in sentencing. However, while its appeal as a predictive factor is considerable,[2] it is not immediately obvious how it can be of any relevance in the assessment of the deserts of an offender in proportion to the seriousness of the instant offence. *Fletcher*[3] and *Singer*[4] have both argued that prior criminal record is of no relevance in the "just deserts" sentencing decision since its inclusion must in fact be "covertly preventive,"[5] and preventive considerations are not germane to an offender's deserts.

Aggravation of Seriousness

6.2 Nevertheless, certain elements of prior criminal record may be considered germane to the "just deserts" principle. The Irish Supreme Court appears to envisage reliance on it in a manner wholly in keeping with "just deserts".[6] The existence of a prior criminal record *may* be seen as a factor which can be regarded as aggravating the seriousness of the offence by increasing the culpability of the offender. If this is the case, then the seriousness of the

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1 There are numerous assertions to this effect in the texts on sentencing; for examples see Wasik, *Guidance, Guidelines and Criminal Record* in *Sentencing Reform*, Pease and Wasik (eds), (1986), pp105-106.

2 The US Federal Sentencing Commission attributed great significance to criminal history in this respect in reliance on a number of authorities; eg. Moore, *Purblind Justice: Normative Issues in the use of Prediction in the Criminal Justice System* and *Career Criminals* (1986) 314; Menahan, '*The Case for Prediction in the Modified Desert Model of Criminal Sentencing*' 5 Int'l JL & Psychiatry 103 (1982). However Wasik, *supra*, casts considerable doubts on the efficacy of past record as a predictive tool.

3 *Rethinking Criminal Law*, (1978).

4 *Just Deserts: Sentencing Based on Equality and Desert*, (1979).

5 The phrase is Wasik's, *op cit*, p 117.

6 See *The People (DPP) v Tiernan*, [1988] IR 250, below.

offence is increased, and so too must be the sentence in proportion to it. *Von Hirsch* explains:[7]

> "The reason for treating the first offense as less serious is...that repetition alters the degree of culpability that may be ascribed to the offender. In assessing a first offender's culpability, it ought to be borne in mind that he was, at the time he committed the crime, only one of a large audience to whom the law impersonally addressed its prohibitions. His first conviction, however, should call dramatically and personally to his attention that the behaviour is condemned. A repetition of the offense following that conviction may be regarded as more culpable, since he persisted in the behaviour after having been forcefully censured for it through his prior punishment."

6.3 If prior criminal record is to increase the culpability of the offender because he or she has persisted in ignoring the prohibitions of the law, then it should be observed that only a limited number of factors of prior record emerge as being of relevance.

6.4 To begin with, the prior offence(s) must be *similar in nature* to the offence in question before they can have any bearing on the culpability of the offender: for example, it cannot be forcefully argued that a prior conviction for a motoring offence "dramatically and personally" calls to the attention of the offender that crimes of violence are condemned by the criminal law.[8] This much was recognised by Finlay CJ in *The People (DPP) v Tiernan* where the offender had four previous convictions: for assault occasioning actual bodily harm; for aggravated burglary associated with a wounding; for gross indecency; and for burglary. Of these, the ones which the Supreme Court considered as aggravating the culpability of the offender for a violent rape were those which involved violence and the crime involving indecency.[9]

6.5 Secondly, the *staleness* of the previous convictions should be taken into consideration. As the time between the past and current offences increases, the culpability of the offender decreases. The more distant the conviction the less plausible it is to claim that it dramatically and personally calls to the offender's attention the fact that the current offence is condemned by the criminal law. Similarly, the *age* of the offender at the time of commission of the previous offences should also be of relevance since an offence committed when a minor casts less light on the present character of the offender.

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7 *Doing Justice*, (1976), p85

8 A Home Office circular of 1973 made a similar point:

> "When the previous offence is for a traffic infringement, previous convictions of offences outside the traffic field will not usually be relevant. More generally, previous offences of a class different from the current offence may be able to be ignored (eg. in the case of theft, no reference may be necessary to a previous conviction of a sexual offence)."

Home Office Circular 17/1973.

9 *Ibid.* See also para 1.84, *et seq*, *supra*. (The Choice of Penalty).

6.6 Thirdly, the *seriousness* of the prior offence may have some bearing on the culpability of the offencder for the current offence, as *von Hirsch* explains:[10]

> ".. the quality of the record should count. Someone convicted of his first serious crime would be entitled to plead that such gravely reprehensible conduct has been uncharacteristic of him, and hence he deserves to have the penalty scaled down - even where he has a record of lesser infractions."

In other words, the prior conviction should drive home to the offender that crimes of a serious nature are condemned by the criminal law - thus he or she should have known better than to engage in further serious crime - hence he or she may be viewed as more culpable.

6.7 *Number* may also be of some relevance. Intuitively, one could claim that the greater the number of prior convictions the more the offender should have known not to engage in criminal conduct. The offender with the greater number of *relevant* prior convictions may thus be viewed as more culpable.

6.8 In this manner, prior offences may be seen as being germane to a "just deserts" based approach. *Von Hirsch* points out that, conceptually, this system may have one shortcoming: The offender, although it is a first offence, may already have been warned by others as to the prohibitions of the law, and consequently may be as culpable as another offender who has a prior record.[11] For example, a police officer who commits a crime should be considered more culpable than an ordinary member of society committing the same crime because of his or her extra knowledge of the prohibitions of the law and his or her duty to uphold it, even though he or she may not have a prior criminal record. However, if there is a problem concerning persons who, although they do not have prior criminal records, are equally deserving of additional censure (e.g. the police officer in our example above) then all that is necessary to ensure that they are equally censured is that the sentencing court takes their special circumstances into account as factors which aggravate culpability.

6.9 The most obvious disadvantage of this approach to prior criminal record is the danger of over-reliance on "cumulative sentencing"; an offender with a lengthy criminal record could end up with a substantial sentence for a minor offence. The logical solution would be to place a *ceiling* on the degree to which criminal history can aggravate the culpability of the offender, but, when one considers that there is no ready means by which culpability can be measured, it is difficult to conceive how such a ceiling could be defined. Even if it can be defined, there is still the question of how many past offences should be counted or how serious should a past offence be before the ceiling is reached.

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10 *Desert and Previous Convictions in Sentencing*, (1981) 65 Minnesota LR 591.

11 *Past or Future Crimes*, Ch 7.

Progressive Loss of Mitigation

6.10 An alternative means of dealing with prior criminal record within a "just deserts" system is the "progressive loss of mitigation" approach. This approach rests on a theory of desert that is primarily oriented towards the present crime, but qualified to a limited extent by considerations related to prior conduct.[12] The foundation for this theory is the fact that disapprobation is addressed *to the offender*, even though the basis for condemnation is *the conduct* - *von Hirsch* allegorises:

> "When a person commits a misdeed in everyday life ... he may plead that the misconduct was uncharacteristic of his previous behaviour. He may use such language as "I'm sorry, I don't know what got into me - it's not been like me to do that kind of thing." ... The actor is pleading in self-extenuation that though this act was wrong, he should not suffer the full measure of obloquy for it because it was out of keeping with the standards of behaviour he has observed in the past. ... The plea, by its manifest logic, carries its greatest force when the actor has not committed the misconduct before, and it loses force progressively with each repetition."[13]

6.11 Under this approach, the "just deserts" theory has to make a concession to a requirement which does not fit neatly into its logic: i.e. persons who do not have a prior criminal record must be given substantial mitigation of sentence. The first offender, according to this theory, is disapproved of less because we wish to accord him some respect for the fact that his inhibitions against wrongdoing have functioned, and to show sympathy for the lapse. He has his sentence mitigated because of the absence of a prior criminal record. The worse the record gets, the less there may be taken off the sentence in mitigation.

6.12 An English judge might respond that this is nothing new - there a "progressive loss of mitigation" system has been recognised for decades - although sometimes more in the breach than in the observance.[14] In the 1973 case of *Bowman, Murphy and Bromwell*[15] the Court of Appeal was faced with three men who had handled a substantial amount of stolen property. One had been sentenced to five years imprisonment, and another to seven years because of his 'longer and worse' record. The Court said that the wrong approach had been adopted:

> "Men are not sentenced on their records. They are sentenced for their offences. If they have got bad records then nothing can be taken off by way of mitigation, while if they have not got bad records a great deal can be taken off."

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12 *Past or Future Crimes*, Ch 7. Also von Hirsch, *Desert and Previous Convictions in Sentencing*, 65 Minnesota LR 591, (1981).

13 *Ibid*, p82.

14 See Wasik, *Guidance, Guidelines and Criminal Record* in *Sentencing Reform*, Pease and Wasik (eds), (1987), pp108, 123; Walker, *Sentencing Theory, Law and Practice*, (1985), p441.

15 See Thomas, *Principles of Sentencing*, (2ed, 1979) p198.

6.13 Again, the prior offence should be similar in *nature* or *seriousness*; some consideration should be given to the time elapsed or the *staleness* of the past convictions and the *number*. However, number is relevant under the progressive loss of mitigation theory only in that mitigation will be exhausted after a specified number of convictions.

6.14 The two systems outlined above of dealing with the question of prior criminal record within a "just deserts" system - the aggravation of culpability approach, and the progressive loss of mitigation approach - both ensure that the existence of prior criminal record does not go un-noticed by the sentencing court, and result in the repeat offender suffering an added measure of censure for his repetition. The end result of both is the same. Which method, therefore, is to be preferred should "just deserts" be adopted in Ireland?

6.15 The *aggravation of seriousness* model appears to represent the present approach to sentencing of the Irish Supreme Court, and thus may be thought to be preferable. If there is anything to be said against it, however, it is that there is no ceiling or upper limit to the amount by which seriousness (and, consequently, sentence) may be aggravated - thus offenders with prior records could be punished excessively more than offenders without prior records. On the other hand, it sits squarely with "just deserts" logic, since it treats the prior criminality in terms of culpability.

6.16 The progressive loss of mitigation theory is certainly engaging, but some doubt must remain, especially if our notion of desert is informed more by consideration of consequences and culpability than by the motivation of the offender. The theory does not sit so squarely with desert logic, since it requires first offenders to be given mitigation of sentence simply because they are first offenders. This cannot be explained in terms of culpability *or* harm. We do not know if the progressive loss of mitigation approach is, or ever was, countenanced by the Irish Courts.

6.17 Also, the unreality of the theory in present judicial practice here and elsewhere may, arguably, be replicated in reforms - it is difficult to believe that criminal history is not aggravating and cumulative simply because the accumulation of mitigation is structured and has an upper limit.[16]

6.18 A possible disadvantage of this approach is that, unlike the aggravation of seriousness approach where there is no limit to the amount by which sentence may be aggravated, under this approach there is no limit on the amount by which sentence may be *mitigated* for a first offender. However, this might not be such a bad thing in a sentencing system which aims to reduce the level of prison population. If a lower limit is to be placed on the amount of mitigation which is to be allowed, then the obvious question is how many repetitions can occur before the mitigation is lost?[17] *Von Hirsch* concedes that there is "no ready

16 Von Hirsch himself admits this problem; *Past or Future Crimes*, pp89-91.
17 Wasik, *op cit*, p 118.

answer", and most supporters of the theory seem content to suggest "a certain limited number of repetitions".[18]

Conclusions and Provisional Recommendations

6.19 In the final analysis, we feel that we should lean as far as possible towards preserving the *status quo*, and that the matter of prior record should be dealt with in a manner that sits most squarely with a "just deserts" theory. This entails an *aggravation of culpability* model. We feel that the danger of an excessive amount of aggravation in some circumstances might be limited by introducing a requirement that sentence may not exceed a stated maximum, (expressed, perhaps, as a percentage of the un-aggravated sentence), although, admittedly, this may involve some stretch of the mind. Other jurisdictions, such as Sweden, Finland, and England and Wales, have employed prior criminal record in a manner which aggravates the culpability of the offender as part of their "just deserts" approach.[19]

6.20 *We provisionally recommend, therefore, a "just deserts" approach which includes the consideration of relevant prior criminal record as a factor which aggravates the culpability of the offender, although we would welcome views as to the merits of adopting a progressive loss of mitigation approach in preference to this.*

6.21 *We therefore provisionally recommend that there be implemented a statutory provision which confines the role of prior criminal record in the determination of the severity of sentence to situations in which it aggravates the culpability of the offender in committing the offence. The statement should highlight the following concerns:*

> *The sentencer, in determining the severity of the sentence to be imposed on an offender, may have regard to any offences of which the offender has been found guilty in the past which may be considered to increase the culpability of the offender.*
>
> *In considering whether such prior offences aggravate the culpability of the offender for the offence for which he is being sentenced the sentencer should have regard to:*
>
> > *the time which has elapsed between the prior offence or offences and the offence for which the offender is being sentenced;*
> >
> > *the age of the offender at the time of commission of the prior offence;*
> >
> > *whether the prior offence or offences is or are similar in nature to the offence for which the offender is being sentenced;*

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18 *Desert and Previous Convictions*, p816. See also Ashworth, *Devising Sentencing Guidance for England.*

19 See Ch 7 *Infra* (Some Comparative Aspects of Sentencing Policy).

whether the prior offence or offences is or are similar in seriousness to the offence for which the offender is being sentenced.

CHAPTER 7: SOME COMPARATIVE ASPECTS OF SENTENCING POLICY

7.1 A number of other jurisdictions have, in response to problems similar to those encountered in the Irish sentencing process, established sentencing commissions and sentencing reform projects to conduct a comprehensive review of sentencing policy with a view to solving some of those problems.

7.2 Two trends are evident in these reforms:

(a) a realisation that sentencing alone cannot solve the problem of crime - a job for the entire criminal justice system, of which sentencing is only a component - and that consequently, the purpose of sentencing should be to assist in the administration of criminal justice through the imposition of fair and just sanctions; and

(b) a rejection of rehabilitative principles of distribution in favour of the growing notion that offenders have a right to an amount of punishment which is proportionate to the reprehensibleness of the offending conduct. "Just deserts" has been favoured as a means of ensuring that offenders are sentenced in a just and fair manner, and as a panacea for the ills of inconsistency and sagging public confidence in the sentencing process.

7.3 In this chapter we shall examine the reforms which these other jurisdictions have implemented in order to make their sentencing policies more coherent and consistent. We shall also take a look at the sentencing systems in some of the member states of the Council of Europe to see how their problems correspond to ours and if they have adopted any useful techniques to solve them.

(i) ***Finland***[1]

7.4 In 1976, Finland added a new Chapter 6 to its Penal Code, dealing with choice of sentence. The new chapter marked a change in Finnish sentencing ideology away from the rehabilitative ideal towards "neoclassical" criminal policy, i.e. the structuring of sentencing discretion and the imposition of proportionate sanctions.[2] Prior to that, the Finnish code had also thereto overemphasised the impact of prior criminality in comparison with other sentencing criteria, and the change in ideology gave strong support to demands to unify the prevailing sentencing practice in order to reduce disparity in sentencing. Article 1 of the new Chapter 6 makes the seriousness of the offending behaviour the most important factor in determining the severity of sentence. It reads:

> "The punishment shall be measured so that it is in just proportion to the damage and danger caused by the offence and to the guilt[3] of the offender manifested in the offence."

7.5 This is in effect an expression of the "just deserts" limb of *cardinal* proportionality - the sentence is to be proportionate to the gravity of the crime.

7.6 A key factor in the Finnish reform is the intentional omission of the risk of *future* misconduct - the most important element of rehabilitation, deterrence and incapacitation. Desert is, consequently, the only principle by which the extent of sentence can be determined.

7.7 Article 1, it will be noted, contains an important description of how seriousness of the offending behaviour is to be measured -by reference to the harmfulness of the conduct and the culpability of the offender. Article 2 of Chapter 6 contains a list of more specific criteria which may be considered as increasing the seriousness of the offending behaviour. The list is not exhaustive, and the elaboration and more detailed development of these criteria is left partly to legal doctrine and partly to the courts.[4] Factors which increase offence seriousness are:

(1) The degree of premeditation;

(2) Commission of the offence as a member of a group organised for serious offences;

(3) Committing the offence for remuneration;

(4) The previous criminality of the offender, if the relation between

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1 Sources: von Hirsch, *Numerical versus Narrative Guidelines* in Pease & Wasik (eds) *Sentencing Reform* (1987) and *Principles for Choosing Sanctions: Sweden's Proposed Sentencing Statute* (1987) 13 New England Journal of Criminal and Civil Confinement 171; *Sentencing Practices in Finland*, Note by the Finnish sentencing expert, Tapio Lappi-Seppälä, in response to the Council of Europe's questionnaire on sentencing PC-R-SN (89) 2.

2 *Straff Och Rättfärdighet: Ny Nordisk Debat*; Hechscker, Snare, Takala and Vestergaard (eds) (1980).

3 Which, by all accounts, is taken to mean "culpability": von Hirsch, *Principles For Choosing Sanctions*, p177.

4 Lappi-Seppälä, *op cit*, p10.

the offences on the basis of their similarity or for another reason shows that the offender is apparently heedless of the prohibitions and commands of law.

7.8 Article 3 of Chapter 6 lists factors which generally reduce the harm or culpability of the offending behaviour:

(1) partial duress or pressure when committing offence;

(2) reduced mental capacity or "exceptional temptation" or "strong human sympathy leading to the offence"; and

(3) voluntary attempts to alleviate the effect of the offence.

7.9 Article 4 allows the sentencing court to take into account other (mitigating) consequences caused to the offender through the crime or the sentence when these together with the punishment would lead to an unreasonable result.

7.10 All of these factors affect the sentence within the range prescribed by statutory maxima and minima. However, in addition, there are specific provisions allowing the court to go below the prescribed minimum where the offender is aged 15-17 years; or had diminished responsibility; aided or abetted; attempted; exceeded the normal boundaries of self-defence; or, in some cases, committed the crime out of necessity.[5]

7.11 A puzzling provision of the Finnish Chapter 6, however, is Article 2(4) which provides that prior record may be taken into account if it suggests that the "offender is apparently heedless of the prohibitions of law." Finnish penologists are reported to regard this as a weak point in the law, because no indication is given as to the weight that should be given to prior record, or how "heedlessness" should be judged.[6]

7.12 A second *lacuna* is the lack of guidance on the use of imprisonment. "Should a large variety of crimes be punished by imprisonment, albeit with graded durations reflecting the comparative seriousness of crimes? The statute does not say."[7]

7.13 A decade of experience with the new law has indicated a trend towards giving increased attention to the degree of gravity of the criminal conduct. The provisions have developed a substantial consensus of support and virtually no sentiment favouring repeal or major alteration has been discernible in Finland to date.[8] A more detailed account of their implementation is to be found at

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5 Lappi-Seppälä, *op cit*, p10.
6 Von Hirsch, *Numerical versus Narrative Guidelines*, p60.
7 Von Hirsch, *Principles for Choosing Sanctions*, p178.
8 See von Hirsch, *Principles For Choosing Sanctions*, pp177-178.

Chapter 9 *infra*. (Implementing Sentencing Policy.[9]

7.14 In short, therefore, the Finnish reforms are characterised by:

(i) A statute based single principle for the distribution of sentence.

(ii) "Just deserts" adopted - limiting role (ie cardinal proportionality limb)

(iii) A clear statement of the main factors to be taken into consideration in deciding offence seriousness, namely the harmfulness of the conduct and the culpability of the offender.

(iv) A detailed, but not exhaustive, list of some of the factors which may be regarded as increasing (aggravating) or decreasing (mitigating) the seriousness of the offending conduct.

(v) A detailed, but not exhaustive, list of some of the circumstances extraneous to the offending behaviour which may be regarded as mitigating the severity of the sentence to be imposed.

(vi) Prior criminal record given a role - but extent not clear.

(vii) No indication as to the use of imprisonment.

(ii) Sweden

7.15 In 1986, the Swedish Committee on Imprisonment (Fängelsestraffkommittén) issued its report *Sanctions for Crimes*[10] which recommended a reduction of statutory maximum and minimum sentences for many offences, changes in the rules on parole, and an expansion of the famous *day fine* system.[11] The Committee also drew up two new draft chapters of the penal code (Chapters 29 and 30) which were enacted by the Swedish legislature with little modification in June 1988,[12] coming into effect in March 1989.[13]

7.16 The Swedish Penal Code had, up to this, provided merely that sentences should (1) Promote general obedience to the law and (2) foster the defendant's rehabilitation.[14] It failed, however, to suggest what features of the offender or the offence ought to be given priority in sentencing, or to give guidance as to the proportionality between the gravity of crimes and the severity of punishments.

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9 See *Statistics, Starting Points, and Informed Judicial Discretion* in Chapter 9 *infra*.

10 Fängelsestraffkommittén, *Påföljd För Brott*, (3 Vols) Stadens Offentliga Utredningar, 1986.

11 See the Law Reform Commission's Report *Indexation of Fines*, LRC 37 1991.

12 See von Hirsch and Jareborg, *Sweden's Sentencing Statute Enacted* [1989] Crim LR 275; von Hirsch *Guiding Principles for Sentencing: The Proposed Swedish Law* [1987] Crim LR 746, and *Principles for Choosing Sanctions: Sweden's Proposed Sentencing Statute*, (1987) 13 New England Journal of Criminal and Civil Confinement, 171.

13 See National Council for Crime Prevention, Sweden, *1990 Crime and Criminal Policy*.

14 Swedish Penal Code, Chapter 1,7.

Guidance was thought to be needed to supply a coherent policy for sentencing, to help choose which penal aims should predominate, and thereby to help decide what features of the offender or his offence should be given the most weight.

7.17 The Swedish Imprisonment Committee proposed a legislative statement of a single principle of distribution to guide sentencers in their choice of sentence. The legislation rests on the principle of proportionality - in effect the *cardinal* proportionality limb of the "just deserts" theory - ie punishments should be commensurate with the seriousness of the defendants' criminal conduct. The severity of the penalty relies chiefly on what it termed the *penal value* (ie seriousness) of the offence. Penal value is determined by (a) the degree of harmfulness of the conduct and (b) the offender's culpability in committing it. The concept of penal value, therefore, defines the deservedness of the offender in relation to his conduct and culpability. The new legislation provides:

> **"Chapter 29**
>
> *On Deciding of Penalties and Remission of Sanction*
>
> *Section 1*
>
> Penalties shall be decided with regard to the desirability of uniform and consistent adjudication and set within the scale of punishment applicable to the culpability of the offence or offences taken as a whole.
>
> In assessing culpability, special consideration shall be given to the damage, injury or danger occasioned by the criminal act, to what the accused realized or should have realized, and to the intentions or motives he may have had in committing such act."[15]

7.18 It will be noted that the Swedish provisions are very much in the same style as the Finnish reforms described above. This pattern continues in sections 2 and 3 which contain lists of aggravating factors (such as taking advantage of a victim's vulnerable position or other special difficulties in protecting himself) and mitigating factors (such as provocation, insanity, or compassion) which enhance or diminish the penal value or deserts of the offender's conduct.

7.19 S2 provides a list of factors which may be regarded as aggravating the seriousness of the offending behaviour:

> (1) whether the accused intended that the offence engender consequences considerably more serious than it in fact did;
>
> (2) whether the accused displayed especial recklessness;

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15 National Council for Crime Prevention (Brottsförebyggande rådet) *The Swedish Penal Code*, 1990, Ch 1, §1.

(3) whether the accused exploited another's defencelessness or another's difficulty to defend himself;

(4) whether the accused made grave abuse of his position or otherwise exploited a special confidence or trust;

(5) whether the accused induced another to complicity in crime by coercion or deceit or abuse of his youth, ignorance or dependency; or

(6) whether the offence itself formed part of a criminal activity which had been carefully planned or carried out on an extensive scale and in which the accused played a significant role.

7.20 S3 contains a list of factors which mitigate offence severity:

(1) whether the offence was occasioned by the grossly insulting or offensive behaviour of another;

(2) whether the accused, in consequence of mental abnormality or affect, or for some other cause, was largely incapable of controlling his or her actions;

(3) whether the actions of the accused bore a relation to his manifestly arrested development or to his lack of experience or powers of discrimination; or

(4) whether the offence was occasioned by strong human sympathy.

If clearly called for in view of the culpability of the offence the sentence imposed may be milder than prescribed for the offence in question.

7.21 S4 and S5 of chapter 29 provide two other factors which may be considered in determining the extent of sentence. S4 addresses how prior record affects the choice between fines and imprisonment and how it affects the amount of fines or imprisonment. To this extent, the Swedish provisions improve upon the Finnish because they clearly define the degree to which prior criminal record is a factor in determining sentence. Under S4, prior record may be taken into account in determining the severity of sentence, but only if it has not already been taken into account in determining the type of sanction or in the revocation of parole:

"In meting out punishment, the court, if insufficient regard can be paid to the circumstances in question through choice of sanction or forfeiture of conditional release, shall give reasonable consideration, besides the culpability of the offence in itself, to whether the accused has previously been guilty of an offence or offences. Special consideration shall be

given to the extent of such previous offence or offences, to the time which has elapsed between the offences, and to whether the previous offence or offences and the new offence are similar in nature or whether in both cases they are of an especially serious character."[16]

7.22 S4 thus allows some room for the possibility that prior criminality may be seen as somehow increasing the culpability of the offender - but only if the prior criminal act is closely related to the one in question. Thus, a commendable feature of the section which should be observed is its clarification of the various elements of prior criminal conduct which are to be considered in determining the *weight* to be attached to prior criminality; namely the *type*, the *extent*, the *seriousness*, and the time which has elapsed since the commission of a prior offence. This excludes from consideration the prior commission of, say, a string of parking offences in the sentencing of a burglar - even more so if they occurred some considerable time in the past.

7.23 S5 gives a list of special factors which may be considered when making the mitigation decision:

"In meting out punishment, the court shall give reasonable consideration, besides the culpability of the offence in itself, to:

1. whether the accused suffered severe physical injury in consequence of the offence;

2. whether the accused to the best of his ability attempted to prevent or remedy any harmful consequences of the offence;

3. whether the accused denounced himself;

4. whether the accused would suffer harm through expulsion from the Realm in consequence of the offence;

5. whether the accused, in consequence of the offence, has been dismissed from his post or has been given notice of dismissal;

6. whether the accused, in consequence of age or ill health would be occasioned unreasonable hardship by a sentence imposed in accordance with the culpability of the offence;

7. whether an unusually long time in relation to the nature of the offence has elapsed since the offence was committed; or

8. whether there exists some other circumstance which might require that the accused be sentenced to a lesser penalty than

16 Response of the Swedish sentencing expert, Lundquist, to the Council of Europe's questionnaire on sentencing.

otherwise motivated by the culpability of the offence.

Should there exist some circumstance or circumstances as envisaged in paragraph one herein, the court may, should there be special grounds for so doing, impose a milder sentence than prescribed for the offence in question".

7.24 Chapter 30 deals with the choice of the nature of sanction. The provisions of Chapter 30 are closely similar to the *choice of method* hybrid discussed *supra*.[17] Whilst the determination of *extent* in Chapter 29 relies solely on the "penal value" or deservedness of the offender, the choice of *nature* of sanction relies on traditional aims such as rehabilitation (S9) and incapacitation (S7).

The important sections of the chapter (for our purposes) read as follows:

"*On Choice of Sanction*

Section 1

In choosing a sanction, imprisonment shall be considered a more severe sanction than conditional sentence or probation.

Section 4

In choosing a sanction, the court shall give special notice to any circumstance or circumstances suggesting the imposition of a sentence milder than imprisonment. And in so doing, the court shall consider such circumstances as are envisaged in Chapter 29, Section 5, of this Code.

In contemplating imprisonment, the Court may take into account, besides the culpability and nature of the offence or offences, the fact that the accused has previously been convicted."

7.25 Incapacitative considerations are included in S7:

"In choosing a sanction, the court, in contemplating conditional sentence, shall consider whether there is no particular reason to believe that the accused will continue to commit criminal acts in future."

7.26 Rehabilitative considerations are included in S9:

"In choosing a sanction, the court, in contemplating probation, shall consider whether such sanction might encourage the accused to refrain

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17 See para 4.102 *et seq, supra.* (Hybrid Principles).

from committing further criminal acts.

As grounds for probation, the court may consider:

1. whether the personal or social circumstances of the accused have significantly improved in some aspect that may be assumed to bear a relationship to his criminal career;

2. whether the accused is undergoing treatment for some abuse, or other circumstances which may be assumed to bear a relationship to his criminal career; or

3. whether the abuse of an addictive substance or drug, or other special circumstance necessitating care or other treatment, made material contribution to the commission of the offence and the accused declares himself willing to undergo a suitable course of treatment which, drawn up on his behalf, can be organized in conjunction with execution of the sanction".

7.27 The thrust of Chapter 30 amounts to the position that once the severity of sentence has been decided in accordance with Chapter 29, and there exist two or more types of sanction which are equal in severity, rehabilitative or incapacitative considerations may be relied upon to determine which type of sanction should be imposed.

7.28 The Swedish reforms are characterised by:

(i) A statutory pronouncement of a single principle for the distribution of sentences (Chapter 29).

(ii) "Just deserts" adopted - limiting limb (cardinal proportionality) - "penal value" used to measure relationship between seriousness of crime and severity of sanction).

(iii) A clearly defined set of factors which govern the assessment of offence seriousness (the "penal value"), namely the harm or risk which the conduct involved, what the accused realised or should have realised about it, and the intentions and motives of the accused. (Ch 29, S1).

(iv) A clear list of factors which may be regarded as enhancing and diminishing the seriousness or penal value of the offending behaviour (Ch 29, S2 and S3).

(v) Limited and defined role for prior criminal record in determining the extent of sentence and in determining the nature of sentence, and a clear espousal of certain factors of prior criminal conduct which are to be considered in

determining the *relevance* of prior offences.

(vi) A "choice of method hybrid". Other goals may be referred to when determining nature of sentence e.g. incarceration as opposed to community service on basis of dangerousness (Chapter 30)

(vii) Use of imprisonment restricted.

(iii) Canada

7.29 The Canadian Sentencing Commission produced its report *Sentencing Reform: A Canadian Approach* in 1987. It proposed a fundamental overhaul of the sentencing system with the purpose of making sentencing "more equitable, predictable and understandable."

7.30 The Commission found that one of the problems with their sentencing structure was:

> "The almost complete absence of policy from Parliament on the principles that should govern the determination of sentences."[18]

7.31 The Commission concluded that a sentencing rationale which declared *purposes* and *principles* of sentencing would provide guidance to the judiciary and enlightenment to the general public.

Purposes

7.32 In order to come to a realistic conclusion as to the purposes of sentencing, the Commission first examined the scope of the sentencing process.[19] Its immediate conclusion was that the sentencing process is limited in its scope. Only a small amount of crimes committed are reported to the police, and of these it was calculated that only 8.5% actually reached the stage where the sentence was passed by a Canadian Court. This was because many of the crimes reported went unsolved, and because many of the solved cases were filtered out of the sentencing process through the intervention of social workers, police officers, and prosecutors who exercised their discretion along the way. The complete picture showed that sentencing deals with only a small amount of offenders:

> "Its actual reach, as compared to the total amount of crime, is little more than a scratch on the surface and this situation is unlikely to change."[20]

7.33 Thus it would be unrealistic to argue that the purpose of the sentencing

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18 Canadian Sentencing Commission, *Sentencing Reform: A Canadian Approach*, (1987), pxxii.
19 *Ibid*, pp119, 120.
20 *Ibid*, p120.

system should be the same as that of the entire criminal justice system, because to do so would be to make the sentencing process accountable for the entire criminal law, over which it has very limited control.[21] This is of profound consequence to those who argue that the purpose of sentencing should be the protection of the public - either by means of rehabilitative programmes to prevent offenders from recidivating; by means of deterrent strategies to prevent others from offending; or by means of incapacitation to prevent certain offenders from re-offending. Since sentencing deals with only a handful of offenders, the function of protecting the public might better be viewed as the overall purpose of the entire criminal justice system, and the primary responsibility of the police, other prosecutorial and regulatory bodies, and Government agencies. The Commission neatly summed up its conclusions as follows:

> "Intuitively, at least, one would rather resort to a security guard than to a sentencing judge to protect one's home."[22]

7.34 On the other hand, although sentencing fulfils an indespensible public function in assisting in the administration of the criminal justice system, the primary objective of the courts is to ensure that justice is observed in the administration of criminal sanction, whereas security objectives are more akin to police work and corrections. The overriding concern of sentencing, therefore, is to ensure that members of the community are made accountable for behaviour which is victimising and flouts the basic values of society; hence the outline of the overall aim of sentencing should reflect the proposition that people should be held accountable for conduct which betrays the core values of their community.

7.35 The *purpose* of sentencing was formulated as follows:

> "The Commission recommends that the fundamental purpose of sentencing be formulated thus: It is recognized and declared that in a free and democratic society peace and security can only be enjoyed through the due application of the principles of fundamental justice. In furtherance of the overall purpose of the criminal law of maintaining a just, peaceful and safe society, the fundamental purpose of sentencing is to preserve the authority of and promote respect for the law through the imposition of just sanctions."[23]

Principles (of distribution)

7.36 As regards *principles* to govern the distribution of sentence, the Commission felt the need for a synthesis between "just deserts" and utilitarian principles, but noted that insensitivity to possible conflicts between objectives ascribed to the criminal justice system and objectives of the sentencing process was a feature of the *status quo*. Such conflicts led to inconsistency.

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21 *Ibid*, p149.
22 *Ibid*, p148.
23 *Ibid*, pp151, 155.

7.37 The Commission thus chose the "just deserts" limb of cardinal proportionality as the paramount consideration governing the determination of sentence. Other principles, (i.e., incapacitation, deterrence and rehabilitation) could also be considered within the framework of proportionality, but were rejected as principles for the determination of sentence for two reasons - First, they could not be proved to work, and second, sentencing *alone* could not solve the crime problem. So increased use of utilitarian sentences could not be promoted to the detriment of individual rights.[24]

7.38 The Commission proposed a two pronged reform strategy as far as principles of distribution of sentence are concerned. First a legislative statement of sentencing principles was to be made; then a rigid guideline system would be imposed with ranking of offence and penalty severity. The legislative statement of principles mentions only cardinal proportionality - ie sentence is "proportionate to the gravity of the offence and the degree of responsibility of the offender" - but it is clear from the guideline rankings that *ordinal* proportionality has an equally important role.[25]

7.39 The Commission's recommendations read:

> "The sentence to be imposed on an offender in a particular case is at the discretion of the court which, in recognition of the inherent limitations on the effectiveness of sanctions and the practical constraints militating against the indiscriminate selection of sanction, shall exercise its discretion assiduously in accordance with the following principles:
>
> (a) The paramount principle governing the determination of a sentence is that the sentence be proportionate to the gravity of the offence and the degree of responsibility of the offender for the offence.
>
> (b) Second, the emphasis being on the accountability of the offender rather than punishment, a sentence should be the least onerous sanction appropriate in the circumstances and the maximum penalty prescribed for an offence should be imposed only in the most serious cases.
>
> (c) Subject to paragraphs (a) and (b) the court in determining the sentence to be imposed on an offender shall further consider the following:
>
> (i) any relevant aggravating and mitigating circumstances;
>
> (ii) a sentence should be consistent with sentences imposed

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24 *Ibid* Chapter 6.

25 The guidelines do not appear to be susceptible to tabulation, and they have negotiated a middle course between unfettered discretion and rigidity. See also para 9.85, *et seq*, *infra* (Canadian Guidelines).

on other offenders for similar offences committed in similar circumstances;

(iii) the nature and combined duration of the sentence and any other sentence imposed on the offender should not be excessive;

(iv) a term of imprisonment should not be imposed, or its duration determined, solely for the purpose of rehabilitation;

(v) a term of imprisonment should be imposed only:

(1) to protect the public from crimes of violence;

(2) where any other sanction would not sufficiently reflect the gravity of the offence or the repetitive nature of the criminal conduct of an offender, or adequately protect the public or the integrity of the administration of justice,

(3) to penalize an offender for wilful non-compliance with the terms of any other sentence that has been imposed on the offender where no other sanction appears adequate to compel compliance.

(d) In applying the principles contained in paragraphs (a), (b), and (c), the court may give consideration to any one or more of the following:

(i) denouncing blameworthy behaviour;

(ii) deterring the offender and other persons from committing offences;

(iii) separating offenders from society, where necessary;

(iv) providing for redress for the harm done to individual victims or to the community;

(v) promoting a sense of responsibility on the part of offenders and providing for opportunities to assist in their rehabilitation as productive and law-abiding members of society."

7.40 The proposals represent a clear attempt to create a system of sentencing

based on proportionality, where the most important factor is the gravity of the offence rather than the offender's past convictions - past convictions are only a factor amongst many to be taken into account in determining the sentence level within the presumptive range or in deciding whether to depart from the presumptive sentence.

7.41 In order to assist sentencers in assessing the gravity of the offence and the degree of responsibility of the offender for the offence (ie. the seriousness of the offending conduct) the Commission proposed a non-exhaustive list of factors which aggravate or mitigate the seriousness of the offence as it appears in the presumptive guidelines.[26] They were as follows:[27]

"*Aggravating Factors*

1. Presence of actual or threatened violence or the actual use or possession of a weapon, or imitation thereof.
2. Existence of previous convictions.
3. Manifestation of excessive cruelty towards victim.
4. Vulnerability of the victim due, for example, to age or infirmity.
5. Evidence that a victim's access to the judicial process was impeded.
6. Existence of multiple victims or multiple incidents.
7. Existence of substantial economic loss.
8. Evidence of breach of trust (eg. embezzlement by bank officer).
9. Evidence of planned or organized criminal activity.

Mitigating Factors

1. Absence of previous convictions
2. Evidence of physical or mental impairment of offender.
3. The offender was young or elderly.
4. Evidence that the offender was under duress.
5. Evidence of provocation by the victim.
6. Evidence that restitution or compensation was made by the offender.
7. Evidence that the offender played a relatively minor role in the offence."

7.42 The Canadian Sentencing Commission's recommendations are characterised by:

(i) A distinction between the general *justifying* aims of sentencing ("purposes") and the *distribution* of sentences ("principles").

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26 See para 9.85 *et seq, infra* (Canada - Guidelines).
27 See p320 of the Report.

(ii) A recognition of the limited role sentencing has to play in the protection of society and the prevention of crime as opposed to the primary role of sentencing in ensuring that the criminal justice system (which has the purpose of protecting the public and preventing crime) is assisted through the imposition of just sanctions.

(iii) A proposed statutory statement of sentencing policy consisting of "purposes" and "principles."

(iv) "Just deserts" adopted as the sole principle for determining the extent of sentence.

(v) A clear description of the factors upon which the seriousness of the offending behaviour may be assessed, namely the gravity of the offence and the degree of responsibility of the offender for the offence.

(vi) A non-exhaustive list of factors which may be regarded as aggravating or mitigating the seriousness of offending behaviour.

(vii) A restriction on the use of imprisonment.

(iv) Victoria

7.43 The Victorian Sentencing Committee published its three volume report *Sentencing* in April 1988. The Committee, after extensive analysis of the traditional aims of sentencing, noted that:

> "In most statutory provisions Parliament merely sets the maximum penalty that may be imposed, and that is generally the only guidance it gives to the court on sentencing."[28]

7.44 It concluded that sentencing is a purposive and complex process which requires to be justified by *a number* of policy aims:

> "No one aim alone can justify either the process as a whole or the imposition of a particular sentence."[29]

7.45 The Committee maintained the distinction, often made by scholars, between principles which justify the entire sentencing system and principles which justify the imposition of a particular sentence on an offender, noting that justification for the imposition of a particular sentence needed to be more specific.

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28 Victorian Sentencing Committee Report, *Sentencing*, (1988), p24.
29 *Ibid*, p115.

7.46 The Committee did not, however, make a distinction between the objects of sentencing and the distribution of sentences, and it is clear from the Committee's recommendations that it intended the question of distribution of sentence to be answered by reference to the justifying principles chosen by the Committee.

7.47 The first matters considered by the Committee were the principles which justify the *entire* sentencing system, and which are to be relied upon by parliament when fixing penalties for crimes. The Committee concluded that deterrence, rehabilitation and retribution were feasible aims of the sentencing system, whilst incapacitation, because of its inefficacy, was not. The concepts of denunciation and wilful default (ie failure to comply with the terms of a lesser punishment - as in imprisonment for fine default) were found to be mere *effects* of the sentencing system, rather than aims to be pursued by it. Economic considerations such as prison capacity and the cost of sanctions were found to affect the sentencing system, and thus had to be borne in mind.

7.48 The Committee concluded:

> "The Committee recommends that the purpose of a sentencing system is to prevent crime and promote respect for the law by:
>
> . providing for sentences that are intended effectively to deter the persons being sentenced and all other persons from the commission of the same or similar types of offences;
>
> . providing for sentences that facilitate the rehabilitation of offenders;
>
> . ensuring that offenders are only punished to the extent justified by:
>
> - the nature and gravity of their offences;
>
> - their culpability and degree of responsibility for their offences; and
>
> - the presence of aggravating or mitigating factors.
>
> by ensuring that appropriate use is made of the State's correctional facilities."[30]

7.49 The Committee then turned its attention to the principles which should justify the imposition of sentences in individual cases, and which may be relied upon by sentencers when fixing the sentence for an individual offender.

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30 *Ibid*, para 3.14.1.

7.50 Primary importance was to be accorded to "just deserts". Although it appears that the Committee was only relying on the *cardinal* proportionality limb of "just deserts" theory, whilst abandoning the requirement of *ordinal* proportionality, the Committee also proposed a comprehensive system of guidance which addressed the requirement of ordinal proportionality.[31] The only purposes for which a sentence could be imposed were to be denunciation, deterrence and rehabilitation, whilst at all times the sentencing decision was to be tempered by reference to consideration of parsimony, or, in exceptional circumstances, mercy. Under no circumstances, however, could a sentence be increased beyond the limit set by the concept of desert. The Committee recommended:[32]

> " In sentencing an offender a court must have regard to
>
> - the nature and gravity of the offence; and
>
> - the offender's culpability and degree of responsibility for the offence; and
>
> - the presence of aggravating or mitigating factors.
>
> The sentence imposed must be the least severe sentence that the court could have imposed to achieve the purpose or purposes for which the sentence is imposed.
>
> The only purposes for which sentences might be imposed were -
>
> - to punish justly the offender; or
>
> - to deter the offender or other persons from committing the same or similar types of offences; or
>
> - to allow for the rehabilitation or treatment of the offender;
>
> - to allow the court to denounce the conduct of the offender; or
>
> - to render the offender, if mentally ill or intellectually disabled, incapable of committing the same or similar types of offence; or
>
> - a combination of two or more of the above purposes.

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31 See para 10.20 *et seq*, *infra*. (Victoria - Guidelines).

32 *Ibid*, para 3.15.1, p122.

A court must impose a sentence that does not involve the immediate confinement of the offender unless -

- the confinement of the offender was necessary to achieve the purpose or purposes for which the sentence was imposed; or

- the court previously imposed a sentence that did not involve confinement of the offender and the court was now dealing with the offender on account of a serious breach of that sentence.

In exceptional circumstances the court might exercise mercy when deciding on the type of sanction to be imposed on the offender or the severity of that sentence".

7.51 The Committee also proposed a statutory statement of factors which would be regarded as aggravating or mitigating the culpability of the offender, and, accordingly, sentence. The lists were to be non-exhaustive.

7.52 The following would increase the culpability of the offender:

- The offence involved the death of, or the infliction of serious injury on, any person;

- The offence involved a threat to kill or inflict serious injury on a person;

- The offender knowingly engaged in conduct that led to a significant risk of death or serious injury being caused to one or more persons;

- The victim was a member of a particularly vulnerable class of people;

- The victim was treated cruelly or in a degrading manner during the commission of the offence;

- The offence was committed to gratify the offender's desire for pleasure or excitement;

- The offender played a leading role in the commission of the offence;

- The offence was planned or premeditated;

- The commission of the offence involved a breach of trust or neglect of any special duty owed to the victim by the offender;

- A substantial amount or value of money or property was involved in the commission of the offence;

- A court might take into account as an aggravating factor any other factor which increased the culpability of the offender and which was consistent with the purposes of, and with the sentencing guidelines contained in or made under, the draft Bill.

7.53 The Committee also recommended the express listing of two factors which were *not* to be taken as aggravating the culpability of the offender:

- A court must not increase the sentence for an offence because the offender pleaded not guilty to it;

- A court must not impose a sentence which was more severe than was necessary to achieve the purpose or purposes for which the sentence was imposed merely because the offender had previously been of bad character.

7.54 The following would decrease the culpability of the offender:

- The offender did not engage in conduct that caused, or involved the threat of, serious injuries to any person;

- The offender did not think that his or her conduct would cause, or involve the threat of, serious injury to any person;

- The offender acted under provocation;

- The existence of grounds which, while not constituting a defence, tend to excuse or justify the offender's conduct;

- The offender played a minor role in the commission of the offence;

- The offender compensated or made genuine efforts to compensate the victim for any damage, loss or injury suffered by the victim;

- The offender's judgment was substantially effected by his or her age, by alcohol or drugs, or the fact that he or she was suffering from substantial stress, intellectual disability or mental illness or behavioural disorders;

- The offender was motivated by a desire to provide necessities for his or her family or for himself or herself;

- The offender was suffering from a physical condition which

significantly reduced his or her culpability for the offence;

- The offender assisted a law enforcement authority in the investigation of the offence for which he or she was being sentenced or in the investigation of another crime or other crimes;

- The offender pleaded guilty to the offence for which he or she is being sentenced, whether or not the plea was motivated by remorse;

- The offender had shown remorse for his or her conduct, whether or not he or she pleaded guilty to the offence;

- The offender had previously been of good character;

- The offence was committed under such unusual circumstances that it was unlikely that the offender was motivated by a sustained intention to break the law;

- Any other factor consistent with the purposes of, and with the sentencing guidelines contained in, or made under, the Bill.

7.55 There followed a brief list of two factors which, although not related to culpability, might be considered as mitigating the severity of sentence:

- any indirect effect which a sentence might have on the offender or his dependents including;

  damage to the offender's future employment or career; and

  financial or emotional damage to the offender's dependants.

- if contemplating a monetary penalty, the financial circumstances of the offender.

7.56 The Committee also found that it would be of some assistance to the courts if the legislature set out a hierarchy of sanctions to guide the courts in their use. It recognised, however, that there might be a certain degree of overlap between a lesser level of one penalty and a more serious level of the penalty below it in the hierarchy,[33] and also that different people might have different views on the comparative severity of different penalties, and therefore the most that could be hoped for was that some degree of consensus might be achieved.

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33 See para 7.4 of the Report.

The consensus reached or the hierarchy of sanctions was as follows, in descending order of severity:

- A term of imprisonment;
- A term of detention in a Youth Training Centre;
- A term of imprisonment (whether suspended or not) combined with a Community Based Order;
- A bond for alcoholic or drug-dependent persons;
- A wholly or partly suspended sentence of imprisonment;
- A Community Based Order containing a community service condition;
- A Community Based Order that does not contain a community service condition;
- A fine that is substantial to the offender; an order requiring the offender to pay an amount of compensation that is substantial to the offender;
- A fine that is moderate to the offender; an order requiring the offender to pay an amount of compensation that is moderate to the offender;
- A fine that is small to moderate to the offender; an order requiring the offender to pay an amount of compensation that is small to moderate to the offender;
- A fine that is small to moderate to the offender with no conviction recorded;
- A discharge without conviction.

7.57 Further details on the Victorian scheme of guidance to assist in the implementation of the new sentencing policy may be found in paras 10.20 *et seq, infra* (Victoria).

7.58 For the present we may characterise the Victorian proposals as follows:

(i) A distinction between the purposes of the sentencing system and the purpose of individual sentencing.

(a) The purpose of sentencing: to prevent crime and to promote respect for the law by imposing just,

rehabilitative or deterrent sentences, and ensure that offenders are punished only in proportion to their criminal responsibility and criminal culpability

(b) The purpose of individual sentences: to deter, punish, rehabilitate, denounce or to incapacitate a mentally ill offender while having regard to the nature and gravity of the offence and the offender's culpability

(ii) A proposed statutory statement of a dominant principle for the distribution of sentences.

(iii) "Just deserts" adopted to determine the extent of sentence. Traditional objects could still be considered when deciding the nature of sentence (e.g. custodial or non-custodial).

(iv) A clear statement of the factors relevant in assessing the seriousness of offending behaviour, namely, the nature and gravity of the offence and the offender's culpability and degree of responsibility for the offence.

(v) A non exhaustive list of factors which increase or decrease the culpability of the offender.

(vi) A non-exhaustive list of factors besides the circumstances of the offence which mitigate the severity of sentence.

(vii) A clear and defined restriction on the use of imprisonment.

(viii) Weight to be attached to *Parsimony* and, in some cases, *Mercy*.

(v) Australian Federal Jurisdiction and Capital Territory

7.59 Like the Victorian Sentencing Committee, the Australian Law Reform Commission published its report *Sentencing*[34] in 1988.

7.60 The Commission examined the purposes of the sentencing system along lines similar to those followed by the Canadian Sentencing Commission.[35] It concluded that sentencing is only one component of the criminal justice system. The goal of the criminal justice system is to make criminal laws real and meaningful by providing the means to ensure that a breach will attract significant consequences. In terms of crime control and protecting the public, it is the criminal justice system, taken as a whole, and all its components, which controls crime, not only one component, in particular, the sentencing or punishing

34 Australian Law Reform Commission Report No, 44, *Sentencing*, (1982) p xxiii.
35 See para 7.33 *et seq*, *supra*. (Purposes).

component.[36] The Commission found that the basic justification for the imposition of a sentence was simply that the offender has committed a crime. The sentencing process had to follow the overriding requirement that in imposing a criminal sanction the system operated in a just manner by imposing just punishments.

7.61 This amounted, in part, to an expression that the purpose of sentencing is to ensure that a person who has committed a crime should be punished - but only in a manner which was just -in other words, by implementing the 'just deserts' principle of distribution.

7.62 The Commission expressed five important principles underlying its approach:

7.63 First, punishments imposed by the criminal justice system for offences must be just, that is, they must be of an appropriate severity, having regard to the circumstances of the offence and the offender.

7.64 Secondly, consistently with a just punishment, rehabilitative goals and restitution for victims may also be pursued. In the final analysis, however, punishments are not imposed on offenders for the purpose of rehabilitation, or for restitution. They are imposed to punish the offender for having broken the law. But where rehabilitation can be advanced, or restitution ensured, within the context of a just punishment for the crime, this should be encouraged.

7.65 Thirdly, inhumane, cruel or vengeful punishments such as capital punishment, corporal punishment, and torture should in no circumstances be permitted.

7.66 Fourthly, goals such as the incapacitation of the offender or general deterrence should not be among the objectives of the imposition of punishment. They both run counter to the general principle of justice underlying the report - and both punish the criminals, not for their criminal activity, but for what they or others may do in the future.

7.67 And, finally, punishment must be consistently applied. This implies not only that offenders should be punished for the crimes they commit but also that similar offenders who commit similar crimes in similar circumstances should be punished in similar ways. It further implies that offenders who commit more serious offences should be punished more severely than those who commit less serious offences.

7.68 The Commission professed a primary reliance on the principle of "just deserts". The ALRC's concept of the "just deserts" theory clearly included both *cardinal* proportionality and *ordinal* proportionality:

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36 ALRC 44, pp11-14.

"The concept of 'just deserts' ... implies that similar offenders who commit similar offences in similar circumstances should be punished in a simliar way. Furthermore, it implies that offenders who commit more serious offences should be punished more severely than those who commit less serious offences."[37]

7.69 Surprisingly, despite these bold statements of policy governing the Commission's own approach to sentencing reform, the recommendations did not include a statutory statement of these principles of any kind. Instead, the Commission proposed a number of reforms to the procedures surrounding the exercise of sentencing discretion so that consistency of treatment between offenders and offences would be enhanced. These included more extensive requirements for the giving of reasons by sentencing judges; a statutory list of factors regarded as relevant to the sentencing decision - but it should not place an obligation on the courts to consider all or any of those matters; a statutory list of factors irrelevant to the sentencing decision; a clarification of the standard of proof required at sentencing hearings; and a more active role for the prosecution at the sentencing stage. Thus, whilst the policy which the Commission favoured is clear, the Commission proposed nothing which would oblige the courts to follow it, apart from a statutory list of relevant factors based on the policy - and even those were not to be considered binding.

7.70 The Commission found that the present law did not provide a statement of which facts are relevant to the exercise of sentencing discretion. A rational and consistent system of law requires the existence of a common standard by which to evaluate individual decision making. Consequently, the Commission recommended provision in legislation for a list of factors relevant to sentencing. Since it is impossible to predict every factor which might be relevant to sentencing, the list of categories should not be closed but should at least include the following:

- the degree of intention, premeditation or planning;
- the level of participation in the offence;
- whether a weapon was used;
- whether the offence was one of a number of offences committed systematically for profit;
- the extent and nature of harm to victims;
- whether the offender knew that the victim was a particularly vulnerable person, such as a child or an elderly person;

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37 *Ibid*, pp16,17.

- whether the offender was a law enforcement officer;

- whether there was provocation or duress, falling short of a complete defence;

- entrapment;

- the age of the offender;

- the offender's character;

- whether the offender was affected by alcohol or another drug, and if so, whether that was intentional;

- whether the offender had personal difficulties, such as emotional or financial difficulties;

- the offender's health;

- the offender's cultural background;

- whether the offender was remorseful or unrepentant;

- whether the offender was intellectually disabled or suffered from a mental illness;

- whether the offender was voluntarily seeking treatment for any health (including psychiatric) condition that may have been a contributing factor in the commission of the offence;

- whether a particular type of sanction would cause hardship to the offender;

- the indirect effects on the offender of conviction or a particular sanction, for example:

    loss of, or inability to continue in or obtain, suitable employment;
    loss of pension rights;
    cancellation or suspension of trading or other licences;
    diminution of educational opportunities;
    deportation;

- the impact on third parties of a particular sanction, for example, distress, reduced financial circumstances and deprivation of emotional support for the offender's family;

- a jury recommendation for mercy;

- grievances arising in the course of proceedings, for example, delay in bringing the matter to trial;

- prior and relevant history of convictions and dispositions.

7.71 It will be observed that the list does not differentiate on the basis of whether a fact is aggravating or mitigating, or on the basis of whether it aggravates or mitigates the seriousness of the offending behaviour, or whether it is merely a factor which mitigates the severity of sentence. This was apparently done on purpose, but the reasons are not clear - although presumably because some may be both aggravating or mitigating depending on the circumstances, e.g. the degree of participation in the offence.

7.72 Two members of the Commission dissented on the issue of a statutory list of relevant factors, saying that if its directory character was emphasised, it would provide little assistance, and if substance was given to it, the courts would be obliged to give effect to the language of the legislation - which would amount to an exercise in statutory interpretation.[38] "What is needed is the development of principle, not an exercise in statutory interpretation ... the development of consistent sentencing principles may be better achieved through the processes of the common law."[39]

7.73 The Commission acknowledged the controversial nature of two factors included in the list. First, the impact of a particular sanction on third parties was controversial because it appeared to authorise punishment otherwise than by reference to the offender's characteristics or conduct. However, it was included because of the potentially destructive consequences which might ensue if the impact of punishment on third parties, especially the family of the offender, was ignored. Secondly, the inclusion of the prior and relevant history of the previous convictions and dispositions of the offender was seen as controversial on the basis that the punishment for an earlier crime having been incurred, that crime was no longer relevant to the offence at hand. However, what the Commission proposed, although it is not clear from the list, was that prior criminal record could be of relevance, without contravening the principle of proportionality to the current offence, if it was appropriate to extend to first offenders some leniency in punishment, because it would consequently not be appropraite to treat offenders who continued to offend with that kind of leniency - whilst remembering that prior offences of a different kind to that being considered might not always be relevant to sentence. This amounted to an espousal of the *progressive loss of mitigation* theory outlined *supra.*[40]

7.74 A novel proposal was for a list of facts *not* relevant to sentencing:

- remission entitlements and early release (other than parole)

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38 See para 171 of the Report.
39 *Ibid.*
40 See Ch 6 *supra.* (Prior Criminal Record).

policies;

- unproclaimed legislation;
- prevalence of the offence;
- facts arising out of the same incident which might have supported another charge for a more serious or different offence;
- any other alleged offences of the defendant which had not been admitted in accordance with the usual procedure for taking offences into consideration;
- facts relevant to charges to which the accused has pleaded not guilty and on which the prosecution has led to evidence;
- the defendant's demeanour in court;
- the defendant's choice not to give evidence;
- the fact that the defendant may have committed perjury in the course of proceedings;
- any antecedent or subsequent offences either committed by the defendant or charged against him or her;
- allegations concerning possible antecedent or subsequent offences;
- the defendant's choice to plead not guilty.

7.75 The Australian Law Reform Commission's recommendations are characterised by

(i) A realisation that the purposes of sentencing are not the same as those of the whole criminal justice system, but, more particularly, to ensure that the punishment which the criminal justice system hands out is administered in a just manner.

(ii) "Just deserts" favoured as the primary principle for distribution of sentences.

(iii) Other objects to be still pursued within the "just deserts" framework.

(iv) No statutory statement of sentencing policy, but rather a list of relevant and irrelevant factors based on the "just deserts" policy

which may be considered by sentencers.

(v) A limited role for relevant prior criminal record.

(vi) Reliance on imprisonment restricted.

The USA

(vi) Minnesota[41]

7.76 The first sentencing commission in the United States was established in the state of Minnesota in 1978. In its reforms, the Commission adopted "just deserts" as the overriding consideration in determining sentences of *imprisonment*; nothing was done to alter the law in relation to other sanctions.[42]

7.77 The Commission boldly chose a prescriptive system for the ranking of offences into ten categories of severity. Offenders were divided into seven categories - their "deservedness" being calculated by reference to their prior criminal record. This reliance on criminal history is problematic, however, as the presence of a high criminal history score reduces the significance of the current offence and the punishment may no longer be proportionate to the gravity of the offence.

7.78 The Commission also produced a list of aggravating and mitigating factors which are only relevant to the sentencing decision if they conform to the desert rationale. This is clearly illustrated in that part of the guidelines which deals with factors which may or may not be used by a judge in departing from the presumed sentence under the statutory sentencing grid.[43]

7.79 The list of factors which *cannot* be used for varying the sentence is:

(a) Race;

(b) Sex;

(c) Employment factors, including -

(i) occupation or impact of sentence on profession or occupation
(ii) employment history
(iii) employment at time of offence
(iv) employment at time of sentencing;

(d) Social factors, including -

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41 See para 9.2 *et seq*, *infra*. (Presumptive Sentencing Guidelines: Minnesota).

42 A summary of the first three years' experience is to be found in Knapp, *Minnesota Sentencing Guidelines and Commentary Annotated*, (1985).

43 See para 9.2 *et seq*, *infra*. (Presumptive Sentencing Guidelines: Minnesota).

(i) educational attainment
(ii) living arrangements at the time of offence or sentencing;
(iii) length of residence
(iv) marital status;

(e) The exercise of constitutional rights by the defendant during the adjudication process.

7.80 The list of factors which *can* be so used is:

Mitigating

(a) victim was an aggressor in the incident;

(b) offender played a minor or passive role in the crime or participated under circumstances of coercion or duress;

(c) offender, because of physical or mental impairment, lacked substantial capacity for judgment when the offence was committed (does not include voluntary use of intoxicants);

(d) other substantial grounds exist which tend to excuse or mitigate the offender's culpability, although not amounting to a defence.

Aggravating

(a) victim particularly vulnerable, and this was or should have been known to the offender;

(b) victim treated with particular cruelty for which offender was responsible;

(c) offence involved multiple victims or multiple incidents per victim;

(d) offence involved high degree of sophistication or planning or occurred over a lengthy period;

(e) offender abused position of trust or status to commit offence.

7.81 There are also some specific mitigating and aggravating factors listed in relation to particular crimes or groups of crimes. These are:

(a) "Just Deserts" chosen as dominant policy consideration.

(b) Limited role accorded to incapacitation.

(c) Heavy reliance on prior criminal record.

(vii) The Federal System of the USA

7.82 In 1987 the United States Sentencing Commission issued its Report *Sentencing Guidelines and Policy Statements*. The *Comprehensive Control of Crime Act, 1984* delegated to the Commission the authority to review and rationalise the federal sentencing process and demanded guidelines which would further the basic purposes of criminal punishment, i.e., deterring crime, incapacitating the offender, providing just punishment and rehabilitating the offender.

7.83 The Commission, in its first report on its guidelines' remarked that it would be "profoundly difficult" to choose between the various possible objects of sentencing.[44] More sustainably, it suggested that "a clear-cut Commission decision in favour of one of these approaches would diminish the chance that the guidelines would find the widespread acceptance they need for effective implementation."[45] *Allen* counters that this begs the question whether there can be effective implementation of guidelines which have no coherent underlying rationale.[46]

7.84 The solution actually adopted by the Commission was to take "an empirical approach", using data estimating the existing sentencing system as a starting point. A primary aim was to determine which distinctions were important in judicial sentencing practice at that time and to replicate them in the guidelines. Thus a descriptive scheme was adopted (though with some evolutionary elements).[47] The Commission made the following case for its decision:

> "Those who adhere to a just deserts philosophy may concede that the lack of moral consensus might make it difficult to say exactly what punishment is deserved for a particular crime, specified in minute detail. Likewise those who subscribe to a philosophy of crime control may acknowledge that the lack of sufficient, readily available data might make it difficult to say what punishment will best prevent that crime. Both groups might therefore recognise the wisdom of looking to those distinctions that judges and legislators have in fact made over the course of time."[48]

7.85 This assessment is rather optimistic, and the Commission's other defence of its action is rather speculative: that as a practical matter, both philosophies may prove consistent with the same result in most sentencing decisions.[49] This, it is submitted, places the cart before the horse, as it were: the objects of sentencing should *dictate* the penalty imposed rather than being found, on examination after the event, *fortuitously* to be in agreement with the sentence

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44 *Sentencing Guidelines and Policy Statements* (1987) at p1.3.
45 *Ibid*, at p1.4.
46 *Sentencing Guidelines: Lessons to be Learned?* [1988] NILQ 315, p324.
47 See para 9.101 *et seq*, *infra*. (US Federal Sentencing Guidelines).
48 Commission Report, *op cit* at p1.4.
49 *Ibid*.

handed down.

7.86 *Breyer*, who was a member of the Commission majority, subsequently justified their position as being "a compromise forced upon the Commission by the institutional nature of the group guidelines writing process."[50] In respect of a "just deserts" approach, a difficulty would arise in that different Commissioners would have different views about the correct rank order of the seriousness of different crimes. The "trade-off" of views would tend, in his opinion, to create increased punishments in each area.[51] Nor did the Commissioners believe that public polling was sufficiently advanced or detailed to warrant its use as an accurate source in ranking criminal behaviours and to combat the inherent subjectivity of Commission decisions in this field.[52] At the same time, it was felt that "the empirical work with respect to *deterrence* could not provide the Commission with the specific information necessary to draft detailed sentences with respect to most forms of criminal behaviour."[53] *Commissioners Nagel* and *Block* gave this further justification for their approach:

> "Even had the Commission "simply mimic[ked] the mathematical averages of past sentences", however, a substantial step toward achieving both fairer and more effective sentences would have been made. Clearly, averaging out the extremes and irregularities of past sentences promotes more equal treatment for offenders. Perhaps more importantly, it furthers the crime-control goal of deterrence. Rational individuals consider the likelihood as well as the severity of punishment. Merely setting the guideline sentences at the average current sentence levels would increase the *certainty* of imprisonment while decreasing the *length* of the term - more offenders would go to prison, although some would go for a shorter time. Few experts would deny that this change in the manner of distributing punishment would increase the level of deterrence, thus enhancing one of the most important purposes of the institution of punishment."[54]

7.87 Thus, the Commission adopted its empirical compromise, which *Breyer* defends thus: "The result of this compromise is that the Commission's results will reflect irrationality in past practice, but only to a degree. Since the Commission employed *typical* past practices, the Guidelines tend to avoid unjustifiably wide variations in sentencing."[55]

7.88 The criticism by *Commissioner Robinson* of this rationale in his dissent

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50 *Op cit* at p15.

51 *Ibid.*

52 *Ibid*, at p16.

53 *Ibid*, at p17. See e.g. Braun, *Statistical Estimation of the Probability of Detection of Certain Crimes* (1988): paper prepared for the US Sentencing Commission).

54 *Preliminary Observations of the Commission on Commissioner Robinson's Dissent* (1987), at p3. It might be remarked, however, that this betrays a concern more for the *reliability* than for the *validity* of the policy adopted; See Pease *Sentencing and Measurement: Some Analogies from Psychology* in Wasik and Pease, *Sentencing Reform*, pp127-128.

55 *Op cit* at p18.

is justified - that individual judges up to the present have been relying on numerous different philosophies, and that the amalgamation of their practice can only deprive their sentencing of such little rationality as it possessed. But both he and the Commission majority were forced into untenable conclusions by the terms of the *Comprehensive Crime Control Act, 1984*, which demanded guidelines "that will further the basic purposes of criminal punishment, i.e. deterring crime, incapacitating the offender, providing just punishment, and rehabilitating the offender."[56] The failure of the original federal legislation to take account of the need to prioritise one single principle for the distribution of sentence must be held largely responsible for the subsequent logic of the Commission's Guidelines and the Robinson dissent. The end result has been that the guidelines manifest a strong tendency toward the incapacitation rationale.

7.89 The Federal Proposals can be characterised by:

(i) A failure to establish a coherent policy - and a failure to prioritise any one object or principle of distribution;

(ii) A pivotal role given to criminal history;

(iii) A tendency towards *increased* incapacitation.

(viii) Great Britain

JUSTICE Report

7.90 JUSTICE, the British Section of the International Commission of Jurists, established a committee in November of 1987 to assess the objectives and effectiveness of sentencing and the extent to which sentencing policy in England and Wales should be predetermined to achieve consistency. The Committee, chaired by Lady Ralphs, produced its report, *Sentencing, A Way Ahead*, in 1989.[57]

7.91 The Committee noted an "urgent" need for a clear and defined objective in sentencing policy, since Parliament had shown a "marked reluctance to provide one".

7.92 After examining the systems of proposed reform in other jurisdictions, the principle of proportionality ("just deserts") was proposed as the new rationale:

> "As an underlying principle of the criminal justice system we consider that punishments must be just in that they are of appropriate severity to reflect both the gravity of the offence and the culpability of the offender. *Thus we recommend that* the rationale underlying sentencing should be

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56 S994(a) of Title 28, United States Code.
57 Justice, *Sentencing, A Way Ahead*, (1989).

that of proportionality to the culpability of the offender. Accordingly, offenders committing similar offences in similar circumstances should be punished in similar ways."

7.93 Goals such as rehabilitation and restitution could be pursued, but "less tangible" goals such as general deterrence could not be relied upon to increase a sentence beyond what is proportionate to the offence.

7.94 An offender's criminal history could not be taken into account as an aggravating circumstance increasing the sentence, but it could cancel or reduce the degree of mitigation to which the offender would otherwise have been entitled.[58] Where a choice had to be made between a community sanction or a custodial one, prior record could also be taken into account, especially since a failure to respond to community sanction in the past could indicate that custody is appropriate for the instant conviction.

7.95 The Committee also recommended that the premise that imprisonment is a punishment of last resort should be firmly established and acted upon. Only those whose offences are so grave that any sentence would be unacceptable should be sent to prison.[59]

The Criminal Justice Act, 1991

7.96 The *Criminal Justice Act, 1991* represents the manifestation of the British Government's proposals contained in its earlier White and Green Papers.[60] Already, the Act is heralded as a great disappointment when seen in the light of the White Paper's proposals.[61]

7.97 The White Paper, *Crime, Justice and Protecting the Public* proposed a new legislative framework for sentencing, since, so far, Parliament had "given little guidance to the Courts on sentencing beyond setting the maximum penalties for offence", even though sentencing principles and sentencing practice are "matters of legitimate concern" to Parliament.[62]

7.98 The aim of the Government's proposals was better justice through a more consistent approach to sentencing. The ultimate objective of the Government was to reduce crime, particularly crimes of young people, before they embarked on a career of criminality. To this end, the Government had promoted and encouraged many crime prevention initiatives, including the promotion of neighbourhood watch schemes and crime awareness strategies.[63] Importantly, the Government noted that while sentencing has an important part

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58 *Ibid*, p11.
59 *Ibid*, p5.
60 White Paper, *Crime, Justice and Protecting the Public* HMSO CM 965, (1990) and Green Paper, *Punishment, Custody and the Community*, HMSO CM 424, (1988). The Act received the royal assent on July 25, 1991.
61 Editorial *The New Criminal Justice Bill*, [1991] Crim LR 1.
62 White Paper, *op cit*, p5.
63 See White Paper, p2.

to play in the prevention of crime, its role must not be over-stated. Many crimes are not reported, and even those that are reported are not always solved, so many of those who commit crime cannot be brought to justice in the sentencing arena. The Government's proposals therefore emphasised the objectives which sentencing is most likely to achieve in whole or in part:

> "The first objective for all sentences is denunciation of and retribution for the crime. Depending on the offence and the offender, the sentence may also aim to achieve public protection, reparation, and reform of the offender, preferably in the community. This approach points to sentencing policies which are more firmly based on the seriousness of the offence, and just deserts for the offender."[64]

7.99 "Just Deserts" was the Government's choice. Objectives such as rehabilitation, deterrence and incapacitation could not be successfully met by sentencing, and, in any event, it had been a long accepted objective of sentencing that punishment should be proportionate to the seriousness of the crime.

7.100 In tandem, the Government proposed that imprisonment be relied upon less, since many offences, especially property offences, could be dealt with adequately by way of compensation orders, fines, or community penalties. In contrast, crimes of violence, which are viewed as being more severe, could be treated more severely.

7.101 Under the proposed framework, an offender's criminal record could not be used to aggravate the sentence; but a good record could be relied upon to mitigate the sentence.

7.102 In contrast to the White Paper, the Act vehemently avoids statements of general principle. In the run up to the Act there was much controversy and debate,[65] and the end result shows many signs of a compromise stance having been adopted. In essence, the Act restricts the Courts to certain justifications for imposing particular sentences.

7.103 The Act is prolix. Part 1 concerns the power of the courts to deal with offenders, and introduces a new framework for sentencing. Section 1 restricts courts to two possible justifications for imposing a custodial sentence:

(a) the offence was too serious to be dealt with by other means, or

(b) the protection of the public from serious harm.

7.104 However, if the offence is indictable only, and the offender was previously sentenced to imprisonment, or the sentence is a mandatory one, these restrictions do not apply. Section 1 also makes provision for the giving of reasons whenever

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64 *Ibid*, p6.

65 See Wasik and von Hirsch, *Statutory Sentencing Principles: The 1990 White Paper*, (1990) 53 MLR 508.

the court is passing a custodial sentence.

7.105 Section 2 provides that the term of custody imposed by a court must be:

(a) commensurate with the seriousness of the offence, or

(b) (if the offence is one of a violent or sexual nature) of a duration necessary to protect the public from serious harm, provided it does not exceed the maximum.

7.106 These requirements do not apply, however, to crimes triable on indictment only. Reasons are only required to be given if the duration of sentence is based on the protection of the public under section 2(b).

7.107 Section 3 covers the consideration of pre-sentence reports, information about the circumstances of the case, information about the offender's attitude to the offence and his or her physical and mental condition, and the importance of prior criminal record. Section 3(2) provides that, in general, previous convictions and responses to previous sentences do not render an offence more serious: however section 3(3) states that the *circumstances* of previous offences *may* be of relevance to the seriousness of the offence. No indication is given of *how* the circumstances of previous offences may be related to the seriousness of the offence, or to what degree.

7.108 Section 4 abolishes the power of the court to pass a partly suspended sentence or an extended sentence. Section 5 sets out the grounds for passing a "community sentence", i.e. a sentence including any one of following:

a) probation;

b) community service;

c) a combination of both;

d) curfew order;

e) supervision order;

f) attendance centre order.

7.109 The courts may only pass one of these types of sentence when satisfied that it is the most suitable for the offender, and the restriction on the liberty imposed by the order or orders must be commensurate with the seriousness of the offence.

7.110 Also of interest is section 16 which provides for fines imposed by the magistrates' courts to be determined by reference to a unit fine scheme in which

the number of units corresponds to the seriousness of the offence.[66]

7.111 All in all, the Act represents a compromise attempt to introduce the policy of "just deserts" into the sentencing decision by requiring the courts to impose a sentence proportionate to the seriousness of the offence, while at the same time retaining the policy of incapacitation when imposing a custodial sentence. Even those who agree with the policy introduced by the Act criticise it for making sentencing too complex without pronouncing any consistent or dominating policy.[67] The Act's "greatest defect"[68] is that it misses the opportunity to declare the aims, principles and policies which ought to govern sentencing generally. It is destined to generate a considerable amount of public and professional discussion in the coming months.

7.112 The Act is characterised by:

(i) A missed opportunity to declare a *general* sentencing policy;

(ii) A preference for 'just deserts' with an exception accommodating incapacation of violent and sexual offenders;

(iii) In so far as it is a chosen principle, only the cardinal proportionality limb of "just deserts" is mentioned;

(iv) Chosen principles govern only certain types of offence;

(v) Use of imprisonment as a sanction is restricted;

(vi) Limited role for prior criminal record; ie. it should not, in general, render an offence more serious, unless it is relevant - but "relevant" is not defined.

(ix) Sentencing Policy On The Continent

7.113 The Council of Europe has in recent years been responsible for extensive comparative work on sentencing throughout the continent. Chief sources are the papers of the *Eighth Criminological Colloquium* (of 1987)[69] and the documents of the Select Committee of Experts on Sentencing which have been published in the intervening period.[70]

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66 The subject of means related fines is dealt with more fully in this Commission's publication *Indexation of Fines*, (LRC 37-1991).

67 Ashworth, *The Criminal Justice Bill*, a paper presented at the conference '*Sentencing, Judicial Discretion, and Judicial Training*', Faculty of Law, University of Manchester, 28th March, 1991.

68 Editorial, *op cit* n.63 *supra*, p3.

69 Collected Studies in Criminological Research, Vol. XXVI, *Disparities in Sentencing: Causes and Solutions* (1989).

70 The Select Committee consists of 12 members appointed by the governments of Cyprus, France, Germany, Greece, Iceland, Malta, Netherlands, Portugal, Spain, Sweden, Turkey, United Kingdom, two scientific experts, and observers from Canada, Finland and the United States. It draws its authority from the European Committee on Crime Problems. Its published papers will be cited in full as they arise in the discussion which follows.

7.114 A good introduction is given by *Marc Robert* to the sentencing problems which the civil legal systems of Europe share with those of the common law world.[71]

7.115 He remarks that there exist troublesome disparities *and* uniformities in European sentencing practice - disparity in the nature of the penalty imposed, and in the quantum of the sentences, and excessive uniformity in the solutions adopted eg. as between "offenders with criminal intentionality who must be segregated from society and ... those without this intentionality in relation to whom a solution should be adopted which does not withdraw them from society, even if the same criminal act is involved."[72]

7.116 A further problem arises with the co-existence in European criminal systems of "two different and almost contradictory values."[73] One is that of *formal* equality: "if the offence has been defined and classified and attributed to the defendant in accordance with the rules of procedure, and if the sentence has been imposed within the framework laid down by the provision relating to the offence concerned, a person convicted after a trial must be considered as having enjoyed all reasonable guarantees against arbitrary proceedings and to have been treated fairly."[74]

7.117 The other is that of individualisation, and of *substantive* equality, "whereby the courts are now required to apply different sanctions to individuals who differ in their degree of responsibility, and their personalities ... giving preference to equal chances for [social] reinsertion over the traditional concern for equality of punishment."[75]

7.118 The combination of these two values requires, in *Robert's* view, a number of features to be introduced to penal systems. In particular, general criteria of individualisation must be given.[76] Such provisions, where they exist, tend to be very similar, ultimately referring the court to the application of the objectives pursued by the penalty. For example, Article 45 of the preliminary draft of the Belgian Criminal Code provides that "within the limits of the law, the court shall select the penalty bearing in mind the objective seriousness of the act and subjective guilt of the perpetrator, and giving special consideration to the effectiveness of this choice for the defence of society, and the values it recognises, and the possibility it provides for the social reinsertion of the offender

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71 Robert, *Inequalities in Sentencing* in *Disparities in Sentencing*, pp19-63.

72 *Ibid*, at pp20-23; quotation from p22. While statistics of the various jurisdictions are not readily comparable, figures for different regions within each jurisdiction seem to indicate the universal nature of these problems - see the surveys quoted, *ibid*, at pp21-22. Robert remarks further (*ibid*, at p22) that "it is the divergence rather than the convergence of decisions which arouses the interest of criminologists, although the latter is equally problematical."

73 *Ibid* at p25.

74 *Ibid* at p24.

75 *Ibid*, at p25. This principle appears in Article 27.3 of the Italian Constitution, which states that the penalty must be designed to re-educate convicted persons, the Spanish Code, and the French and Belgian preliminary draft codes.

76 *Ibid.*

and respect for his personality."[77]

7.119 However, the functions of penalties are rarely more precisely defined by the legal systems of Western Europe:[78]

> "The history of French legislation in the field of penology in the last ten years is a good example of the uncertainty which can prevail in this area owing to the confrontation of two antagonistic currents: the first insists on the need to treat offenders by using security measures (*mesures de surete*) rather than penalties (see Acts of 15 July 1975 and 30 June 1983); the other seeks to reinstate deterrence by retribution and neutralisation by a selective increase of prison sentences (see Acts of 22 November 1978, 2 February 1981 and 9 September 1986), not so much in the interests of equality but in an attempt to put an end to a supposed laxity of the courts, exemplified by the difference between the statutory penalties and the penalties actually imposed."[79]

7.120 The German Penal Code contains what *Weigend* calls "a compromise formula that states rather than resolves the perennial conflict between retributivists and rehabilitators":[80]

> "The culpability of the offender is the basis of sentencing. The effects which the punishment is expected to have on the offender's future life in society shall be taken into account."[81]

7.121 In fact, rehabilitation has never been more than a complementary purpose of punishment in practice, though regarded as co-equal with retribution in theory. German courts are precluded from prolonging a sentence beyond the limits set by the desert principle in order to facilitate the rehabilitation of the offender.[82] (This, however, can be circumvented by recourse to "non-punitive" measures like preventive detention, which are discussed below).

7.122 Two German commentators, *Horn and Schoech*, have made a novel proposal for the interpretation of the statutory formula in a non-self-contradictory fashion. They suggest that culpability and rehabilitation be the guiding themes of different phases of the sentencing process. The length of sentence would be determined, as an initial step, according to the desert of the offender. The nature of the sentence (imprisonment, probation, fine) would then be dictated by rehabilitative theory.

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77 See also Article 133, Italian Criminal Code; Portuguese Criminal Code (23rd September 1982); Article 133-22, draft French Criminal Code.

78 *Ibid.*

79 *Ibid*, at p30. Note also the tension between Article 27 of the Italian Constitution, with its stress on rehabilitation, and Article 133 of the Criminal Code, which takes account of the objective of general deterrence.

80 Weigend, *Sentencing in West Germany* in Tonry and Zimring, *Reform and Punishment* (1983) 21, p52.

81 S46(1), German Penal Code.

82 Federal Appellate Court Judgment, 4th August 1965, 20 Entscheidungen des Bundesgerichtshofs in Strafsachen 264.

7.123 Sentences of up to a year would be interchangeable (and the majority of sentences lie in that range). "The choice among modes of punishment, as opposed to its quantum, should be guided, according to this proposal, by criminological knowledge rather than by an assessment of culpability."[83]

7.124 Stated thus simply, the *Horn/Schoech* scheme is not dissimilar to the hybrid *choice of method* approach discussed above.[84] The criticisms voiced by German commentators are therefore of interest, as summarised by *Weigend*:

> "Critics argue that mechanical allocation of sentencing considerations to different phases of sentencing is too simple to be fair. Nor does the statute permit the total exclusion of rehabilitative considerations from the determination of the length of the sentence. Finally, the proposal offers no solution to the problem of sentencing in serious cases, where the conflict between culpability (which requires a long prison term) and rehabilitation (which is often best served by noncustodial treatment) is most acute."[85]

7.125 It is submitted that the first two criticisms could be answered by greater sophistication in operating the choice of approach method, but the third remains problematical.

7.126 *Robert* noted, however, a growing realisation that there exists no consensus on the function of criminal penalties (nor of the criminal law), and that a sentence cannot of itself resolve social problems, and must be content simply to preserve the authority of the law and promote its observance in a spirit of justice and equity.[86]

7.127 But whether continental judicial systems are prepared to follow more precise instructions on the nature and length of sentences (as must be necessary if simple uniformity and proportionality become chief aims of sentencing) is open to question.[87] *Robert* does remark that up till now, the means available to European courts to promote individualisation in sentencing varied enormously, dependent largely on the proportion of the procedure devoted to a sentencing hearing. In England and Sweden, this is of considerable importance, in Italy and France it plays only a marginal role.[88] This may be explained by the extent to which the preliminary investigation in an inquisitorial system can provide the necessary information for fixing sentences. Nonetheless, the comparative rarity of recourse to personality studies casts doubt on the individualisation of

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83 Weigend, *op cit*, at p53; See Horn, *Zum Stellenwert der "Stellenwerttheorie"* in Frisch & Schmid (eds), *Festschrift fuer Hans-Jurgen Bruns* (1978); Schoech, *Grundlage und Wirkungender Strafe, Zum Realitaetsgehalt des s46(1) STGB* in *Festschrift fuer Friedrich Schaffstein* (1965).

84 See para 4.102, *et seq, supra.* (Hybrid Principles).

85 *Loc cit.* See e.g. Schoenke and Schroeder, *Strafgesetzbuch* (1982, 21 ed); Lackner, *Ueber neue Entwicklungen in der Strafzumessungslehre und ihre Bedeutung fuer die Richterliche Praxis* (1978) at pp16-22.

86 *Ibid*, at pp31-33. This realisation has also featured in the reports of sentencing reform commissions and bodies in Canada, Australia, and England and Wales mentioned earlier in this chapter.

87 *Ibid* at p33.

88 *Ibid* at p34.

sentences in such circumstances, implying that more importance is attached to the act than to the personality.[89]

7.128 The amenability of judges to the influence of judicial precedent is of considerable importance for the success of any sentencing initiatives. While in countries applying the Romano-Germanic system, judicial precedent is not normally a source of domestic law, there is evidence that in Italy, Belgium and France, objective criteria for the commonest types of offence are being fixed by the courts for certain offences - cheque fraud, misappropriation, traffic infractions, shoplifting - and that penalties are fixed in some chambers by genuine judicial precedents based on local constants.[90] In France and Germany, instructions and scales are distributed to courts or to prosecuting authorities (who are subject to superior instructions) based on past judicial practice. But, as *Robert* points out, this relates only to the mass of very frequent repetitive offences committed in similar circumstances which are ill-adapted to individualisation.[91] In general, judicial sentencing in France and Italy is governed by tradition, non-rational factors and the courts' concept of criminal policy and not by criteria laid down by statute or case-law, with judges exercising too wide a discretionary power without instructions or supervision.[92]

7.129 The Scandinavian countries are much closer to "the Anglo-Saxon Model" - in Denmark, Norway and Sweden, judicial decisions are of real influence in subsequent analogous cases. In Denmark, this reaches its greatest extent, where the presidents of the two High Courts may consolidate practice with guidelines for offences such as traffic offences.[93]

7.130 *Robert* also gives an account of the erosion of judicial control of sentencing at both the pre-hearing and post-hearing stages in most European countries, through the broad discretion given to prosecution authorities and through selective or varied enforcement of penalties (especially imprisonment).[94]

A number of European countries make special provision for "dangerous" offenders. Sometimes, such provisions exist on the statute books but may be said to be dormant, as in the case of Norway.[95] In Germany, there is no provision for the *punishment* of dangerous offenders.[96] There are, however, what are termed measures of rehabilitation and prevention.[97] As these are not considered to be punishment, they are not subject to the usual rules on

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89 See generally *ibid*, at pp35-36.

90 See eg. Bilon, *La Peine de la Malice*, (1986) 2 Revue de Science Criminelle 333; cited by Robert, *op cit*, at p40.

91 *Ibid.*

92 Dolcini, *La Commisuzione della Pena*, Cedam (ed), *Collana di Studi Penalistici*, nouvelle serie, vol xvii, (1979); Robert, *Recherche Criminologique et Reforme du Code Penal* (1972), both cited by Robert, *op cit*, at p47.

93 *Ibid*, at p39.

94 *Ibid*, at pp49-55.

95 According to s39 of the Norwegian Penal Code, a defendant who is guilty of several attempted or completed serious felonies (listed in the provision) may be kept in preventive detention after he has served all or part of his sentence. The courts have not had recourse to this provision since 1963: *Sentencing Practices in Norway* PC-R-SN (89) 24, at p10.

96 Per Horstkutte, *Sentencing Practices in the Federal Republic of Germany*, PC-R-SN (90) 2, at p11.

97 See ss. 61 *et seq*, German Criminal Code.

sentencing. Two "medical" measures are placement in a psychiatric hospital and committal to an alcohol/drug dependency unit. The third measure is preventive detention.[98] At present, some 40 preventive detention orders are given annually: three quarters relate to rape, robbery and homicide, the rest to burglars and professional fraudsters. An order of preventive detention is imposed with a prison sentence and is served after the term of imprisonment. The prerequisites for such an order are a number of previous convictions and prison terms, and a finding that these, combined with the instant offence, are the expression of an inclination to commit very serious offences. The maximum detention is 10 years (unless the offender has been so detained before). Release is necessary as soon as the detainee "can responsibly be allowed out of the institution to see whether he will desist from further offence."[99] These decisions are the responsibility of a specialised court.[100]

7.131 The Council of Europe has yet to produce a final report on sentencing. The Select Committee of Sentencing Experts, chaired by *Professor Ashworth*, has, however, published Draft Recommendations on Consistency in Sentencing, with a commentary by *Professor Ashworth*. Many of the proposals are in accordance with the recommendations of this paper. Those recommendations and commentary are published in full below as Appendix A.

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98 S86, Criminal Code. Weigend remarks (at p49) that the offender pays a heavy price for the neat doctrinal separation between culpability and dangerousness.

99 S67(d), Criminal Code. This may happen before any detention is served, at the end of the prison term.

100 Horstkutte, *loc cit.* No details are given of the composition of this court, or of the criteria it applies. Finland has a system similar to Germany's, which is now almost, but not entirely, dormant. See Lappi-Seppala, *op cit*, at pp 12-13. See also Andenaes *The Choice of Sanction: A Scandinavian Perspective* in Tonry and Zimring (eds), *Reform and Punishment*, (1983), p4.

CHAPTER 8: DISPARITY IN CONTINENTAL EUROPE

8.1 That there is a general lack of concern about sentencing problems in continental Europe, and a tendency to rely on formalist solutions where such problems are raised, is illustrated by the responses of various States participating in the European Committee on Crime Problems to a questionnaire circulated by *Professor Ashworth*.[1] It is worthwhile summarising some of the results of this questionnaire.

8.2 The first four questions sought information on any techniques, restrictions, etc, adopted in order to reduce disparity in prosecution or sentencing practice.

8.3 In countries applying the principle of mandatory prosecution, it was stated that no discretion existed at this stage, so no techniques to reduce disparities had been introduced.[2]

8.4 Where discretion does exist to prosecute, the adoption of different approaches is sought to be prevented by the issue of circulars or guidelines following consultation between chief prosecutors.[3] In some cases, summary fines or financial settlements in lieu of prosecution were also cited,[4] but it is difficult to appreciate how the existence of this option can guide recourse to this or other courses of action available to the prosecution. A proposal in Norway, during the preparation of the *Penal Prosecution Act, 1987*, that the defendant have a right

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1 Select Committee of Experts on Sentencing, Questionnaire *Techniques of Disparity Reduction*, for the Eighth Criminological Colloquium, Council of Europe Doc. APCRSN 5.89.

2 Summary of Replies to Questionnaire Document APCRSN 7.90 at p2. Countries in this category include Italy, Greece, Portugal, Austria, Germany and certain Swiss cantons.

3 Belgium, Luxembourg, certain other Swiss cantons. Summary, *loc cit.* No account is given in the replies of the individual States of the contents of such guidelines.

4 In respect of Belgium and Norway.

of appeal to a superior prosecuting authority eg. on the ground that there was a disparity in the prosecution's treatment of his case, was ultimately rejected.[5] This is an interesting idea. It appears that a similar, informal practice exists in Ireland: defendants can (and do) contact the DPP's office to complain about prosecutions taken by the Gardaí, etc.[6]

8.5 More countries had taken account of the possibility of disparities at the sentencing stage. Luxembourg has ordained the preparation of a "standard prosecution application" by the public prosecutor so as to introduce standardised case-laws for comparable cases.[7] This seems a useful practice, but one whose utility is probably limited to the more common minor crimes for which there can be few special circumstances that should aggravate or mitigate punishment.

8.6 Another Luxembourg innovation has been the diversion of criminal cases, at first instance as well as on appeal, to a special court chamber whose members are appointed for a certain term, with the object of attaining greater uniformity of decision-making.[8]

8.7 In other countries, disparity or severity of sentence may be a ground of appeal (e.g. in Cyprus, Denmark, Luxembourg and many others) or of Royal Pardon (e.g. in Belgium); courts may have more than one judge in order to ensure consistency (e.g. in Greece); fixed sum fines have been introduced in specific fields, especially for traffic offences (e.g. in Switzerland and various other states). Legislative control of judicial discretion in sentencing is almost non-existent in some countries (Norway, Switzerland); in most, upper (and sometimes lower) limits are set for each offence type. (See especially Belgium, Italy, Portugal).

8.8 In general, therefore, the measures taken at this stage to reduce sentencing disparities are not very interventionist. In only two countries (Luxembourg and Greece) is there any provision for the righting of sentencing disparities by the authorities responsible for the *execution* of sentences.[9] In most countries, early release either cannot or is not resorted to in order to achieve such a goal.[10]

8.9 The autonomy of judges rules out in most jurisdictions judicial provision of general advice, guidance or instruction either on appeal or otherwise. In many countries, the restriction of the competence of higher courts to the supervision

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5 *Reply of Norway*, PCRSN (89) 14.

6 See HEUNI, *Non-prosecution in Europe - Proceedings of the European Seminar* (1986) *Summary Report on Ireland* at pp231-239.

7 The Luxembourg response gives the following account of this system: "The Parquet General (Prosecutor General) can order the two prosecutors always to place 'similar' matters in the same composition or form, which obviously has the effect of creating, for such matters, a more or less unanimous jurisprudence. Examples include thefts in self-service shops (shop-lifting); drunken driving; drunken driving causing an accident, etc". (translation, from Reponse du Luxembourg, PC-R-SN (89) 13 at p3.

8 *Ibid.*

9 *Summary of Responses*, at p4.

10 *Ibid* at p3.

of purely legal points strengthens this trend.[11] Only Norway and Denmark are substantial exceptions. In Norway, a higher court may provide general guidance for judges in lower courts; in Denmark, the Presidents of High Courts issue guidelines on certain matters. These however, are only in respect of minor offences; nonetheless, in general, judgments of higher courts are followed. In Norway, the Supreme Court is the only court of appeal in criminal cases, with competence to review all aspects of the case. "The purpose of this system of *direct appeal* is to ensure an efficient attention to uniformity in law and sentencing. The Supreme Court is thus given the authority to avoid concrete disparity and to draw general guidelines for the lower courts."[12] Interestingly, almost half (46%) of *all* cases of the Norwegian Supreme Court concern *inter alia* sentencing appeals, so that a considerable jurisprudence must by now have been built up.

8.10 It is worth noting that plea-bargaining is not accepted in theory, and almost unknown in practice, in Scandinavia, as well as in many other continental European countries.[13] A formal plea of guilt is not conclusive - the court still has a duty to find out the truth, so that a confession is not given conclusive evidentiary weight.[14]

8.11 Nonetheless, there are practices in place which concede considerable power to prosecutors. In the Netherlands, judges tend (but are not bound) to follow the guidelines of the Public Prosecutions Department which are applied in demanding a sentence in court.[15] These have been issued in respect of *inter alia* contravention of weapons laws, drunken driving and drug offences (contravention of the *Opium Act*). In respect of the latter, for example, the Public Prosecutions Department has indicated in its guidelines which minimum statutory penalties are to be demanded for certain categories of offenders such as traffickers, couriers, addicts and dealers.[16] "In practice the guidelines and the sentence demanded by the public prosecutor play an important role in sentencing by the court. They reduce undesirable inequality in sentencing, provide the court with some guidance in sentencing and compel judges to provide reasons for sentences which deviate from the normal".[17] One point of criticism that might be raised, however, is that this scheme gives too much influence and initiative to prosecutors; there is no sign that defence counsel's contributions carry equal weight. In the absence of fuller evidence, it is impossible to pronounce on this question.[18]

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11 Greece, Portugal, Austria, Germany. See *Summary of Responses* at p5.

12 *Reply of Norway*, PC-R-SN (89) 14 at p2. See also *Sentencing Practices in Norway*, PC-R-SN (89) 24; it is more explicit on the nature of such guideline judgments, remarking solely that they "quite substantially narrow the scope of discretion applicable" (at p3).

13 Andrews, *The Choice of Sanction: A Scandinavian Perspective* in Tonry and Zimring eds *Reform and Punishment* (1983) 3 at p18.

14 *Ibid*, at p19. It will be noted that what might be called a more inquisitorial approach is advocated in respect of guilty pleas consequent upon plea agreements. See Ch 12, *infra* (Plea Discussions and Agreements).

15 *Sentencing Policy in the Netherlands*, PC-R-SN (89) 27 at p6.

16 *Ibid* at p9. Though the description is limited, the guidelines do not appear to be very extensive in effect.

17 *Ibid* at pp9-10.

18 It has been decided, however, not to recommend that prosecution counsel be permitted to make submissions on the most appropriate actual sentence for a given case. See para 11.24 *et seq*, *infra* (The Role of Prosecuting Counsel).

8.12 In Germany, the prosecutor is accorded unusual deference within the criminal justice system, based on the view that he is a *neutral* officer, who upholds the law rather than necessarily seeking a conviction, so that "he can safely be trusted to share sentencing authority with the judge".[19]

8.13 In two common situations, the prosecutor can contribute significantly to the determination of the sentence imposed on the defendant. In minor cases, the judge can give a provisional written judgment containing a criminal conviction and a specific sentence, based on the prosecutor's file - this becomes final if the accused does not appeal within a week. If he or she does, an ordinary trial is held. The novel feature of this system (to Irish eyes) is that it is the *prosecutor* who decides if this process (*Strafbefehlsverfahren*, or penal order proceeding) is to be employed, and who drafts the provisional judgment including the sentence. The judge cannot alter this - he or she must either accept it in its entirety, or reject and order a trial.[20] In fact, judicial consent is withheld in less than 1 per cent of cases, not least because there exist informal channels of negotiation between judges and prosecutors.[21]

8.14 Almost half of all criminal cases are processed by *Strafbefehl*,[22] and 85% of these penal orders become final either because the defendant acquiesces or because he withdraws an appeal filed.[23] The result is that prosecutors can virtually dictate legal outcomes in vast numbers of cases without there ever being a trial - a situation resembling plea-bargaining, except that the accused's position is significantly weaker, as there is no bargaining process as such.

8.15 In a second situation, more akin to their powers in other European countries, prosecutors can recommend a sentence after trial. There is approximately 50% judicial adherence to such recommendations. They are most significant in that judges will rarely impose a harsher sentence than that recommended - in practice, the recommendation is viewed as the most severe appropriate sentence, and so sets an outer limit to the punishment a defendant can normally expect to receive.[24] It may be remarked, however, that the prosecutor's role in recommending the harshest appropriate sentence sits ill with his or her supposedly neutral role as a court officer when operating the *Strafbefehl* system and effectively setting sentences himself or herself.

8.16 An important factor when judges come to place a particular crime on the scale of seriousness is the presence of features which the law describes as aggravating or mitigating. Naturally, in a jurisdiction with a clearly defined and non-contradictory sentencing policy, these could in any event be deduced. Some European states expressly list such factors (usually non-exhaustively) in positive

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19 Weigend, *op cit* at pp 32-33. In one important respect, however, the prosecutor's power is limited: the court, not the prosecutor, decides upon the legal characterisation of the charges brought against the defendant. See s155(2), German Code of Criminal Procedure.

20 See ss 407-412, German Code of Criminal Procedure.

21 See Weigend, *op cit*, at pp 33-34.

22 436,000 out of 946,000 cases in 1981 (Weigend, *op cit*, at p34).

23 Albrecht, *Strafzumessung und Strafvollstreckung bei Geldstrafen* (1980) at p94.

24 See Weigend, *op cit*, at pp34-35.

law; in others, they may be formulated by the judiciary. Sometimes, aggravating and mitigating factors are defined on an offence-by-offence basis, and so vary according to the offence charged.[25]

8.17 In Germany, the Criminal Law Code does not define aggravating or mitigating factors as such. Most of the factors cited in the general part of the Code can be aggravating in some cases and mitigating in others.[26]

8.18 In the special part of the Code, the exemplary description of really serious cases is, in a way, similar to the definition of aggravating circumstances e.g. "theft":

> "burglary, a specially secured object, weapons as an object of the theft, professional stealing, stealing from a museum, church or helpless person".[27]

8.19 In this respect, therefore, Germany mirrors the French practice of defining these factors on an offence-by-offence basis.[28] Nonetheless, the *courts* have also developed a number of factors in practice, although the appeal courts are cautious about giving general advice on this topic.

8.20 The difficulty in giving advice on this issue must be considerable in a system, such as Germany's, which has been dedicated to pursuing conflicting sentencing objectives.[29] Finland is exemplary in this respect: its *Sentencing Act* contains both general sentencing principles (chief of which is proportionality of punishment to offence seriousness and culpability)[30] and a non-exhaustive list of more specific sentencing criteria.[31]

8.21 These factors, as well as the normative starting points[32] are employed not only to determine the level of the offender's responsibility and consequent punishment, but also to choose between a custodial and non-custodial type of sentence.[33]

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25 As in the Netherlands (see at p6) and in France: see *Sentencing in France* PC-R-SN (89) 30 at p5. In France also there are no special criteria governing the choice of a custodial sentence: the law merely gives the judge the general power to pass an alternative sentence in the case of lesser indictable offences. "Whether he does so depends on the crime policy approach decided upon by each Minister for Justice" (*Ibid*). In the new criminal code, prison sentences will no longer be considered as the "standard" sentence.

26 Horstkotte, *op cit*, at p8.

27 *Ibid*

28 The law codes of the German states of the 19th century contain long lists of general aggravating and mitigating circumstances. Traces of these old catalogues can still be found in the Austrian Penal Code of 1975 (ss. 33,34).

29 See Ch 2, *supra*. (Sentencing Policy).

30 Penal Code 6: 7.

31 See Lappi-Seppaelae, *Reply of Finland*, PC-R-SN (89) 2 at p10.

32 See Ch 9 *infra*. (Implementing Sentencing Policy).

33 *Ibid*, at p11.

CHAPTER 9: IMPLEMENTING SENTENCING POLICY: PRESUMPTIVE GUIDELINES, STARTING POINTS AND JUDICIAL GUIDANCE

9.1 In the following chapters, we will concentrate on examining methods of implementing sentencing policy and of regulating judicial sentencing discretion which have been developed in other jurisdictions. Broadly speaking, two approaches are discernible: those of court sentencing guidelines and of sentencing starting points. The former is almost exclusively of North American invention; the latter is of continental Europe origin, but may in fact be very appealing to those weaned on the common law. They share many features in common, employ statistical methodologies which are in some degree interchangeable, and may on their face appear very similar. Moreover, both approaches have their roots in the principles of proportionality and "just deserts" which it is proposed should be pursued by sentencers in this country. However, presumptive guidelines are ostensibly much more rigorous in their control of judges' discretion. The two schools of thought are not internally uniform. Numerous US states, Canada and the US federal jurisdiction, have adopted guidelines schemes which are in many respects dissimilar - these will be considered in detail in the following three sections, and their possible extension to Ireland assessed. The related but less imaginative and appealing notion of determinate sentencing will also be discussed. The two chief contending means of devising sentencing starting points - the Finnish and the Victorian - will then be examined in a similar fashion.

(I) PRESUMPTIVE SENTENCING GUIDELINES: MINNESOTA

9.2 The State of Minnesota in the U.S. was the first jurisdiction to adopt a system of presumptive sentencing guidelines, which was a radical departure from previous, highly discretionary sentencing regimes in America, and which has subsequently been extremely influential. "It was the trigger which set in motion a range of sentencing reform projects in the United States involving sentencing commissions, sentencing guidelines, parole abolition or parole guidelines,

mandatory sentence laws, determinate sentencing, plea bargaining bans and rules, and appellate sentence review."[1]

9.3 A combination of institutional arrangements - what *Tonry* calls the "sentencing commission model"[2] was central to this new departure. The Minnesota scheme involved:

(a) a sentencing commission;

(b) presumptive sentencing guidelines; and

(c) appellate sentence review.

9.4 The sentencing commission was deemed indispensable because it was thought to possess the institutional capacity to develop sentencing standards of much greater subtlety and specificity than any legislature could (not to mention the judicial bench).[3] Its important political role in promoting a policy which was in very many respects revolutionary will be alluded below.[4] First, the components of the scheme will be set out.

9.5 The guidelines apply only to felony convictions. Felony offences are divided into ten categories based on levels of seriousness. Offenders are categorised into seven groups on the basis of "criminal history scores" (largely grounded on the number of prior felony convictions). The resulting rankings are used to calculate the applicable presumptive sentence by means of a guideline *matrix* (See Table 1) - a table with offence severity and criminal history as its axes. The interior cells of the table contain the presumptive sentence ranges. The sentencing court in any case needs simply to refer to the cell at the intersection of the row and column relevant to the defendants' crime, and his past record. Those whose offence and prior convictions, if any, place them in a cell above or to the left of the bold black line are presumptively *not* to receive a state prison sentence (the numbers in such cells indicating the prison sentence to be imposed on failure of probation or similar conditions). For those whose cases fall below the dividing line, the single number is the presumptive sentence in months, but the judge may impose any sentence from within the narrow range shown at the bottom of each cell. *Tonry* states succinctly the advantages of such a scheme:

> "Presumptive sentencing guidelines provide a mechanism for expressing sentencing standards in a form that has more authority than voluntary guidelines, is less rigid than mandatory sentencing laws, and is much more specific than the maximum and minimum sentences set out in the

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1 Allen, *Sentencing Guidelines; Lessons to be learned?* 39 NILQ 315 (1988) at p320.

2 *Sentencing Guidelines & Sentencing Commissions, - the second Generation* in Wasik& Pease, (eds) *Sentencing Reform: Guidance or Guidelines?* (1987) 22 at p25.

3 *Ibid*, at p26.

4 The Minnesota Sentencing Commission was established in 1978, and submitted its guidelines to the legislature in 1980. The scheme was first put into operation in 1981.

criminal codes."[5]

9.6 It should be noted that the presumptive sentence is not mandatory, but only "substantial and compelling circumstances" allow a departure from it. Such a departure must be supported by written reasons, and either prosecution or defence can appeal the decision to depart. This has given Minnesota its first "meaningful system of appellate sentence review"[6] and has helped clarify the appropriate considerations in a sentencing court's decisions to depart from the presumptive sentence. It is the third distinctive plank in *Tonry's* "sentencing commission model." There is a distinction between those departures from the presumptive sentence which are *dispositional*, and those which are *durational*.

9.7 *Dispositional departures* include both execution of a presumptively stayed sentence, and stay of a presumptively executed sentence. The sentencing court may address the question of whether the presumptive sentence would be best for the defendant as an individual and for society.[7] In practice, this is a question of his amenability or unamenability to probation.[8]

9.8 Social factors such as age, remorse, prior record, co-operation with the authorities and with the court, etc. are all relevant in such cases.

9.9 Social and other factors are excluded from consideration in respect of *durational* departures. The guidelines provide that race, sex, employment or social position, or the defendants exercise of constitutional rights (i.e. the decision to contest his or her guilt at trial) should not be used as reasons for departure. The appellate courts have also ruled out any consideration of prior criminal record, or of the elements of the offence, standing alone, as these are employed in the first place to calculate the presumptive sentence.[9]

9.10 Justifications for departure must not be too vague or speculative (if only because they would be of little use to a reviewing court). Instead, durational departure must normally rest on the particular characteristics of the offence i.e. "whether the defendant's conduct was significantly more or less serious than that typically involved in the commission of the crime in question."[10]

9.11 The guidelines provide a non-exclusive list of factors that illustrate a typical criminal conduct.

9.12 In mitigation, they suggest aggression by the victim, lack of judgment due to physical or mental impairment, and the minor or passive role of the offender in the crime, where applicable. Aggravating factors include cruelty and victim

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5 *Op cit*, at p26.
6 *Ibid*, at p25.
7 *State v Heywood*, 338 NW2d 243, 244 Minn 1983.
8 Simon, *Sentencing Guidelines: Issues Confronting Appellate Courts* (1988) 67 Oregon L Rev 871 at p875. This issue is related to the secondary decision in our model of sentencing principles, on penalty - *type*.
9 *State v Gist*, 358 NW2d 664, 667 (Minn 1984); *State v Brusven*, 327 NW2d 591, 593 (Minn 1982); see Simon, *op cit*, at pp875-6. To do otherwise would breach the principle against double jeopardy.
10 *State v Cox*, 343 NW2d 643 (Minn 1984).

vulnerability. Consideration of the course of conduct underlying the charge for which the defendant is being sentenced[11] can allow sentencing courts to flirt with considering additional crimes for which the defendant was not convicted, though this is not otherwise permissible,[12] e.g. as in *Garcia,* when ascertaining the circumstances of a kidnapping entailed examining allegations of sexual assault for which charges had earlier been dropped in a plea bargain.[13] Unfortunately, no clear standard exists to distinguish such cases from those in which such a consideration is deemed improper.[14] There exists considerable debate on such "real offence sentencing" and it does not conform entirely with our views.[15]

9.13 Appellate courts will not review a decision *not* to depart even in the presence of aggravating or mitigating factors; nor will they reverse a decision to depart unless there is a clear abuse of discretion.[16] Where no reasons are stated a sentencing departure is not allowed.[17] However, a reviewing court may also consider other bases of departure not expressly stated by the trial judge if the stated reasons are insufficient. Thus, as *Simon* points out,

> "the standard of review of sentencing departures is quite deferential to the sentencing court. Only clearly erroneous decisions will be reversed."[18]

Appellate courts will also be concerned with the *extent* of the departure from the presumptive range. *Evans* concerned two consecutive sentences of 15 years where the guidelines indicated consecutive sentences of two years each. The Minnesota Supreme Court concluded that "*generally* in a case in which an upward departure in sentence length is justified, the upper limit will be double the presumptive sentence length."[19] But in highly exceptional cases, a greater degree of departure might be permitted. This concession has led to a distinction between aggravating and severely aggravating circumstances between which, unfortunately, no clear boundary has been established by the Minnesota courts. Thus, little effective guidance has been provided to sentencing courts in this area. This may be due in part to the insignificant history of appellate review in America. The long maximum sentences in indeterminate sentencing systems, intended to permit the individualisation of punishment, which were so prevalent in the United States, were unconducive to the establishment of judicial standards of review. It was a significant achievement of the Minnesota Commission that it secured to the extent it did accountability of lower courts for their sentencing.

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11 Cox, *ibid.*

12 Simon, *op cit*, at p379.

13 *State v Garcia*, 302 NW2d 643 (Minn 1981).

14 Simon, *ibid*, at p379.

15 It is discussed in more detail below in respect of the US Federal Guidelines, and in relation to Plea Agreements. See para 9.101 *et seq* and Ch 12, *Infra.*

16 *State v Edmison*, 398 NW2d 584, 589 (Minn Ct App 1986). This may be due to the high level of adherence to the presumptive guidelines. As will be seen, this is one of the chief points of distinction from sentencing starting points. See para 7.4 *et seq*, *Infra* (Finland).

17 *Williams v State*, 361 NW2d 840, 844 (Minn 1985).

18 Simon, *op cit*, at p880.

19 *State v Evans*, 311 NN 2d 481 (Minn 1981) at p483 - the 'Minnesota doubling rule'.

9.14 A number of important features of the Minnesota sentencing guidelines scheme are attributable to bold policy decisions by the Sentencing Commission.[20]

(1) As is apparent from the matrix elements of offence severity and criminal history, the Commission elected to adopt "just deserts" as the overriding consideration in determining which offenders should be imprisoned. Other penal rationales such as rehabilitation, surface, if at all, only in respect of ***dispositional*** departures. Durational departures may be justified only in terms of aggravated or mitigated desert. (The place of criminal history in the deserts model is discussed elsewhere).[21]

(2) What is also apparent from the grid is the policy adopted in pursuance of the chosen penal goal. Rather than attempting to replicate existing sentencing patterns in a "descriptive" system, the Commission chose to be "prescriptive", and explicitly to establish its own sentencing priorities and policies. Imprisonment is de-emphasised for property offenders and emphasised for the violent; (formerly repetitive property offenders tended to be imprisoned, while first-time violent offenders were not). The number of first-time offenders convicted of the 4 most serious levels of offence who were committed to prison jumped from 45% in 1978 to 78% in the first year of the scheme's operations; meanwhile, only 15% of those convicted of the two least serious levels of offence, but with 3 to 5 prior convictions, were incarcerated in 1981, as opposed to 54% in 1978.

(3) As has been mentioned, presumptive sentencing ranges are very narrow, reasons for departure from them being "substantial and compelling." This was with the object of reducing sentence disparity (consistency being tied to the key concept of *desert*). In the first year of implementation, this aim *appeared* to be largely achieved:

> "If sentences in 1978 are viewed relative to the guidelines, 19.4% of sentences would have been dispositional departures ...; the actual departure rate in 1981 was 6.2%, clearly indicating increased uniformity in state imprisonment policies."[22]

A point of some importance is that only 1% of sentences imposed under the Guidelines were appealed.[23] Of course, one can only be satisfied that this level of uniformity is reducing sentencing disparity if one is satisfied that all the case factors by which we believe offenders should be differentiated at the sentencing stage are accounted for, and given appropriate weight, in the guidelines.

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20 See Tonry, *op cit*, at pp26-28.
21 See Ch 6, *supra* (Prior Criminal Record).
22 Tonry, *op cit*, at p28.
23 *Ibid*, at p29.

(4) The Commission interpreted a statutory injunction to take correctional resources into " substantial consideration" to mean that its guidelines should not lead to an increase in the prison population beyond existing capacity constraints. "Thus, if the Commission increased prison sentences for one group of offenders it would have to balance this by a decrease in the length of sentences for another group, or by prescribing non-custodial measures for that group."[24]

Despite the considerable adjustment to prior sentencing patterns entailed by the guidelines, the criminal justice system was not unduly disrupted. In respect of the point in hand, prison populations remained at projected levels.[25]

(5) As was mentioned above, the Commission excluded consideration of many personal factors that many judges believed to be legitimate - education, employment, marital status, living arrangements, sex, race, etc. - in order to combat direct or indirect discrimination against minorities, women and low-income groups.[26]

9.15 *Tonry* reserves special praise for the work of the Commission in ensuring the adoption, and successful implementation of these measures with a minimum of inconvenience.[27] Some reference to the methods of the Commission should be made, simply because similar schemes, as we shall see, have met with rejection or failure in other jurisdictions. The Commission had an unusually talented staff, and a politically knowledgeable chair. Also, members representing the judiciary and prosecutors could argue for the interests of their constituencies, and later persuade them of the merits of the Commission's package. The Commission's work was an "open political process", in which the views of all interested groups could be expressed. Therefore, necessary compromises had been made, and considerable consensus reached, before its proposals were presented to the legislature. All these factors gave the Minnesota Guidelines Scheme considerable political potency, and probably account for their successful adoption in practice (schemes in many other states having been ignored or circumvented by judges and lawyers).

9.16 Nonetheless, the Minnesota Sentencing Guidelines are open to substantial criticism, of two varieties. The first concerns problems inherent in the system's design.

9.17 A major weakness in the design of the Guidelines was that they were limited from the outset to sentences of imprisonment, thus excluding some 80% of felony convictions which result in other penalties, and permitting unrestrained

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24 Allen, *op cit*, at p320.
25 Tonry, *op cit*, at p29.
26 *Ibid*, at p27.
27 For example, case processing time did not increase.

discretion to continue.[28] This was despite the enabling legislation placing non-incarcerative sanctions firmly within the Commission's ambit. "In as much as up to one year's *jail incarceration* may be imposed as a condition of probation, the absence of guidance could well have produced considerable disparity"[29] - jail here is quite distinct from *state prison*, and is not subject to the guidelines. Hardly surprisingly, there was little change in jail use in the period of the Guidelines' introduction.[30]

9.18 *Allen* sums up very effectively another criticism of the appealing, but possibly deluding, simplicity of the scheme's design:

> "Another problem arose from the simplicity of the system whereby each felony conviction is given one point on the criminal history score axis. There is no grading of these convictions to reflect the gravity of the offences; but *grading* would seem to be necessary if fairness between offenders is to be maintained. This failure to grade past convictions would also seem to increase the significance of past convictions in many cases over and above the significance of the current offence. This can result in an offender found guilty of a minor offence receiving a substantial prison sentence because he has a high criminal history score. The punishment then ceases to be proportionate to the gravity of the offence - thus conflicting with the basic premise of a sentencing system founded on the "just deserts" rationale."[31]

9.19 This suggests an even greater cause for concern, that the two elements of offence severity and criminal record, so central to the reduction of discretion and of disparities at the sentencing stage, can be manipulated prior to that point. Many critics charge that the Minnesota System has simply caused discretion to shift from judges to prosecutors, where it is subject to even less scrutiny than before. Multiple charging of property offenders can see their criminal history scores rise very fast to levels justifying imprisonment, while the very great degree of certainty about the consequences of conviction of any charge preferred against an offender increases the influence of the prosecutor, who makes that choice, in the plea-bargaining process.[32] That both of these factors were exploited by prosecutors is clear - one reason is that they did not tend overwhelmingly to endorse the Commission's view on the non-imprisonment of property offenders. *Tonry* remarks on the issue as follows:

> "For example, an offender who in 1978 might have been permitted to plead guilty to one of four charged counts of larceny, might in 1982 be

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28 See Allen, *op cit*, at p321; Tonry, *op cit*, at p29; Knapp, *The Impact of the Minnesota Sentencing Guidelines Commission* (1984), at pp48 *et seq*.

29 Tonry, *op cit*, at p38.

30 Knapp, *op cit*, at p48.

31 *Op cit*, at p321. On this point, see Wasik, *Guidance, Guidelines and Criminal Record* in Wasik & Pease, *op cit*, at pp105-125, and discussion at para 4.73 *et seq*, *supra* ("Just Deserts") on the significance of criminal history to "just deserts" theory.

32 On the possibility of controlling the prosecutor's discretion, see Ch 12, *Infra*. (Plea Discussions and Agreements).

required to plead guilty to all four. The next time he appeared in court, under the guidelines he would have four prior convictions and therefore be eligible for prison. The Commission changed its rules on counting prior convictions in an effort to offset this prosecutorial manipulation, with some success. Nonetheless, the experience demonstrates that even in Minnesota prosecutors will wilfully attempt to undermine policies with which they disagree."[33]

9.20 While charge negotiations (and reductions) also increased, and sentence negotiations diminished[34] this latter practice has not disappeared. "Pursuant to sentence negotiation" is the single reason most commonly given by judges for departing from the guidelines, even though the Minnesota Supreme Court has held that this is inadequate justification; in practice, "defendants who have agreed to a departure pursuant to a sentence negotiation, which will almost always be a departure downwards, are unlikely to lodge a sentence appeal".[35]

9.21 A conscious policy decision had been made, however, given the experimental nature of the scheme, that it was premature to constrain prosecutorial discretion. As it happens, prosecutorial manipulation has never extended to radical subversion; and efforts to counter it in other jurisdictions have had some success, as will be seen below.[36]

9.22 The second chief line of criticism concerns the implementation of the Minnesota Guidelines after the initial, apparently very successful stage. After a few years of guidelines experience, judicial practice began to revert to old habits: for low record violent offenders in 1983, imprisonment rates were significantly below those of the two previous years (though still ahead of the levels of the 1970's); for long record property offenders, the "1983 imprisonment rate ... was almost at the same level as the pre-guidelines imprisonment rate."[37]

9.23 Also, in 1982 and 1983, the prison population increased substantially. This was partly due to legislative increases of sentence severity for certain offences, but also, according to Knapp, to the increased power of the prosecutors being used to effect harsher sentences.[38] However, Tonry has remarked that the problem has abated thanks to Commission alterations to the guidelines with the object of reducing average sentence lengths.[39]

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33 *Op cit*, at p39. It has to be assumed, in fairness, that such offenders were free not to bargain on those terms.
34 See Knapp, *op cit*, at p72.
35 Tonry, *ibid*, at p39. This should not arise as a problem in Ireland, as it is not proposed to expand the role of prosecution counsel at the sentencing hearing to the point of his or her being able to recommend a specific sentence. See para 11.32, *Infra* (The Role of Prosecuting Counsel).
36 Tonry, *ibid*, at p42. See also Bottomley, *Sentencing Reform and the Structuring of Pre-Trial Discretion* in Wasik & Pease *op cit*, at pp139-162, and the discussion below.
37 Knapp, *op cit*, at p31.
38 *Ibid*, at p90.
39 Tonry, *op cit*, at p40.

TABLE E

APPENDIX I

IV. SENTENCING GUIDELINES GRID

Presumptive Sentence Lengths in Months

Italicized numbers within the grid denote the range within which a judge may sentence without the sentence being deemed a departure.

Offenders with non-imprisonment felony sentences are subject to jail time according to law.

SEVERITY LEVELS OF CONVICTION OFFENCE		CRIMINAL HISTORY SCORE						
		0	1	2	3	4	5	6 or more
Unauthorized Use of Motor Vehicle *Possession of Marijuana*	I	12*	12*	12*	13	15	17	19 *18-20*
Theft Related Crimes ($250-$2500) *Aggravated Forgery ($250-$2500)*	II	12*	12*	13	15	17	19	21 *20-22*
Theft Crimes ($250-$2500)	III	12*	13	15	17	19 *18-20*	22 *21-23*	25 *24-26*
Non-residential Burglary *Theft Crimes (over $2500)*	IV	12*	15	18	21	25 *24-26*	32 *30-34*	41 *37-45*
Residential Burglary *Simple Robbery*	V	18	23	27	30 *29-31*	38 *36-40*	46 *43-49*	54 *50-58*
Criminal Sexual Conduct, 2nd Degree (a) & (b)	VI	21	25	30	34 *33-35*	44 *42-46*	54 *50-58*	65 *60-70*
Aggravated Robbery	VII	24 *23-25*	32 *30-34*	41 *38-44*	49 *45-53*	65 *60-70*	81 *75-87*	97 *90-104*
Criminal Sexual Conduct 1st Degree *Assault, 1st Degree*	VIII	43 *41-45*	54 *50-58*	65 *60-70*	76 *71-81*	95 *89-101*	113 *106-120*	132 *124-140*
Murder, 3rd Degree *Murder, 2nd Degree (felony murder)*	IX	105 *102-108*	119 *116-122*	127 *124-130*	149 *143-155*	176 *168-184*	205 *195-215*	230 *218-242*
Murder, 2nd Degree (with intent)	X	120 *116-124*	140 *133-147*	162 *153-171*	203 *192-214*	243 *231-255*	284 *270-298*	324 *309-339*

1st Degree Murder is excluded from the guidelines by law and continues to have a mandatory life sentence

☐ At the discretion of the judge, up to a year in jail and/or other non-jail sanctions can be imposed as conditions of probation

☐ Presumptive commitment to state imprisonment

*one year and one day

I - 2.

(II) THE GUIDELINES MOVEMENT IN THE US STATES

9.24 The Minnesota experiment's initial success, and widespread disillusionment with the previously prevailing norm of indeterminate sentencing, led to that state's being followed by a wave of imitators, with mixed success. That movement has culminated in the adoption of the US Federal Guidelines.

9.25 In some states, the new scheme met with utter failure; in others, its effect was diluted by compromise; in yet others, substantial and valuable refinements were made which addressed some of the problems experienced in Minnesota.

Maine

9.26 In the state of Maine, a Sentencing Guidelines Commission was established in 1983, but its funding was insignificant, no full-time professional staff were appointed, and its members were ill-informed about developments elsewhere. It failed to produce guidelines, (many of its members had opposed them from the outset), and recommended only that a new commission be established.

South Carolina

9.27 In South Carolina, the Sentencing Guidelines Commission (established in 1982) made proposals which were rejected by the State Legislature, largely because its guidelines were opposed by the judiciary (including those judges who had served on the commission).[40]

New York

9.28 These cases illustrate *Tonry's* point on the importance of the sentencing commission, and on the necessity of gaining political consensus on guidelines proposals. In New York state in particular, the guidelines movement was derailed by political opposition. That state's committee was very well staffed and funded, and had experience both of guidelines systems and of New York politics. A number of proposals, and eventually draft guidelines, were produced. However, the committee had failed to reach a consensus on its aims or motives; an especially influential member dissented; its report was exploited to fuel political disputes between various interest groups: and its proposed guidelines were rejected by the New York Legislature.[41]

Connecticut

9.29 In Connecticut, the sequence of events was most unusual. From 1979 on, its Commission developed a "descriptive" sentencing grid based on research into past sentencing practices, with the usual array of provisions for departures, mitigation, and so on. But the commission then publicly *opposed* adopting such

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40 On these two instances, see Tonry, *op cit*, at pp30-31.

41 *Ibid*, at pp31-32.

a scheme, and recommended the abolition of indeterminate sentencing and of parole, and the introduction of a statutory determinate sentencing system (which was done in July 1981).[42]

Pennsylvania

9.30 Pennsylvania's is an interesting case. As in the above instances, the Commission on Sentencing was a weak body, politically speaking, and failed to win the support of vital interests and constituencies in advance of the presentation of its initial guidelines, which succumbed to the law and order lobby in the legislature in 1981. Presumptive guidelines revised in accordance with the directions of the legislature were resubmitted in 1982 and passed into law. These new guidelines embodied a number of key compromises. Sentencing standards were more severe, and judicial discretion wider.

9.31 Most unusually, the guidelines prescribe ranges for minimum sentences only - parole release has been retained, and judges have a full discretion over the maximum. Despite this, three ranges of minima are prescribed for every offence - normal, aggravated and mitigated. No criteria are set for aggravation or mitigation, or for total departure from the guidelines except that the reason for any departure should be stated.

9.32 Because of all this, the high "compliance rates" claimed for the Pennsylvanian system are largely spurious. Substantial disparities can occur even within the guidelines, as *Tonry* points out, because judges can use the aggravating/mitigating factors at will, and because no efforts have been made to account for the role of plea bargaining in sentencing.[43]

9.33 There is some debate on the extent of this problem. *Tonry* is of the view that it renders appellate review almost toothless:

> "[B]ecause the guideline ranges are broad, and because there are no rules governing when judges may depart from them, Pennsylvanian appellate courts will have difficulty knowing the basis by which a sentence appeal can or should be evaluated."[44]

9.34 However, an analysis of Pennsylvanian case-law does not bear this out entirely. *Dowling* has suggested that "the guidelines have acquired the force of mandates which the sentencing judge deviates from at his peril and where in explaining his non-compliance he needs the elegance of a Holmes, the wit of Musmanno, and the profundity of Blackstone, if he is to satisfy his appellate brethren ... A 'common law' of punishment has grown out of successive appellate

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42 *Ibid*, at p31. See discussion at para 9.75 *et seq*, *infra* (Determinate Sentencing: California) of determinate sentencing systems.

43 *Ibid*, at p34.

44 *Ibid.*

decisions."[45]

9.35 As *Schwartz* puts it, these decisions "have come to govern sentencing more than the guidelines".[46] The shift in the degree of discretionary power accorded to trial courts was achieved in some cases by subterfuge, in *Dowling's* view: appellate courts would reverse the trial court under the guise of a "failure to articulate properly the reasons for its sentence"[47] when they ultimately disagreed with the sentence imposed.[48]

9.36 Furthermore, in *Commonwealth v Bullicki*,[49] having rejected the trial judge's sentence on a technicality, the Pennsylvania Superior Court remanded for sentence to be imposed "within the range of the guidelines". In *Commonwealth v Radabaugh*,[50] the trial judge imposed a higher than usual sentence for a drug offence, for stated reasons - the Superior Court remanded for sentence "specifically to be imposed within the minimum or mitigated range of the sentencing guidelines", despite a recognition by the Sentencing Commission itself that major drug trafficking may warrant a more severe sentence than suggested under the guidelines.[51]

9.37 This process culminated in the decision in *Commonwealth v Hutchinson,* in which the Pennsylvania Superior Court prescribed that "only in exceptional cases and for sufficient reasons may a court deviate from the guidelines",[52] despite the absence of this language in the sentencing code.

9.38 *Dowling* and *Tonry* approach this issue from very different points of view. *Dowling* is a Pennsylvanian judge and proponent of judicial discretion; *Tonry* is an advocate of classical guidelines systems, and rightly apprehends that *unstructured* discretion within such systems can make them effectively impotent. As it happens, *Dowling's* views have prevailed in Pennsylvania. The process described above has been reversed on constitutional grounds in *Commonwealth v Sessions.*[53]

9.39 Due to the inclusion of legislators and judges on the Sentencing Commission, and in order to avoid a violation of the separation of powers doctrine, the court held that the "guidelines cannot, without more be given the effect of law, either as legislation or regulation, so as to by themselves alter the legal rights and duties" of the parties or the court.[54] The trial court "has no 'duty' to impose a sentence considered appropriate by the Commission", and

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45 *Sentencing Discretion in Pennsylvania: Has the Pendulum Returned to the Trial Judge?* (1988), 26 Duq L Rev 925, at p927.

46 *Options in Constructing a Sentencing System: Sentencing Guidelines under Legislative or Judicial Hegemony,* (1981) 67 Va L Rev 637 at p665.

47 See *Commonwealth v McDonald*, 322 Pa Super 110, p112, 469 A 2d 206, p207 (1983).

48 *Op cit*, at pp930-931.

49 355 Pa Super 416, 513 A 2d 990 (1986).

50 Unreported opinions; see Dowling, *op cit*, at pp933-934.

51 204 Pa Admin Code s303(1)(e).

52 343 Pa Super 596, p599, 495 A 2d 956, p958 (1985).

53 516 Pa 365, 532 A 2d 775, p778.

54 532 A 2d 780.

need only "take notice of the Commission's work."[55] In the later *Commonwealth v Devers*[56] a long line of decisions which had required an explicitly detailed statement by the trial judge of the reasons for the sentence imposed was abandoned and the court attacked the requirement that the judge tick off the statutorily mandated factors as a "ritualistic litany like prayers before meals."

9.40 The result of this reversal of policy is that *Tonry's* criticisms stand - the earlier attempt to transform the operation of the guidelines, in order more closely to mirror schemes such as that in Minnesota, failed. In any event, the collapse of appellate review, and of the moves to attribute more binding effect to such guidelines as exist, may not change very much. Because the parole board makes release decisions, it can, when it chooses, disregard idiosyncratic maximum sentences.[57] Whether the parole board can exercise the same principled and general (as opposed to individualised) control over sentence review as a Superior Court might is, however, open to question.

9.41 *Tonry* would of course advocate the implementation of more rigorous guidelines; *Dowling* advocates the abandonment of appellate review in all but the most exceptional cases. Given the triumph of *Dowling's* view in Pennsylvania, and the almost unlimited judicial discretion remaining in the system, that State's presumptive guidelines have been almost fatally compromised - they are effectively voluntary in character and relatively unhelpful even to those judges who choose to abide by them. It might be speculated that the existing Pennsylvania guidelines could form the nucleus of a viable system of starting points - a speculation which will not, however, be pursued in this paper.

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55 *Ibid*, at p781.
56 Unreported 1988, see Dowling *op cit*, at p839, note 90.
57 Tonry, *op cit*, at p34.

TABLE F: PENNSYLVANIA GUIDELINES

Offence gravity score	Prior record score	Minimum range[a]	Aggravated minimum range[a]	Mitigated minimum range[a]
5	0	0-12	12-18	non-confinement
For example: Criminal	1	3-12	12-18	1½- 3
Mischief (Felony III): Theft	2	5-12	12-18	2½- 5
by Unlawful Taking (Felony	3	8-12	12-18	4 - 8
III): Theft by Receiving Stolen	4	18-27	27-34	14 -18
Property (Felony III):	5	21-30	30-38	16 -21
Bribery[b]	6	24-36	36-45	18 -24
4	0	0-12	12-18	non-confinement
For example: Theft by	1	0-12	12-18	non-confinement
receiving stolen property, less	2	0-12	12-18	non-confinement
than $2,000, by force or threat	3	5-12	12-18	2½- 5
of force, or in breach of	4	8-12	12-18	4 - 8
fiduciary obligation[b]	5	18-27	27-34	14 -18
	6	21-30	30-38	16 -21
3	0	0-12	12-18	non-confinement
	1	0-12	12-18	non-confinement
	2	0-12	12-18	non-confinement
Most Misdemeanour I's[b]	3	0-12	12-18	non-confinement
	4	3-12	12-18	1½- 3
	5	5-12	12-18	2½- 5
	6	8-12	12-18	4 - 8
2	0	0-12	Statutory limit[c]	non-confinement
	1	0-12	Statutory limit[c]	non-confinement
	2	0-12	Statutory limit[c]	non-confinement
Most Misdemeanour II's[b]	3	0-12	Statutory limit[c]	non-confinement
	4	0-12	Statutory limit[c]	non-confinement
	5	2-12	Statutory limit[c]	1 - 2
	6	5-12	Statutory limit[c]	2½- 5
1	0	0- 6	Statutory limit[c]	non-confinement
	1	0- 6	Statutory limit[c]	non-confinement
	2	0- 6	Statutory limit[c]	non-confinement
Most Misdemeanour III's[b]	3	0- 6	Statutory limit[c]	non-confinement
	4	0- 6	Statutory limit[c]	non-confinement
	5	0- 6	Statutory limit[c]	non-confinement
	6	0- 6	Statutory limit[c]	non-confinement

Notes

(a) Weapon enhancement: At least 12 months and up to 24 months confinement must be added to the above lengths when a deadly weapon was used in the crime.

(b) These offences are listed here for illustrative purposes only. Offence scores are given in S.303.7.

(c) Statutory limit is defined as the longest minimum sentence permitted by law.

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9.42 Interesting refinements of the classical Minnesota - style guidelines have been introduced in Michigan, and in Washington. These serve to combat some of the problems presented by that initial experiment.

Michigan

9.43 Michigan adopted presumptive guidelines by Supreme Court order in 1984, after an initial experimental period. This employed a grid with six levels of criminal history, and three of offence seriousness i.e. it embodied the same key variables as the Minnesota matrix. The focus is on the facts of the crime and the prior record of the offender. Other indirect attempts to measure the potential for rehabilitation (or stated conversely, the prospects of recidivism) were thought by the Sentencing Guidelines Advisory Committee to be inappropriate for inclusion in the sentencing guidelines.

9.44 The introduction of the guidelines saw the diminution of statistically significant racial disparity in sentencing in all of the nine crime groups (formerly a considerable problem) and an overall compliance rate of some 80% was achieved.[58] Interestingly, the guidelines are largely descriptive - they are designed to reproduce and reinforce current mean sentencing practice, rather than to prescribe entirely new standards. One approach is not necessarily preferable to the other - in any jurisdiction, levels of satisfaction (or otherwise) with prevailing standards should dictate which is adopted.[59] Adherence to a coherent sentencing policy seems a prerequisite for the sort of satisfactory sentencing practice which would justify a descriptive scheme.

9.45 Because the guidelines are meant to reflect present attitudes, substantial deviations from them are an even greater cause for concern than in a prescriptive system - high levels of departure suggest that the reflection of current practice is not sufficiently accurate. *McComb* remarks as follows:

> "One particular area, mentioned by numerous judges, concerned the guidelines' handling of the violent crimes contained in the Assault, Criminal Sexual Conduct, and Robbery crime groups. Certain crimes in the assaultive crimes groups have compliance rates in the vicinity of 60%. These problem areas were investigated in depth. Armed robbery, because it is the most frequently occurring violent crime, was the most conspicuous example. If it were clear that the sentence ranges for armed robbery were so low, it would be a simple matter to increase the recommended sentence ranges. The problem is that there were an equal number of departures above and below the recommended sentence ranges in armed robbery. Although the nature of the problems differed from grid to grid, the low compliance rates in the assaultive crimes could

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58 McComb, *An Overview of the Second Edition of the Michigan Sentencing Guidelines*, (1988) Michigan BJ 863, at p864.

59 For a fuller anaylsis of the relative merits of descriptive and prescriptive guidelines, see para 9.101 *et seq*, *infra* (US Federal Sentencing Guidelines). See also the debate on statistical methods at para 9.166 *et seq*, *infra* (Statistics, Starting Points and Informed Judicial Discretion).

not be overcome by adjusting the recommended ranges or adding additional variables. In short, the problems defied simple analysis."[60]

9.46 It became apparent that the point values for the prior record variables and offence variables, the 3 x 6 grid structure and the recommended sentences were not consistent with current sentencing practice or with each other (or both). Offenders placed in the same grid cell were not always very similar in point of culpability, thus deterring compliance.

9.47 A substantial revision of the guidelines was conducted. 4 x 4 grids were substituted for 3 x 6; four levels of prior record were thought sufficient to divide up the realm of prior offences (instead of 6). Prior Record Levels are now stated as follows:

A	No Prior Record	0 points
B	Low Prior Record	1-24 points
C	Moderate Prior Record	25-49 points
D	Extensive Prior Record	50 + points

9.48 At the same time, a fourth level of offence severity was added to separate out the various degrees of culpability:

I	Low Offense Seriousness	0- 9 points
II	Medium Offense Seriousness	10-24 points
III	High Offense Seriousness	25-49 points
IV	Very High Offense Seriousness	50 + points

9.49 The importance of these changes will become clear after a discussion of the major innovation of the revised guidelines.

9.50 It was necessary to reassess, and to distinguish from each other, factors of greater and of less significance, in the allocation of the offender to a place in the grid, so that similarly circumstanced offenders could be similarly located.

9.51 In both the old and revised schemes, the judge calculates a number of points for each prior record variable (PRV) and each applicable offence variable (OV). In the original model, points from zero to four were attached to various factors to illustrate their order of importance *within* the context of each variable. The following two examples are illustrative.

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60 *Ibid.*

OV 1	**Weapon: Presence, Type and Use**
4 =	a firearm discharged or pointed at victim: touching with other weapon
3 =	a firearm displayed but not pointed
2 =	any weapon, other than a firearm, displayed in a threatening manner
1 =	any weapon, other than a firearm, displayed; a firearm implied or possessed, but not displayed
0 =	no weapon displayed, implied or possessed

OV 9	**Offender's Role**
3 =	leader in multiple offender situation
2 =	active participant in multiple offender situation
1 =	alone
0 =	minor or peripheral role

9.52 But the intervals between factors were just one point, even though discharging a firearm may be signally more serious than displaying one, and so on. The relationship between the categories of offence variable also was hardly accounted for in the former system e.g. leading a number of offenders was equivalent, in point terms, to displaying a firearm, which is arguably more serious. *McComb* summed up the problem thus:

> "While existing point values capture the order of importance *within* a specific variable, they do not constitute an interval scale that can be used to compare categories within or between variables."[61]

9.53 Over 50,000 cases were analysed, to try accurately to assess the reasoning of sentencing judges.[62] The resulting scoring system reflects not only the *order* but also their relative *magnitude*.[63] Scoring is now on a scale of one to one hundred, and OV1 and OV9 were redesigned as follows:

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61 *Ibid*, at p865.

62 In a prescriptive system, the restructuring might be based on more theoretical considerations of the commensurability of various factors, but a reallocation of point values on lines, similar to those described below should still emerge.

63 The importance of correctly assessing the relative weight of material case factors is confirmed by Victorian judicial surveys. See para 9.248, *Infra* (The Victorian Experience).

OV 1	**Weapon: Presence, Type and Use**
25 =	a firearm discharged by offender during commission of the offence
15 =	a firearm pointed toward victim or touch with another weapon
5 =	a firearm displayed, implied, or possessed; any other weapon displayed
0 =	no firearm displayed, implied, or possessed; no other weapon
OV 9	**Offender's Role**
10 =	leader in multiple offender situation
0 =	not a leader

9.54 The old and reformed scales for OV2 illustrate how important is the scoring *within* the variable and *in relation to other variables*:

OV 2	**Physical Attack and/or Injury**
6 =	victim killed
5 =	serious impairment of body function or permanent serious disfigurement
3 =	bodily injury
1 =	touching beyond that needed to commit the instant offence
0 =	no touching or assault
OV 2	**Physical Attack and/or Injury**
100 =	victim killed
50 =	victim treated with excessive brutality
25 =	bodily injury and/or subjected to terrorism
0 =	no injury

9.55 *McComb* offers the following comments on the new scales:

> "Notice that within the context of OV2, the fact that a person is killed is now four times more important than bodily injury. Comparing OV1 and OV2, it is apparent that bodily injury is of the same importance as the aggravated use of a firearm. Each of these, in turn, are only half as important as excessive brutality. Finally, all are substantially less important than the fact that the victim is killed."[64]

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64 *Ibid*, at p886.

9.56 It is now worth looking again at the revised grid. The point values for the Prior Record Levels are set so that the extensiveness of the prior record is consistent with the verbal descriptions attached to each of the four levels, from no previous convictions at Level A to Level D, which includes all those who have had at least two high severity felonies. Level B does not include anyone who has been convicted of a high severity felony, while Level C embraces those who have a single high severity felony on their records, or two of low severity.

9.57 It will be appreciated that this is a great deal more sophisticated than the simple Minnesota points allocation system, so prone to manipulation by the prosecution through multiple charges; it is illustrative of the possibility of countering abuses through improved system design, and Minnesota has proceeded to introduce some reforms to its own method of computing criminal history scores. Similarly, the Offence Variable Levels are much more reflective of the needs of the system in the second edition of the Michigan model. In general, that model can be concluded to be a successful development of Minnesotan innovations.

Washington State

9.58 Washington's *Sentencing Reform Act, 1981* came into force in 1984. It shares many features with the Minnesota scheme. Parole was abolished, the role of sentencing was declared to be punishment, there was a shift towards incarcerating violent offenders, and a presumptive grid was established, based on the same factors as Minnesota's (but with somewhat broader sentencing ranges - see Table G).

TABLE G

Washington sentencing guidelines

Seriousness level	*Offender score*									
	0	1	2	3	4	5	6	7	8	9 or more
XIV	Life sentence without parole/death penalty									
XIII	23y 4m **240–320**	24y 4m **250–333**	25y 4m **261–347**	26y 4m **271–361**	27y 4m **281–374**	28y 4m **291–388**	30y 4m **312–416**	32y 10m **338–450**	36y **370–493**	40y **411–548**
XII	12y **123–164**	13y **134–178**	14y **144–192**	15y **154–205**	16y **165–219**	17y **175–233**	19y **195–260**	21y **216–288**	25y **257–342**	29y **298–397**
XI	6y **62–82**	6y 9m **69–92**	7y 6m **77–102**	8y 3m **85–113**	9y **93–123**	9y 9m **100–133**	12y 6m **129–171**	13y 6m **139–185**	15y 6m **159–212**	17y 6m **180–240**
X	5y **51–68**	5y 6m **57–75**	6y **62–82**	6y 6m **67–89**	7y **72–96**	7y 6m **77–102**	9y 6m **98–130**	10y 6m **108–144**	12y 6m **129–171**	14y 6m **149–198**
IX	3y **31–41**	3y 6m **36–48**	4y **41–54**	4y 6m **46–61**	5y **51–68**	5y 6m **57–75**	7y 6m **77–102**	8y 6m **87–116**	10y 6m **108–144**	12y 6m **129–171**
VIII	2y **21–27**	2y 6m **26–34**	3y **31–41**	3y 6m **36–48**	4y **41–54**	4y 6m **46–61**	6y 6m **67–89**	7y 6m **77–102**	8y 6m **87–116**	10y 6m **108–144**
VII	18m **15–20**	2y **21–27**	2y 6m **26–34**	3y **31–41**	3y 6m **36–48**	4y **41–54**	5y 6m **57–75**	6y 6m **67–89**	7y 6m **77–102**	8y 6m **87–116**
VI	13m **12+–14**	18m **15–20**	2y **21–27**	2y 6m **26–34**	3y **31–41**	3y 6m **36–48**	4y 6m **46–61**	5y 6m **57–75**	6y 6m **67–89**	7y 6m **77–102**
V	9m **6–12**	13m **12+–14**	15m **13–17**	18m **15–20**	2y 2m **22–29**	3y 2m **33–43**	4y **41–54**	5y **51–68**	6y **62–82**	7y **72–96**
IV	6m **3–9**	9m **6–12**	13m **12+–14**	15m **13–17**	18m **15–20**	2y 2m **22–29**	3y 2m **33–43**	4y 2m **43–57**	5y 2m **53–70**	6y 2m **63–84**
III	2m **1–3**	5m **3–8**	8m **4–12**	11m **9–12**	14m **12+–16**	20m **17–22**	2y 2m **22–29**	3y 2m **33–43**	4y 2m **43–57**	5y **51–68**
II	0–90 **Days**	4m **2–6**	6m **3–9**	8m **4–12**	13m **12+–14**	16m **14–18**	20m **17–22**	2y 2m **22–29**	3y 2m **33–43**	4t 2m **43–57**
I	0–60 **Days**	0–90 **Days**	3m **2–5**	4m **2–6**	5m **3–8**	8m **4–12**	13m **12+–14**	16m **14–18**	20m **17–22**	2y 2m **22–29**

Note Bold type presents presumptive sentence ranges in months. Midpoints are included as a reference point (y = years, m = months). 12+ equals one year and one day. For a few crimes, the presumptive sentences in the high offender score columns exceed the statutory maximums. In these cases, the statutory maximum applies.

Additional time added to the presumptive sentence if the offender or an accomplice was armed with a deadly weapon: 24 months (Rape 1, Robbery 1, Kidnapping 1) 18 months (Burglary 1) 12 months (Assault 2, Escape 1, Kidnapping 2, Burglary 2 of a building other than a dwelling, Delivery or Possession of a controlled substance with intent to deliver)

9.59 However, a number of lessons were learned from the Minnesota experience. For example the guidelines extend to both felonies and misdemeanours (whereas Minnesota's dealt only with felonies). More importantly, the Washington Commission was alive to the potential in guidelines systems for prosecution manipulation both of the offender's criminal history score (through multiple charging) and of the offence seriousness level (through charge bargaining). Such manipulation is facilitated by the relative certainty of sentence for particular combinations of offence and prior record. It was decided to try to structure the discretion of the prosecution by promulgating statewide prosecutorial charging and bargaining guidelines.[65]

9.60 Washington has parted company with Minnesota in a more worrying fashion in respect of appellate review, despite the two states' guidelines making almost identical provision for it. In both cases, departure from the guidelines is permitted only for "substantial and compelling reasons".[66]

9.61 There are three grounds for review of such sentences:

(1) where the judge's reasons for departure from the guidelines are not supported by the record.[67] This is a factual determination, and the appellate court must uphold the sentencing judge's reasons unless they are clearly erroneous. Thus, there is a high degree of deference to the sentencing judge;[68]

(2) when, as a matter of law, the sentencing judge's reasons do not justify the imposition of a sentence outside the presumptive range.[69] A departure from the guideline range is appropriate "when the circumstances of the crime distinguish it from other crimes of the same statutory category. The Legislature considers the *typical* circumstances of a crime when it establishes the severity of a statutory offence."[70] As in Minnesota, the illustrations provided by the guidelines in this respect are not exhaustive - also, factors that are incorporated in the computation of the presumptive sentence range may not justify departure from that range.[71] Also departures may not be justified by factors that suggest that the defendant committed crimes which were not charged or for which convictions were not obtained;[72]

(3) where the appellate court considers a sentence to be "clearly excessive

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65 Tonry, *op cit*, at p35. Unfortunately, detailed information on these guidelines has not yet become available. However, numerous models for judicial regulation of prosecutorial charging and negotiation practice are cited below. See Ch 12, *Infra* (Plea Discussions and Agreements).

66 Wash Per Code S9.94A. 120(2).

67 Wash Rev Code S8.94A 210(4)(a). See *State v Nordley*, 106 Wash 2d 517.

68 Simon, *op cit*, at p883.

69 See Wash Rev Code S9.94A 210(4)(a); *Nordley*, *op cit*, at p518.

70 *State v Noody* 48 Wash App 772, at p778.

71 Nordley *op cit* at p518; Simon, *op cit* at p886.

72 Simon, *op cit*, at p887. See Wash Per Code Ann S9.94A 370(2); *State v McAlpin*, 108 Wash 2d 466. See also Ch 12, *Infra* (Plea Discussions and Agreements).

or clearly too lenient."[73] In *State v Oxborrow*[74] the Washington Supreme Court provided a standard of review for such cases. In a fraud case involving every factor illustrative of aggravating circumstances in major economic crimes, the judge imposed consecutive sentences totalling fifteen years rather than the presumptive concurrent sentences of up to one year. This sentence was upheld, the court concluding that a sentence should not be reversed as "clearly excessive" unless the sentencing judge *abused his discretion*, on the grounds that the guidelines explicitly reserved a discretion for the judge in departure cases.[75] On the same day, in *State v Armstrong*, the court stated that there was abuse of discretion "only if the trial court's action was one that no reasonable person would have taken."[76]

> "Thus, the court adopted a standard that ensured that rarely, if ever, would an appellate court overturn a sentence as clearly excessive or clearly too lenient. In so doing, the court completed its development of the three stages of appellate inquiry and, at each stage, established a fairly difficult path to overturning a sentencing decision."[77]

9.62 This reluctance by Washington's appellate courts to review sentencing departures extends to review of the *extent* of departures from the presumptive ranges. In particular, in *State v Stalker,*[78] Minnesota's *doubling rule* was dismissed as an arbitrary imposition, not necessarily desired by the legislature, and restrictive of the trial judge's discretion. It was observed by the majority in *Oxborrow* that the sentence would have been grossly inadequate if limited to a mere doubling of the presumptive range, and that in Minnesota the rule had proven to be difficult to apply and somewhat unworkable.[79]

9.63 Utter J, in dissent, urged the contrary, saying that the rule would give principled guidance to the sentencing courts.[80] While it has already been admitted that the Minnesota position is problematical, it is submitted that it offers scope for some principled control of discretion, which must have been intended when the legislature provided for a "meaningful appellate review of exceptional sentences."[81] In one hundred years, only one sentence has successfully been overturned on appeal due to a trial court abuse of discretion in sentencing a criminal in Washington.[82] *Altman* comments that appellate review under the *Sentencing Reform Acts* standard "could result in the appellate

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73 Wash Rev Code Ann S9.94A 210(4)(b).
74 106 Wash 2d 523.
75 Wash Rev Code Ann S.9.94A 010.
76 106 Wash 2d at 551-52. In dissent, Goodloe J argued that the abuse of discretion standard of review failed to give guidance to sentencing judges and undermined the guidelines' goal of proportionality in sentencing: *Ibid*, pp553-54.
77 Simon, *op cit*, at p888.
78 42 Wash App 1 at p5 (1985).
79 106 Wash 2d at p531. See Simon *op cit*, at p889.
80 *Ibid*, at p546.
81 See Boerner, *Sentencing in Washington*, (1985) SS. 6.23.9.33.
82 In *State v Potts* 1 Wash App 614. Referred to by Goodloe J in *Armstrong*, *op cit*, at p553.

courts merely rubber-stamping the trial courts' exceptional sentences."[83]

9.64 The contrary argument is that the legislature recognised that not all exceptional fact patterns could be anticipated and that the trial court is in the best position to tailor exceptional sentences to the facts of each particular case.[84] Nonetheless, the abuse of discretion standard must lead to some degree of sentencing disparity, i.e. the prescription of disproportionate sentence lengths for similarly committed crimes.[85]

9.65 Goodloe J argued in *Armstrong* for the introduction of the Minnesota doubling rule on the extent of departures, especially if the only substantive ground for reversing a departure was to be abuse of discretion. This should apply to most exceptional cases, save where the nature of the crime is so outrageous and heinous that a sentence greater than twice the presumptive range is justified - the distinction should be made by comparing the nature of the offence committed to the typical offence contemplated by the statute.[86] While difficult at first, a body of case-law would eventually build up to help the Court make the necessary distinction between "ordinary" and "extraordinary" exceptional cases.

9.66 Nonetheless, the Washington Supreme Court rejected the doubling rule in *Oxborrow*, as was remarked above, with the result that appellate review in that state has been effectively disarmed by those whose task it was to implement it. The adoption of an almost impassable review standard in Washington is certainly disappointing. However, it is as well to remember that such disparities as do arise will exist only among those who receive departure sentences. In 1985, only 3.5% of cases decided under the *Sentencing Reform Act* resulted in exceptional sentences - the potential disparity thus compares well with the enormous disparity problems under Washington's former sentencing system.[87] This does not, however, excuse the downgrading of the effect of appellate review in a limited number of cases, where the potential for injustice is especially great.

Florida

9.67 From an initially very similar starting point, Florida's courts moved in a very different direction in respect of appeal policy. In *State v Mischler*,[88] it was held that "an appellate court's function in a sentencing guidelines case is merely to review the reasons given to support departure and determine whether the trial court abused its discretion in finding those reasons 'clear and convincing'."[89]

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83 *Review Standards under the Sentencing Reform Act*, (1987-88) 23 Gonz L Rev 655, at p664.

84 *Ibid.*

85 See e.g. Goodloe J in *Armstrong*, *op cit*, at p554.

86 *Ibid*, at p556. See Altman, *op cit*, at pp665-666.

87 Altman, *op cit*, at p665. It bears reiterating that this apparent reduction in disparity is convincing only if all relevant sentencing factors are properly accommodated in the guidelines.

88 488 So 2d 523.

89 *Ibid*, at p525. The guidelines permit departure only if "there are clear and convincing reasons to warrant aggravating or mitigating the sentence" F/A R Crim P 3.701(d)(ii).

9.68 This apparently deferential standard of review has in fact been developed to exclude a large number of considerations from the sentencing process. It was held in *Mischler* that the court's reasons must be supported by facts proven beyond reasonable doubt (though later legislation substituted for this a requirement merely of the preponderance of the evidence)[90] and that the reasons "must be of such weight as to produce in the mind of the judge a firm belief or conviction, without hesitancy, that departure is warranted."[91]

9.69 The *Mischler* court also established a number of categories of reasons which may *never* justify departure from the guidelines. Some are actually prohibited by the guidelines themselves e.g. prior arrests without accompanying convictions.[92] Others are factors already taken into account in calculating the guidelines score e.g. prior criminal record.[93] Such a rule is common to most such systems.

9.70 Inherent components of the crime of conviction are also excluded, e.g. in *Mischler,* breach of a fiduciary relationship could not be an aggravating factor in a sentence for embezzlement. Otherwise, departure would be appropriate in almost all cases of embezzlement, so that the guideline sentence would in fact rarely be imposed - which result would be inconsistent with the concept of sentencing guidelines.[94]

9.71 The corollary to this provision against undermining the guidelines is that common or typical aspects of a crime do not justify departure either - this rule was expressed in *State v Lerma,* when it was held that emotional hardship and physical trauma on the victim were sufficiently common factors of all sexual batteries to exclude them as grounds of a sentence departure.[95] This is a useful and intelligent principle, and should be more widely adopted.

9.72 Departures based on disparate regional perceptions of the severity of a crime, or on the sentencing judge's dissatisfaction with the guidelines are also excluded.

9.73 It is clear thus, that Florida's simple, abuse of discretion, standard of review is qualified by numerous other, entirely laudable limitations on the judicial discretion. The result has been that departure sentences have been rejected in "myriad instances",[96] despite the apparently deferential standard of review.

9.74 Unfortunately, this may be a result, in the view of the Florida Commission, of an undue concentration by sentencing judges on finding means of departure from the guidelines.[97] In fact, this process has been aided by the

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90 F/A Stat Ann S921.001(5).
91 480 So 2d 523, at p525.
92 F/A R Crim P 3.701(d)(ii).
93 488 So 2d, 525.
94 *Ibid,* at p526.
95 497 So 2d 739.
96 *Davis v State,* 511 So 2d 430, at p432.
97 Holton, *What is to be done with Sentencing Guidelines?* (1987) 61 F/A BJ 19 at p22.

State legislature - the decision of the Florida Supreme Court to review the *extent* of departures from guidelines was reversed in a statute of 1986.[98] In that respect, the hands of the Florida appellate courts have been tied more tightly than the courts of Washington tied their own.

(III) DETERMINATE SENTENCING: CALIFORNIA

9.75 The reaction to indeterminate sentencing practice in California was rather different from that in Minnesota and the other states discussed above. On their face, the reforms adopted have much in common with the Minnesota model, but there are also considerable points of divergence, and the California scheme is ultimately the weaker of the two.

9.76 In 1976, the *Uniform Determinate Sentencing Bill* was enacted in California. It shares with the cases already discussed a commitment to consistency in sentencing, which objective is to be achieved in accordance with a policy of just deserts. Section 1170a of the Amended Penal Code states that "the purpose of imprisonment for crime is punishment", and that "this is best served by terms proportionate to the seriousness of the offence with provision for uniformity in sentence of offenders and mandatory prison sentences for a number of offenders committing the same crime under similar circumstances."

9.77 Mandatory life prison sentences are retained for first and second degree murder, and for kidnapping for ransom. In all other cases, the judge has a discretion as to whether imprisonment or a community sanction is more appropriate. In this respect, the determinate sentencing law (DSL) differs markedly from the Minnesota matrix, with its express policy commitment to prison in the case of certain offences, and not in the case of others. In fact, the DSL gives no guidance at all on the exercise of this in/out discretion, "other than the negative guidance provided by the increased statutory prescription of mandatory sentences of imprisonment."[99] This must be accounted a major flaw of omission in the system's design, probably due to the fact that it was introduced as part of an integrated overhaul of the whole sentencing system and structure.

9.78 The real area of operation of the DSL is reached when the prison term is considered by the judge (he or she having decided upon imprisonment or the decision having been made for him or her by a mandatory imprisonment requirement). The law lays down three possible prison terms for each felony, the higher and lower making provision for aggravation and mitigation respectively. The term is decided on the basis of only one of the axes on a Minnesota style grid, as it were - that of offence gravity. Only afterwards does criminal history enter the judge's calculations, along with other considerations, when he or she must decide whether or not to "enhance" the term. Enhancements of specified durations may be added if the offender has previous convictions, used or carried a firearm, caused injury, or stole more than a certain amount of money, e.g. two

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98 See Simon *op cit*, at p895.
99 Allen, *op cit*, at p323.

years could be added for each violent offence previously committed. In *all* cases, the factual basis of, and reasons for, the sentence must be set out.

9.79 It should be noted that the Californian innovation involves a curious mix of judicial discretion and judicial constraint - there is considerable freedom where there exists a choice between imprisonment or an alternative sanction, and on the question of enhancement, while at the intermediate stage, when the basic term is established, the sentencing judge's range of choice is very limited. For example, the sentence for burglary, previously 7-15 years indeterminate (i.e. with release being determined by the Adult Authority), became 6 months, 2 years or 3 years.[100] This degree of restraint becomes fairly meaningless with discretionary enhancement - yet a rather brutal form of consistency has been achieved by making heavy enhancements mandatory in many cases, while at the same time the base prison terms in the DSL have also been subject to continuous upward amendment. Thus, the greatest achievement of the new scheme, the massive reduction in the upper terms of imprisonment, as in the example of burglary above, has been under assault from two directions - from within, by the express increase of base terms, and by the snowball effect of enhancement. The scale of this assault is frightening. From 1st January, 1980, five years were added to the base term for each prior conviction for sex offences and violent offences. In 1982, Proposition 8 of the new *Victims' Bill of Rights* prescribed mandatory enhancement of 10 years for each prior prison term served for violent sex offences, and that prison be the mandatory sentence for first-degree burglary (which covers all burglaries of residential property). In 1980, nine specific sex offences became subject to mandatory sentences and larger enhancements.[101]

9.80 The result has been a doubling of the imprisonment rate for felons.[102] Furthermore, it is said the DSL "institutionalises double jeopardy by the system of enhancements for prior prison terms which effectively punishes the offender again for the same offence."[103] This is a symptom of the failure of the designers of the DSL to address the issue of commensurability. While the Californian scheme may achieve consistency between similarly circumstanced and culpable offenders, it has allowed penalties to diverge from the offences committed, because of the huge influence of penalty enhancements. As *Allen* remarks, "the Californian sentencing system is a counterfeit "just deserts" model",[104] because while *disparities* may have been reduced, many of the punishments imposed are grossly unfair in themselves, being quite incommensurable with the seriousness of the crimes committed.

9.81 *Davis* submits that the DSL has in fact departed from its stated

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100 *Ibid*, at p322.

101 See Davis, *Determinate Sentencing Reform in California and its Impact on the Penal System* (1985) 25 Br J Crim 1, at p17.

102 However, Puglia remarks that the impetus for "legislative excesses in the imposition of greater penalties will eventually be constrained by the problems of prison over-crowding and prison finance", *Determinate Sentencing in California* in *The Future of Sentencing* (University of Cambridge, Institute of Criminology, Occasional Papers No.8), 33 at p43.

103 Allen, *op cit*, at p323.

104 *Ibid.*

objective: developments in California "have less to do with 'just deserts' and more to do with incapacitation. The original philosophy of the DSL owed much to the retributive view of punishment; the offender deserves to suffer for his wrongdoing, he pays the price and then re-enters society with a clean state. Incapacitation, on the other hand, reflects the view that criminals should be locked away until they are no longer a danger to society."[105]

9.82 As must be clear from that description, incapacitation is a concept more easily associated with indeterminate sentencing than with the stated aspirations of the DSL - one might see it is a negative expression of rehabilitative theory.

9.83 It can be concluded that the Californian determinate sentencing scheme is highly unsatisfactory. It remains to be asked whether its faults are attributable in the main to poor design, or whether the notion of determinate sentencing is inherently flawed. *Allen* does suggest that "the problems of escalating sentence levels encountered in California might not have arisen if oversight of the sentencing system had been entrusted to an independent sentencing commission rather than to a legislature which is so susceptible to short-term political pressures.[106]

9.84 It is submitted that if the initial discretion on imprisonment were subject to some guidance; the role of criminal history as a sentence enhancing factor were reduced; determinate *community* sentences were also prescribed; and general penalty levels lowered by an independent sentencing commission (or by a more responsible legislature), the DSL might be a more appealing piece of legislation. Yet in that case, it would be difficult not to compare it to a matrix guidelines system (perhaps one better designed than in Minnesota); and not to find it wanting, by the comparison, as a means of achieving the goals substantially shared by both schemes. Ultimately, the justice envisaged by determinate sentencing is procrustean; the grid system's guidelines can be simpler, clearer, and more just in their combination of criminal record and offence gravity in assessing the culpability, or desert, of the offender; while they provide a better structured, and easily reviewable, discretion to judges who wish to depart from them.[107] *We provisionally recommend that a determinate sentencing law not be adopted as a means of implementing sentencing policy in this jurisdiction.*

(IV) PRESUMPTIVE SENTENCING GUIDELINES: CANADA

9.85 The work of the Canadian Sentencing Commission, which reported in 1987,[108] is part of a general process of reconsideration and reform of the criminal law begun in that country in 1979. The process has continued, in respect of sentencing, since the publication of the Commission's Report and a

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105 *Op cit*, at pp17-18.
106 *Op cit*, at p323.
107 For a critique of the Illinois determinate sentencing scheme, see Zimring, *Sentencing Reform in the States* in Tonry & Zimring (eds) *Reform and Punishment* (1983) 101, at pp111-112.
108 See *Report on Sentencing Reform: A Canadian Approach*, (1987), hereinafter *Canadian Report*.

number of other documents have since been published in this area.[109]

9.86 As has already been remarked above, the Commission advocated as a rationale for the sentencing system the principle of proportionality, but stressed the accountability rather than the punishment of the offender. This was to be the guiding motivation for a package of interdependent reforms. One development ostensibly inspired by the "just deserts" principle was the passing of legislation in 1988 allowing courts to consider victim impact statements in determining the appropriate sentence to be imposed on an offender.[110] However, most of the package remains to be implemented. Among its recommendations are:

(i) the replacement of the current penal structure with the new maximum penalties of 12 years, 9 years, 6 years, 3 years,, 1 year and 6 months. There would be a reduction of maxima for most offences; and the abolition of nearly all mandatory minimum penalties, as these tend to transfer discretion from the judge to those responsible for the conduct of criminal prosecutions;[111]

(ii) increased resort to community sanctions;

(iii) abolition of full parole - there would be a maximum 25% remission for good behaviour;[112]

(iv) a permanent sentencing commission to work in conjunction with a committee of trial judges;

(v) the introduction of presumptive guidelines.[113]

9.87 The Standing Committee on Justice (the Daubney Committee) reported subsequently and dissented from some of these proposals.[114] In particular, it recommended the retention of parole. A public opinion poll conducted for the Department of Justice suggested its retention, with 80% in its favour.[115] The Canadian Ministry of Justice advocated a Sentencing and Parole Commission, to provide the mechanism for the formulation of guidelines and of conditional release strategies within a consistent policy framework.[116]

9.88 With respect to guidelines, the Daubney Committee proposed that these

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109 See *Sentencing: Directions for Reform*, Canadian Ministry of Justice, (1990) at p1.

110 See *A Framework for Sentencing, Corrections and Conditional Release*, Canadian Ministry of Justice, (1990), at pp11-12. However, it is not thought that victim impact statements are in fact a desirable innovation in a "just deserts" scheme. See para 11.33 *et seq*, *infra* (Role of the Victim).

111 Canadian Report, chapter 8.

112 *Ibid*, at p247.

113 *Ibid*, chapter 11. The Commission's terms of reference specified that guidelines be formulated (*Ibid*, at p273).

114 *Taking Responsibility*, Report, 1988.

115 Directions for Reform, *op cit*, at p9. However, the Sentencing Commission, in chapter 4 of its report, documented significant public confusion respecting the operation of the criminal justice system.

116 *Ibid*, at p10.

be advisory only.[117]

9.89 It is apparent, therefore, that the proposals of the Canadian Sentencing Commission were received with less than unanimous approval. Nonetheless, their approach to the drafting of sentencing guidelines contains some new ideas which are worthy of consideration.

9.90 The Law Reform Commission of Canada, in its submission to the Sentencing Commission, proposed the use of benchmarks:

> "A "benchmark" sentence or disposition indicates the norm in the "usual" case. It would be an indication of the usual disposition in the "normal" case. Because individual circumstances vary, it should be possible for a court to depart from the benchmark, but in order to maintain a rough equality among cases of roughly equal seriousness such departure should be limited to a 10% or 15% variation either way depending on aggravating or mitigating circumstances. Exceptional cases, all would agree, cannot be dealt with by general rules or "benchmarks". Accordingly, for a limited number of cases where the circumstances are "clearly compelling" for a departure which is greater than 15% from the benchmark, the court should be able to impose a sentence, according to the principles stated, giving reasons, and subject to appeal by either Crown or defence counsel".[118]

9.91 Among the objections of the Sentencing Commission were that the classes of offences for which benchmarks would be formulated were very broad, and included offences for which actual sentencing practice was very different. Benchmarks would thus force uniformity on a diversity of practices. In general, it was considered that the LRCC benchmark proposal was much influenced by the Minnesota model. Being based on a much simpler structure it would be even cruder in effect.[119]

9.92 Neither was a US-style two-dimensional guideline matrix recommended. It was decisively rejected by judges, and was therefore deemed to be unworkable.[120]

9.93 The proposed guidelines would inform the judge whether the presumptive sentence would involve a community (ie non-custodial sanction) or would include a term of imprisonment. Offences would be assigned one of four presumptions:

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117 The Committee also refused to endorse the elimination of minimum sentences, the recommended revision of maximum sentences in the Code, and the abandonment of dangerous offender provisions. *Ibid*, at p2.

118 LRCC submission, cited, Canadian Report at p288.

119 *Ibid*, at p300.

120 Canadian Report, at p292.

IN (i.e. custody);
OUT (i.e. community sanction);
QI (qualified in i.e. custody unless it is a minor instance of the offence and the offender has no relevant criminal record); and
Q0 (qualified out i.e. community sanction unless it is a serious instance of the offence and the offender has a relevant criminal record).[121]

9.94 The Commission provides the following example of the eight possible outcomes of applying the presumptive "qualified out" disposition to theft over Can$1,000. Four comply with the presumption, four depart:

Compliance Outcomes

(i) The theft was not a serious instance of this offence (e.g., the sum of $1,000 was stolen) and the offender has no relevant record (e.g. a first offender). The judge *does not impose* a sentence of incarceration.

(ii) The theft was a serious instance of this offence (e.g., $10,000 was stolen) and the offender has a lengthy record of offences against property. The judge *does impose* a sentence of incarceration.

(iii) The theft was a serious instance (e.g., $100,000 was stolen) but the offender has no relevant record (e.g., a first offender). The judge *does not* impose a sentence of incarceration, because only one of the two conditions for custody is present.

(iv) The theft was not a serious instance of the offence (e.g., $1,100 was stolen) but the offender has the record of a career criminal. The judge *does not* impose a sentence of incarceration, because only one of the two conditions for custody is present.

Departure Outcomes

(v) The theft was not a serious instance (e.g., $1,100 was stolen) and the offender has no relevant record (e.g., a first offender). The judge *does impose* a sentence of incarceration, which he or she justifies by using one or more of the aggravating factors allowed by the sentencing guidelines.

(vi) The theft was a serious instance of this offence (e.g., $10,000 was stolen) and the offender has a lengthy record of offences against property. The judge *does not impose* a sentence of incarceration, which he or she justifies by using one or more of the mitigating factors allowed by the sentencing guidelines.

(vii) The theft was a serious instance (e.g., $100,000 was stolen) but the offender has no relevant record (e.g., a first offender). The judge *imposes* a sentence of incarceration and justifies it by

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121 It will be appreciated that in the model of sentencing principles proposed in this paper, qualified in/out decisions are not matters primarily of desert but are governed by secondary sentencing aims.

referring to the magnitude of the loss which itself warrants a term of custody, even for a first offender. The judge may also cite other aggravating factors. This outcome *departs* from the presumptive disposition because only one of the conditions for imposing a sentence of custody was met.

(viii) The theft was not a serious instance of the offence (e.g., $1,100 was stolen) but the offender has the record of a career criminal. The judge *imposes* a sentence of incarceration justified here by the offender's record which warrants a custodial sentence even though the magnitude of loss was not great. The judge may also cite other aggravating factors. This outcome also *departs* from the presumptive disposition because only one of the conditions for imposing a sentence of custody was met.[122]

9.95 The more complex approach to the decisions whether or not to incarcerate an offender was deemed to avoid the in\out rigidity of the Minnesota system,[123] and also Minnesota's perceived exclusion of an effective *policy* role for appellate courts.[124]

9.96 For those cases resulting in custody, a presumptive range is provided. It is worthwhile looking at the guideline prototype for an offence like theft over Can$1,000, illustrated in Table H.[125]

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122 *Ibid*, at p313.
123 *Ibid*, at p298.
124 *Ibid*, at p299.
125 A number of other guideline prototypes are contained in Appendix A.

TABLE H

SAMPLE CANADIAN GUIDELINE PROTOTYPE

I. Group of Offences:

Theft Over $1000
s283\294(a), *Criminal Code*

Possession of Property obtained by Crime Over $1000
s312\313(a), *Criminal Code*

False Pretence Leading to Theft Over $1000
s319\320(2)(a), *Criminal Code*

Fraud Over $1000 or Pertaining to a Testamentary Instrument
s338(1)(a), *Criminal Code*

II. Maximum 6 Years

III. Presumptive Disposition Qualified Presumption of Non-Custody (QO) (ie. 'out' unless it is a serious instance of the offence *and* the offender has a relevant criminal record).

IV. Guidelines Range*: 1-2 Years

ADVISORY INFORMATION

V. Current Practice:

(These data reflect sentencing under the current system which includes full release on parole as early as one-third and remission based release after an inmate has served two-thirds of sentence. To get an idea of time actually served by inmates, these sentences must be discounted to a greater degree than would the ranges proposed by the Commission).

1. Theft: Similar data are provided in respect of the other offences in this group

Percentiles (m = months, y = years)

Source	*25th*	*50th (Median)**	*75th*	*90th***
Correctional Sentences Project (s283,294)	1m	3m	5m	1y
Sentencing Commission (a294(a))	4m	18m		

* The median sentence can be regarded as the sentence in the middle of the distribution: of all cases resulting in custody, half are above (ie higher) and half are below it.

** The 90th percentile is that sentence below which 90% of cases can be found. To illustrate, the 90th percentile for theft over $1,000 during this period was 18 months (Sentencing Commission). This means that of *all* offenders who were convicted of theft over $1,000 *and* who were sent to prison, 90% received terms of imprisonment that were 18 months or below

VI. Case Law: No clear principles emerged which were relevant to the entire group of offences.

9.97 The statistical scheme adopted in order to illustrate current practice is not very helpful, as it does not indicate the differing circumstances in which different sentences were handed down. By describing outcomes but not inputs, it is of little use to the judge who has to decide where to locate the case before him or her on the scale of seriousness.[126]

9.98 This weakness is surprising, as it is at variance with the Commission's own analysis of the need for sentencing information, which would view the data provided as being more relevant to the formulation of guidelines than to their application:

> "The kind of information needed to determine policy - broad numerical figures on major trends - is to be sharply contrasted with the type of information which is relevant to the sentencing judge in solving particular cases, and, particularly, in reviewing cases. Whereas the latter must be detailed and sensitive to differences between cases, the former is general and aims at identifying the common features of a vast number of cases."[127]

9.99 The proposed guidelines also contain a non-exhaustive list of aggravating and mitigating circumstances which could be used to determine the sentence level within the presumptive range, where custody is involved, or to provide valid grounds for departing from the guidelines.[128] Judges would be required to give reasons for any departures. Thus, a considerable degree of judicial discretion is maintained, but parameters for effective appellate review on foot of defence or *Crown* appeals are established. It was recommended that guidelines also be formulated in respect of community sanctions.[129]

9.100 At least one commentator, *Allen*, has praised the Canadian Report as "well-reasoned"; however, his remark that the guidelines would benefit from being part of a package of reforms resulting from a complete overhaul of the whole sentencing system may not hold true, in the light of the reservations of other influential Canadian bodies about some of the package's contents. *Allen* is also impressed by the fact that the guidelines do not appear to be susceptible to tabulation, and that the offender's past convictions would not be determinative of his sentence in the way they are e.g. in Minnesota, but rather are a factor to be taken into account in deciding whether to *depart* from the presumptive sentence.[130]

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126 For more detailed discussion, see para 9.166 *et seq*, *infra* (Statistics).

127 *Ibid*, at p290. For an account of how the Commission's data base was designed and compiled, see Hann and Harman, *Information Systems to Support a Canadian Sentencing Commission: Initial Comments*, (1986). At most, the data can provide sentencing judges with crude *de facto* starting points on German/Norwegian lines (see para 9.166 *et seq*, *infra* (Statistics)).

128 *Ibid*, at p320.

129 *Ibid*, chapter 12.

130 *Op cit*, at p329.

(V) US FEDERAL SENTENCING GUIDELINES

9.101 Prior to the introduction of the US Federal Guidelines in the 1980's, federal judges' discretion in sentencing seemed almost infinite, as long as the sentence imposed did not exceed broad statutory limits.[131]

9.102 In the seminal case of *Williams v New York*,[132] the Supreme Court expressly disapproved of rigid and mechanical concepts in sentencing that unnecessarily restricted judicial exercise of discretion; in *United States v Tucker*, it was noted that the sentencing judge "may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come."[133]

9.103 The reaction to this state of affairs was led by *Marvin Frankel*, a former Federal District Judge. Judge *Frankel* was an early advocate of sentencing commissions, composed of judges, lawyers, criminologists and penologists, which could determinewhich substantive considerations should enter into the sentencing determination, and develop procedural rules for the implementation of those considerations. In his landmark work of 1973, *Criminal Sentences: Law Without Order*, he declared:

> "Those of us whose profession is the law must not choose any longer to tolerate a regime of unreasoned, unconsidered caprice for exercising the most awful power of organised society, the power to take liberty and ... life by process of what purports to be law."[134]

9.104 *Frankel* was particularly critical of the absence of any requirement for judges to give reasons for their sentences, and of their reluctance to do so for fear of reversal upon appeal. That the criticisms of *Frankel* and others were well-founded has been borne out by research conducted by the Federal Sentencing Commission, established as a result of the change in attitudes to sentencing which he helped to initiate. Considerable disparities were found in sentencing practice in various areas:

> "The region in which the defendant is convicted is likely to change the length of time served from approximately six months more if one is sentenced in the South to twelve months less if one is sentenced in Central California .... [F]emale bank robbers are likely to serve six months less than their similarly situated male counterparts ... [and] black [bank robbery] defendants convicted ... in the South are likely to actually serve approximately thirteen months longer than similarly situated bank robbers convicted ... in other regions."[135]

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131 Ogletree, *The Death of Discretion? Reflections on the Federal Sentencing Guidelines* (1988), 101 Harv L Rev 1938 at p1941.

132 (1949) 337 US 241.

133 (1972) 404 US 443, at p446.

134 At pp6-7. See also Frankel, *Lawlessness in Sentencing*, (1972) 41 U Cin L Rev 1.

135 Hearings before the Subcomm on Criminal Justice, 100th Cong, 1st Sess 554-87 (1987) at pp876-77 (Testimony of Ilene H Nagle, US Sentencing Commissioner).

9.105 Other statistical studies showed, for example, that in the Second Circuit, punishments for identical actual cases could range from three years to twenty years imprisonment.[136]

9.106 *Senator Edward Kennedy* introduced an early sentencing guidelines bill in the Congress in 1975,[137] but a consensus did not emerge on the need for such measures until, almost a decade later, Congress took a particular interest in the guidelines established by the United States Parole Commission in the 1970's. As with the judiciary, the Parole Commissioners had been reluctant to move beyond decision-making on an individual basis -their policy was to treat each case on its merits. The guidelines advocated the determination of each prisoner's release date mainly upon two dimensions (thus leading to the original matrix), namely, the seriousness of the instant crime, and the probability of recidivism, calculated from a "salient factor score" based on nine personal characteristics whose success at predicting post-parole conduct was statistically validated.[138] Any departure from the policy matrix was to be explained, and every six months a review of such departures was made by the board sitting *in banc*.[139]

9.107 *Leslie Wilkins*, one of the initiators of the Parole Guidelines matrix, has pointed out that it was designed as a management or policy *tool*, but gradually, as it moved from parole to the courts, became a legal instrument involving legislatures. The Parole Board sought to protect itself and its independence from accusations of disparity in its decision-making by illustrating, through the adoption of the guidelines, that its determinations were principled and in accord with an explicit policy.[140] It was hoped that the judiciary would defend collectively its independence from legislative (political) intervention in similar fashion; but the judges seemed to prefer to defend the right of each individual judge to independence.[141] 9.108 Instead, presumptive sentencing guidelines tended in most states to be a political innovation (though as we have seen, they could not be assured of success without judicial support). This was also the case in respect of the Federal Guidelines: although the Sentencing Commission was established, by the Sentencing Reform Act 1984[142] as "an independent commission in the judicial branch of government", to avoid separation of powers difficulties, the ultimate responsibility for its establishment was political.

9.109 The Commission comprised seven members (including three federal judges) appointed by the President, confirmed by the Senate and instructed to

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136 See S Rep No. 225, 98th Cong, 2d Sess 41 n22 (citing Partridge and Eldridge, *The Second Circuit Sentencing Study: A Report to the Judges* 1-3 (1974)); see generally S Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest* (1988), 17 Hofstra L Rev 1 at pp4-5.

137 See S 2699, 94th Cong, 1st Sess, 121 Cong Rec 37, 563-64 (Nov 20, 1975).

138 See *Developments in the Law - Race and the Criminal Process* (1988), 101 Harv L Rev 1472 at pp1636-7; Wilkins, *Disparity in Dispositions: the early ideas and applications of guidelines* in Wasik& Pease, *op cit* pp7-21 at pp11-15.

139 *Ibid* at p13.

140 Nonetheless, it has been concluded that the system adopted proved incapable of eliminating unwanted disparities. See US Comptroller General *Federal Parole Practices: Better Management and Legislative Changes are Needed* (1982) 11-52 (report no. B-133223). Parole has since been abolished.

141 *Ibid*, at pp14-15.

142 Codified at 28 USC ss991-998 (Supp III 1985); re the "judicial" nature of the Commission, see s991(a).

write, by April 1987, sentencing guidelines which would automatically take effect 6 months later unless Congress passed another law to the contrary.[143]

9.110 The authority granted to the Commission to carry out its mandate was thus very considerable. That mandate was a complex one, which *Ogletree* summarises in detail as follows:

> "The Act requires courts to impose sentences "which reflect the seriousness of the offence"; "promote respect for the law"; "provide just punishment for the offence"; "afford adequate deterrence to criminal conduct"; "protect the public from further crimes of the defendant"; and "provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner". To implement these goals, Congress gave the Sentencing Commission the responsibility to determine under what circumstances an individual would be subject to imprisonment, a term of probation, a fine, or some combination of these sanctions.[144] Moreover, Congress created a grading scheme to be employed by the Commission to rank each offence according to its seriousness.
>
> Although the Sentencing Commission was expected to draft guidelines and develop policy statements that would eliminate disparities, it was also expected to develop policy statements that would leave federal judges with sufficient flexibility to impose individualised sentences warranted by mitigating or aggravating factors not taken into consideration in the general sentencing guidelines. Congress mandated that the Commission take numerous factors and circumstances into account, to the extent that they are relevant, in establishing categories of offences. The factors included the grade and nature of the offence, the mitigating and aggravating circumstances, the public concern generated by the offence, the deterrent effect a sentence might have on others, and the incidence of the particular offence in the community and in the nation. Congress authorised the Commission to consider, in establishing the categories of defendants, the relevance of an offender's age, education, vocational skills, mental and emotional condition, physical condition (including drug dependence), previous employment record, family and community ties, role in the offence, criminal history, and dependence on criminal activity for a livelihood. Additionally, the Commission was expected to develop means of measuring the effectiveness of sentencing, penal, and correctional practices in fulfilling the purposes of sentencing articulated by Congress in the federal sentencing statutes.
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> Finally, the Sentencing Commission was given the authority to

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143 Breyer, *op cit*, at p5.

144 That the Guidelines were not confined to imprisonment was a welcome development. Nonetheless, they are weighted in favour of imprisonment. See below.

promulgate guidelines to determine whether multiple sentences should be ordered to run concurrently or consecutively and to develop "policy statements regarding the application of the guidelines or any other aspect of sentencing or sentence implementation that in the view of the Commission would further the purposes set forth" in the sentencing statutes. The Commission was also authorised to establish a sentencing range for each category of offence involving each category of defendant,[145] as long as, in cases involving imprisonment, the maximum of the range did not exceed the minimum of the range by more than the greater of twenty-five percent of the sentence or six months. The Commission was also required to insure that its guidelines and policy statements were "entirely neutral as to the race, sex, national origin, creed, and socio-economic status of offenders."[146]

9.111 Judges might depart from the Guideline range, but only upon giving reasons, and the imposed sentence would be subject to appellate review for "reasonableness."[147]

9.112 The circumstances of the Guidelines compilation were less than ideal. No prosecutor, judge or defence attorney was appointed with extensive experience in federal sentencing practices - the absence of a defence lawyer was thought to be especially lamentable. More importantly, the timetable set by Congress for the enactment of the guidelines was arbitrary and unrealistic, and an extension was refused when requested.[148] The federal task was also more difficult than that of state commissions like those of Minnesota and Washington for two substantive reasons. First, the Federal Criminal Code has many more crimes than most State codes: against Minnesota's 251 and Washington's 108 statutory crimes, the Federal Commission had to deal with 688 statutes, including such complex criminal laws as the *Racketeer Influenced and Corrupt Organisations Act*.[149] Secondly, the political homogeneity in individual states may have made it easier to achieve consensus. While there was near unanimous nationwide support for the concept of federal guidelines, serious political differences emerged once the Commission reduced that concept to a detailed reality.[150]

9.113 The Commission began its task by conducting public hearings, and by establishing a research programme to consider summary reports on some 100,000 federal cases, and detailed reports on some 10,000.

9.114 It then tested its guidelines against the actual sentences imposed.[151] Furthermore, the guidelines' impact on the federal prison population and on other components of the federal criminal justice system was assessed. In

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145 Thus, a grid was suggested, but was not mandatory.

146 *Op cit*, at pp1946-1947.

147 See Breyer, *op cit*, at pp5-6; 18 USC ss3553(b) (Supp IV 1986), 3553(c) and 3742(d).

148 See Ogletree, *op cit*, at pp1949-1951.

149 (RICO) 18 USC ss1961-1963 (1982 & Supp IV 1986).

150 See Breyer, *op cit*, at pp3-4, and especially notes 16 and 18.

151 See Supplementary Report on the Initial Sentencing Guidelines and Policy Statements (1987) at pp11, 16-17. For an account of some of their conclusions, see above.

September 1986, after extensive consultations with federal agencies, public meetings, etc, detailed preliminary draft guidelines were published.[152]

9.115 These were widely criticised as inflexible, unduly harsh and difficult to administer. Their application to real cases was found in some studies to lead to disparities of even greater magnitude than had previously existed, as well as to serious computation errors - for example, in a mock sentencing exercise in the Eastern District of Pennsylvania.[153]

9.116 A revised draft was submitted for public review in January 1987, after the consideration of thousands of pages of submissions and the elimination of some flaws. Despite further criticism,[154] only two days of public hearings were held to solicit comments; the guidelines were put before Congress without any subsequent test or trial a month afterwards.[155]

9.117 They automatically became federal law on November 1, 1987, but have since been subjected to several substantial amendments.[156]

9.118 The guidelines are largely "descriptive" of prior sentencing practice, though not entirely so - this point will be returned to. They feature a grid or matrix which is a more complex version of the Minnesota model. This is the "Sentencing Table", which has 43 "offence levels" on one axis, and 6 "criminal history categories" on the other. The determination of both of these scores is more refined (and complicated) than in most of the State systems already described.

9.119 The offence level is calculated by determining the "base level" of the particular criminal offence, and by adjusting this level - usually upwards - in accordance with a host of offence characteristics identified by the guidelines. Some of these are summarised by *Allen* as follows:

> "For example, the amount of money involved in theft or robbery or the use of a weapon can lead to an increase in the base level. Further increases may be made because of the vulnerability of the victim, the offender's organisational role in the offence, the offender's abuse of a position of trust or the offender's wilful obstruction of the administration of justice during the investigation or prosecution of the offence. The base level may also be adjusted downwards where the offender's role in the offence was minimal, or where he has demonstrated a recognition and affirmative acceptance of personal responsibility for the offence by, for example, voluntary payment of restitution or voluntary admission to

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152 See US Sentencing Commission Guidelines Preliminary Draft, 40 Crim L Rep (BNA) 3001 (Oct 1, 1986).

153 See *Sentencing Commission's First Effort Receives Outpouring of Criticism*, 40 Crim L Rep (BNA) 2223; Supplementary Report, *op cit* at p11.

154 See *Sentencing Commission;s Second Draft Meets with More Approval than First*, 40 Crim L Rep (BNA) 2487.

155 It was suggested that the guidelines should first be "field tested" by judges and lawyers; *Ibid* at p2489. See also *Sentencing Commission sends Guidelines to Congress*, 41 Crim L Rep (BNA) 1009.

156 See *Sentencing Act of 1987*, Pub L No. 100-182, (1988) US Code Cong and Admin News (101 Stat) 1266.

the authorities of involvement in the offence (but not for a 'guilty' plea), or voluntary surrender to the authorities."[157]

9.120 For the offender's criminal history, points are not simply added according to the number of previous convictions, as in Minnesota, but vary on the basis of their seriousness as determined by the length of any prison terms already served.[158]

9.121 Certain prior sentences are not counted or are counted only under certain conditions.[159] The court may depart from the criminal history score if it appears significantly to under-represent or over-represent the seriousness of the defendant's criminal history or the likelihood that he or she will commit further crimes. In addition, if the offender is a "career offender", his or her criminal history category is prescribed as category VI and the offence level is augmented to ensure that career offenders receive a sentence of imprisonment at or near the maximum term authorised.[160] If the defendant committed the offence as part of a pattern of criminal conduct from which he or she derived a substantial portion of his or her income, his or her offence level must be set at least at 13 and such an offender is not eligible for probation.[161]

9.122 The meeting point of the two scores on the Sentencing Table gives the appropriate range of sentences. As has already been adverted to, the guidelines deal not only with imprisonment but also with probation, community service, supervised release, fines and restitution.[162]

9.123 *Breyer* offers the following useful illustration of the guidelines' operation:

> "Imagine the case of a bank robber, with one serious prior conviction (i.e. a sentence of imprisonment exceeding thirteen months), who robs a bank of $40,000, while pointing a gun at the teller. The sentencing judge (and probation officer) would proceed through the following steps.[163]
>
> 1. Look up the statute of conviction in the statutory index. The index will lead the judge to guideline §2B3.1 ("Robbery").[164]
>
> 2. Find the "base offence level" for "Robbery" (Level "18").[165]
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> 3. Add "specific offence characteristics". In this example, add two

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157 *Op cit*, at p325, note 54.
158 Section 4AT.1, Guidelines.
159 Section 4A1.2.
160 A person is a career offender if (1) he or she was at least 18 years old at the time of the instant offence, (2) the instant offence is a crime of violence or trafficking in a controlled substance, and (3) he or she has at least two prior felony convictions of either a crime of violence or a controlled substance offence (s4B1.1).
161 Section 4B1.3.
162 Section 5H1.10.
163 S1B1.1.
164 S2B3.1.
165 S2B3.1(a).

levels for the money taken[166] and three more levels for the gun.[167]

4. Determine if any "adjustments" from chapter 3 of the Guidelines apply. They include adjustments for a vulnerable victim or an official victim, abduction of the victim, role in the offence, efforts to obstruct justice, acceptance of responsibility, and rules for multiple counts.[168]

5. Calculate a criminal history score on the basis of the offender's past conviction record. Here, §4A1.1 assigns three points for one prior serious conviction.[169]

6. Look at the table on page 5.2 of the Guidelines[170] to determine the sentence. Here, an offence level of "23", with three points for the prior conviction, yields a range of fifty-one to sixty-three months in prison for this armed robbery by a previously convicted felon.[171]

7. Impose the Guideline sentence, or, if the court finds unusual factors, depart and impose a non-Guideline sentence.[172] The judge must then give reasons for departure,[173] and the appellate courts may then review the "reasonableness" of the resulting sentence.[174]

.... If the Commission has done its job as it hopes, the resulting term of confinement - about four to five years -should strike most observers as about the typical time such an offender would have served prior to the Guidelines."[175]

9.124 Both the defendant and the government may appeal final sentences imposed in violation of (1) the law, (2) the sentence specified in a plea agreement,[176] or (3) as a result of an incorrect application of the guidelines.

9.125 There are a number of further new or refined features of the Federal Guidelines which bear discussion. These will arise in the treatment which follows of the voluminous debate which has accompanied their introduction. The debate sheds considerable light on the problems faced in designing a guidelines system.

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166 S2B3.1(B)(1).
167 S2B3.1(b)(2).
168 SS3A1.1-3E1.1.
169 S4A1.1(a).
170 S4A5.2.
171 *Ibid.*
172 18 USC s3553(b) (Supp IV, 1986).
173 18 USC s3553(c).
174 18 USC s3742(d).
175 *Op cit*, at pp6-7.
176 Re which see below, and also Ch 12, *infra* (Plea Discussions and Agreements).

Criticism of the US Guidelines

9.126 The main criticism of the guidelines upon their introduction was their failure to specify the objects of sentencing. *Professor Paul Robinson*, a member of the Commission who dissented from the final draft, strongly criticised the adopted guidelines for failing to articulate a clear purpose:

> "What's the standard by which one can judge during the field study whether sentences are being applied disproportionately? Because the commission has no stated sentencing policy, one has no way of knowing whether a sentence fulfils the goals of the commission or not.
>
> An example of this would be in sentencing a drug addict. One judge might give a long prison term as a deterrent. Another judge, more inclined to rehabilitation, might give probation conditioned on treatment.
>
> Both are rational sentences that have some policy behind them. They are different policies, which explains why we have so much disparity in the system today.
>
> But what this commission is supposed to do is to decide, even in hard cases like that, what policy ought to be pursued. That's the way that greater consistency in sentencing under the Act is supposed to be brought about.
>
> This requires research into which one of these sentences, for example, is going to reduce crime most in the future. Instead, by its mathematical averaging, the commission has come up with irrational sentences."[177]

9.127 *Ogletree* endorses this view. He cites the Senate Report on the issue as suggesting that the language proposed by Congress "requires the judge to consider the four purposes of sentencing" - rehabilitation, punishment, incapacitation and restitution -"before imposing a particular sentence".[178] He submits that federal judges need efficient guidance in choosing between the various purposes available to justify a sentence imposed on a particular defendant, and that the guidelines ultimately submitted for congressional approval failed to provide such guidance.[179] This is an unusual stance, and seems to be shared by *Robinson*. While both reject "bastardised sentences",[180] based on mathematical averaging of past sentencing practice (which will be discussed immediately below), their alternative is not the choice of a *single* philosophy as the guiding force of the guidelines. They would, rather, preserve all the possible objects, under the broader rubric of *crime control*. In each case, whichever object would "tend to reduce crime most in future" would operate. Thus, empirical

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177 *Should Congress adopt Sentencing Guidelines?*, ABAJ, 1/7/1987 at p37. For an account of the sentencing policy prescribed by the *Sentencing Reform Act, 1984*, and that followed by the US Commission, see para 7.82 *et seq*, *supra* (The Federal System of the USA).

178 S Rep No. 225, 98th Cong 2d Sess at 75.

179 Ogletree, *op cit* at p1952.

180 Robinson, *Dissent on the Promulgation of the Guidelines*, 1/5/87 at p4.

research might suggest that incapacitation operated best on violent criminals, rehabilitation on sexual offenders, and retribution on those guilty of crimes relating to property. Guidelines would thus be formulated in each sphere based on the most applicable philosophy.[181]

9.128 It is submitted that this, if it is a correct assessment of their position, is unsustainable. It is certainly inconsistent with the model of sentencing policy proposed in this paper. Quite apart from the fact that the present popularity of at least one of the possible objects of sentencing - just punishment - is founded on its rejection of utilitarian goals like crime control, such a selective approach must be a licence for disparity. Even if one does not take their statements literally (that a sentencing policy must be chosen in each particular case), and presumes them to intend only that different offence types would be governed by different policies, there would be, in such a scheme, huge disparities in sentencing *as between offence-types*. *Robinson* is adamant that offences be ranked in order of seriousness,[182] yet such a ranking would point up disparities if crimes of violence and against property, adjudged to be of equal severity, were sentenced on different grounds: the violent offender might be incapacitated for a long period while the property offender might be sentenced to a short period of rehabilitative community service. What *Robinson* is really advocating is the adoption of a general object of prevention of recidivism based on predictive factors. But it was despair of the disparities produced by such a philosophy in individualised sentencing which first motivated the guidelines movement - there is no evidence that its application on an offence basis (based on an assessment of the "typical" offender in each offence category), while possibly effective in pursuit of its stated goal of crime control, would reduce the perceived problems of disparity, unfairness and disproportion in sentencing. *Robinson's* failure to appreciate the real philosophical (and effective) differences between sentencing objects is illustrated by his approach to the ranking of offences by seriousness (in itself a laudable aim). He stated that "[d]eterrence and just punishment both call for more serious offences to be sanctioned more seriously", thus demanding systematic offence ranking.[183] *Robinson* does not appear to realise that offence severity rankings in pursuit of "just punishment" objectives would probably differ markedly from those formulated as part of a 'deterrence' system. In the former case, seriousness should be gauged from the harm done or contemplated and the moral culpability of the offender who inflicted such harm; in the latter, if the system were realistic and empirically based, the key indicator of seriousness would be the recidivism rate of typical offenders of that type. For example, the recidivism rate (and thus, the need for adequate deterrence) might be low for an offence, like manslaughter, which is nonetheless one of considerable gravity in point of harm, and of desert and moral guilt.[184]

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181 Neither Ogletree nor Robinson states this specifically, but it is the only possible conclusion from their remarks, as cited above.

182 Dissent, at p8.

183 *Ibid.*

184 This discussion is based on the concept of *individual* deterrence - the fundamental objections to both this type of deterrence and of *general* deterrence as a primary object of sentencing have been outlined already. See para 4.32 *et seq*, *supra* (Deterrence).

9.129 The weaknesses of *Robinson's* alternative proposals do not, however, excuse the guidelines from his attacks automatically. The eclectic approach of the Commission, purporting to combine a number of policies in a single set of rigid presumptive guidelines, has been comprehensively criticised elsewhere in this paper.[185]

9.130 This is not to say that empirical study of sentencing practice, and the adoption of a "descriptive" approach to the introduction of some of its elements into guidelines, is in all circumstances ill-advised. The work of the Commission in examining the common factors in the decision of some 100,000 cases could be very valuable if properly employed. Essentially, the *rationale* for each such decisive factor must be identified. Where this corresponds to the sentencing theory which has been chosen for the decision on quantum of punishment under the guidelines (e.g. "just deserts"), the factor can be employed to help in the formulation of offence-seriousness rankings, or as an aggravating or mitigating factor within the guidelines. This can help combat the problem identified by *Breyer* of such decisions being made, unguided, by Commission members. Similarly, factors attributable to other sentencing philosophies such as rehabilitation and incapacitation can be introduced as specified key factors in the decision on the *choice* of penalty. In response to *Robinson's* allegations of their "mimicking the mathematical averages of past sentences", his colleagues stressed both the sophistication of the multivariate statistical techniques employed, and the relative subtlety of the results obtained[186]:

> "By using advanced statistical techniques, we were able to estimate the average time served for offender/offence combinations. To illustrate, the average time served was estimated for typically occurring variations of burglary offences, including the value of the property taken, the degree of planning, the possession of a weapon, and whether the case was adjudicated through a plea of guilty or by a trial. The results of these analyses were then used as a starting point for the guidelines."[187]

9.131 The results of such analyses were not universally followed:

> "We reviewed the results of these analyses to determine whether the structure and degree of significance were logical and reasonable, and made changes where they were not."[188]

9.132 As the Supplementary Report makes clear, robbery provides a notable example. Research showed that the average sentences for robbery of an individual were considerably lower than those for the much more common (in the federal system) offence of bank robbery, even adjusting for other relevant factors.

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185 See para 7.82 *et seq*, *supra* (The Federal System of the USA).

186 See e.g. Nagel and Block, *Supplemental Statement* in response to Robinson's dissent, 1st May 1987, at p1.

187 *Preliminary Observations of the Commission on Commissioner Robinson's Dissent* (1987) p3, note 2. For a detailed account of the statistical methods employed, see *Supplementary Report*, (1987), Chapter 4. See also the discussion of statistical methods at para 9.248 *et seq*, *infra* (The Victorian Experience).

188 Nagel and Block, *op cit*, at p2.

Because it did not find a persuasive rationale for this, the Commission made little distinction between such offences.[189]

9.133 Thus, a quasi-prescriptive, evolutionary mechanism was established alongside the guidelines' more descriptive features. This is in line with the Commission majority's stated belief "that our proposed changes should evolve from, not represent a sharp break with, existing practice".[190] That is a belief which the authors of this study endorse (not least because of the necessity of achieving judicial support for any proposed reforms). That such practice should be informed by coherent policy statements is, however, imperative.

9.134 The sentencing factors which emerged from the Commission's studies are the subject of continuing discussion in particular, the important role granted to criminal history as the key *offender* characteristic is open to criticism. The debate on this point, including that on the specific features of the US Guidelines' provisions, is rehearsed elsewhere -suffice to note here that the Federal approach is quite sophisticated, but the *weight* attributed by it to criminal history is, as in most guideline grid systems, probably excessive.

9.135 The factors to be taken into account, are also a focus of debate on *levels of detail* in guidelines. *Robinson* commences his argument on this point by citing the instruction to the Federal Commission that the guidelines take account of "every important factor relevant to sentencing", so that departures would be rare, arising only where there was an unusual factor that "was not adequately taken into consideration" by the Commission at the time of drafting.[191] *Robinson* submits that it is the most basic function of any rational sentencing system to provide appropriately different sentences for cases that are meaningfully different: there must be no "free" harms, and significant mitigatory factors should be reflected in reduced sentences. He accused the Commission of failing to make provision for much relevant conduct of the offender, the judge being permitted to take into account under the guidelines only such factors as are listed as applicable to a particular offence:[192]

> "For example, because the burglary guideline does not specifically aggravate the guideline sentence where the offender causes physical injury, the burglar who beats a homeowner will be treated the same as the burglar who does not. That is, the beating of the homeowner is "free" in burglary, as it is in a host of other offences."[193]

9.136 The culpability of an offender's state of mind, i.e. whether he was intentional, reckless or negligent, is also commonly ignored:

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189 *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements*, (1987), at p18.
190 *Preliminary Observations of the Commission on Commissioner Robinson's Dissent, op cit*, at p2.
191 Robinson Dissent, *op cit*, at p2. See also S. Rep. No. 225, 98th Cong., 1st Sess. 169 (1983) and 18 U.S.C. 3553(b).
192 *Ibid*, at pp 5-6.
193 *Ibid*, at p6.

"The statutory definition of an offence generally requires a minimum level of culpability - recklessness (or negligence), for example - and the guidelines generally assume this level of culpability. Because the guidelines do not adjust for a higher level of culpability, the court must depart from the guidelines to account for an offender who intentionally commits the offence. Thus, the offender who intentionally burns a lumber-producing forest is treated the same as the camper who negligently fails to extinguish his campfire, unless the court departs."[194]

9.137 As well as such general factors, the guidelines fail to consider scores of more specific features of offences that are relevant and commonplace, and many of which were recognised by Congress in the definition of the offence, e.g. risking the victim's death in kidnapping, child abuse or exploitation in pornography, the perpetration of acts of perversion or the causing of extreme psychological injury in rape.[195]

9.138 *Ogletree* echoes *Robinson's* grievance in respect of *offender* (as opposed to *offence*) characteristics. Of the many factors suggested by Congress - including the defendant's age, education, vocational skills, mental and emotional condition, physical condition or drug dependence, previous employment record, family responsibilities and community ties - the Commission concluded that only his or her criminal history, dependence on criminal activity for a livelihood, and acceptance of responsibility for his or her wrongdoing were relevant. This disappoints *Ogletree*: "A system that fails to consider the offender's personal characteristics places too great an emphasis on the harm caused by the offender's act and too little emphasis on circumstances which would serve to mitigate the punishment."[196]

9.139 It is *Robinson's* contention that skeletal non-comprehensive, guidelines maintain disparity, by creating the opportunity (indeed, the *need*) to depart from the guidelines in cases with features not provided for in the guidelines.[197] That such departures are invited (or directed) "for the predictable and the commonplace",[198] without an articulated policy to guide the judge and with no legal limit to a departure sentence other than the statutory maximum, is suggested to be inimical to the purging of present anomalies in sentencing practice.[199] The guidelines, it is *Robinson's* contention, are not only skeletal, but fatally *vague* as well. For example, for the offences for which no guidelines were formulated, judges are directed to apply the "most analogous" guideline; and if no sufficiently analogous guideline exists, "the court may impose any sentence that is reasonable."[200]

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194 *Ibid*, at p15.
195 *Ibid*, at p15 and at note 51.
196 Ogletree, *op cit*, at p1953.
197 Robinson Dissent, *op cit*, at p13.
198 *Ibid*, at p19.
199 *Ibid*, see para 9.268 *et seq*, *infra* (Conclusions and Provisional Recommendations) on how departures from guidelines will always be necessary, but always undermine the aims of guidelines.
200 See FD 2x5 1 and commentary.

9.140 Without an express policy to influence such decisions, such discretion is fatal: "Each instance creates the opportunity for different judges to supply their own criteria, definitions and interpretations of key provisions, and thus generate different sentences for similar cases."[201] Robinson continues that for some offences, "the conditions for departure are so numerous and broad that one is hard-pressed to think of a case that would not fall under at least one of the conditions described in the commentary." He cites the guideline on the mishandling of hazardous or toxic substances or pesticides (s2Q1.2), which includes the following commentary, as an instance of the licence which is still given the judge in sentencing under the federal system:

> "Because of the wide range of potential conduct arising out of the handling of different quantities of materials with widely differing propensities, a departure either upward or downward may be warranted. Depending upon the resultant harm from the emission, release or discharge, the quality and nature of the substance or pollutant, the duration of the offence and the risk associated with the violation, a departure of up to two levels in either direction from the offence levels prescribed in these offence characteristics may be appropriate."[202]

9.141 The result is that *Robinson* views the guidelines as neither comprehensive nor binding.[203] Furthermore, as well as maintaining disparity (while the one admittedly inadequate remedial body, the Parole Board, has been abolished), this lack of guideline comprehensiveness makes effective appellate review almost impossible,[204] and prompts *judicial* development of the guidelines to provide the substance and direction that they lack. *Robinson* opposes this both because judges are rarely eager to reduce their own discretion,[205] and also because such development must of necessity be reactive, unsystematic, uncoordinated and on a case-by-case basis,[206] and excludes the possibility of guiding policy decisions by empirical studies and analysis.

9.142 The Commission has been extremely vocal in its defence of the Guidelines against such criticisms. On the issue of the factors relevant to sentencing, it refers to the tension between the mandates of uniformity (to treat like cases alike) and proportionality (to treat different cases differently). It rejects having only a few, easily-administered categories of crime, but suggests that introducing too great a level of detail would also be impractical:

> "At the same time, a sentencing system tailored to fit every conceivable wrinkle of each case can become unworkable and seriously compromise

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201 Robinson Dissent, *op cit*, at p17. A number of other ambiguous or undefined terms from the Guidelines are instanced at note 60. Robinson's criticism of the lack of clear policy objectives as a flaw of the Federal Scheme is very convincing, but it should be remembered that his own alternative approach is no more satisfactory.

202 *Sentencing Guidelines and Policy Statements*, *op cit*, at 2.97. See also Robinson Dissent, *op cit*, at p18 and note 63.

203 *Ibid*, at p12.

204 *Ibid*, at p23.

205 *Ibid*, at p22.

206 *Ibid*, at p27.

the certainty of punishment and its deterrent effect. A bank robber with (or without) a gun, which the robber kept hidden (or brandished), might have frightened (or merely warned), injured seriously (or less seriously) or tied up (or simply pushed) a guard, a teller or a customer, at night (or at noon), for a bad (or arguably less bad) motive, in an effort to obtain money for other crimes (or for other purposes), in the company of a few (or many) other robbers, for the first (or fourth) time that day, while sober (or under the influence of drugs or alcohol), and so forth."[207]

9.143 Quite apart from the multiplicity of combinations and permutations of factors which might arise, many are said to be context specific, i.e. the infliction of injury may be of varying importance depending on the offence under consideration - the risk involved varies and also, the effect of multiple harms need not be simply additive.[208]

9.144 Even more telling is the suggestion that complexity and what Robinson calls "comprehensiveness" may be counter-productive to the guidelines' aim of eliminating sentencing discrepancies:

> "The greater the number of decisions required and the greater their complexity, the greater the risk that different judges will apply the guidelines differently to situations that, in fact, are similar, thereby reintroducing the very disparity that the guidelines were designed to eliminate."[209]

9.145 On the other hand, the granting of considerable discretion in a simple broad-category scheme also is thought to introduce too great a tendency towards disparate sentencing into the system. There is thus a "practical stalemate". "The Commission ... had to simply balance the comparative virtues and vices of broad, simple categorisation and detailed, complex sub-categorisation, and within the constraints established by that balance, minimise the discretionary powers of the sentencing court. Any ultimate system will, to a degree, enjoy the benefits and suffer from the drawbacks of each approach."[210]

9.146 In respect of departure policy, the Commission defends the Guidelines as carving out a "heartland", a set of typical cases embodying the conduct that each guideline describes.[211] It does not limit the kinds of factor that could constitute grounds for departure in an unusual case - firstly because of "the difficulty of foreseeing and capturing a single set of guidelines that encompasses the vast range of human conduct potentially relevant to a sentencing decision"; and secondly, because "despite the courts' legal freedom to depart from the

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207 *Sentencing Guidelines and Policy Statements* at 1.2.
208 *Ibid*, at 1.3.
209 *Ibid.*
210 *Ibid*, see also Supplementary Report at p14. See also para 9.269 *et seq*, *infra* (Conclusions and Provisional Recommendations).
211 *Ibid*, at 1.6.

guidelines, they will not do so very often" - this is due to the considerable efforts taken to make the guidelines reflect the most significant factors in current sentencing practice.[212]

9.147 The Commission in its Supplementary Report points out that the offence level numbers - from 1 to 43 - correspond to a series of *overlapping* ranges that increase in width (so far as permitted) as the offence level increases. The levels overlap so as to limit the significance of small changes in a sentencing factor and to limit the importance of disputed sentencing factors. The minimum of any range is at or below the centre of the next lower range, and ranges that are two levels apart have at least one point in common.[213] This system reflects the attempt to balance the competing demands of broad- and narrow-category schemes.

9.148 In respect of the alleged exclusion of important factors, the Commission remarks that in the choice of elements for inclusion in the criminal history score, regard was had for reliability in field scoring. "Field scoring reliability refers to the accuracy and consistency with which decision-makers can score actual cases, and is affected by a number of factors, including the complexity of the items and the difficulty in obtaining verified information about the items."[214] Clearly, reliance on sentencing factors, no matter how apparently relevant, which are not readily quantifiable must create an opening for disparity in decision-making.[215] The fact-finding mechanism employed is therefore very important - but it must be one which is workable and efficient as well as reliable. The Commission rejected as over-simplistic some state guideline systems, in which the sentence depends almost entirely on the literal offence of conviction. At the same time, as we have seen, it limited the number of factual issues upon which the guidelines rely, focusing on a relatively manageable number of frequently occurring factors, avoiding giving a specific weight to every nuance.[216]

9.149 Factual stipulations by the parties are permitted, in order to speed up the process, and avoid unnecessary disputes, but they must be fully representative of the facts of the offence. The Court is encouraged to place primary reliance on the presentence report, and the parties are required to indicate in advance of the sentencing hearing their positions on all the relevant sentencing factors - areas of agreement can then be easily identified.[217] The Commission did not set out procedural rules for the resolution of any remaining factual disputes - but given their importance to the guidelines system, greater formality was expected.[218]

9.150 A related question is that imposed by the competing rationales of procedural and substantive justice, and of "real offence" and "charge offence"

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212 *Ibid*, at 1.7.
213 Supplementary Report, at p15.
214 *Ibid*, at p43.
215 See *ibid*, at p45, and generally Note, *How Unreliable Factfinding can undermine Sentencing Guidelines*, (1986) 95 Yale LJ 1258.
216 *Ibid*, at p46.
217 Sections 6A1.2 and 6A1.2(c)(3).
218 See also Breyer, *op cit*, at pii, text at notes 65-67. See generally s6A1.3, Guidelines.

sentencing. Sentencing merely according to the offence charge is irrational; but has as seen, adding to the severity of sentence with every *harm* caused can be impracticable, procedurally and otherwise. *Breyer* argues that here too, the Commission achieved a benign compromise. The offence charged dictates the base offence level, but it is then the *real* features of the offence (and of the offender's record) which influence the actual sentence arrived at.[219]

9.151 *Robinson* alleges that reliance on the specific code provisions of federal law (described by Congress itself as archaic, fragmented and overlapping), and on the inclusion of some types of behaviour (e.g. arson) under a host of different code sections reproduces this legislative fragmentation: "The identical arson conduct might fall under any number of guideline sections, each with different values of seriousness and different aggravating factors. What is needed is a consolidation of offences and reliance upon generic offence categories."[220] He suggests as a possible solution that the guidelines be based on the American Law Institute's Model Penal Code.

9.152 The Commission's response was that it did not have the political or institutional authority "to rewrite the United States Criminal Code under the guise of writing sentencing guidelines."[221] It might have added that the reliance on an offence definition other than that of the offence of which the accused was convicted might create huge difficulties.

9.153 Nonetheless, the problem pointed out by *Robinson* is significant, and suggests that coherent sentencing can only take place in the framework of a coherent criminal law.

9.154 In this treatment of the debate between *Robinson* and the Commission on sentencing factors and levels of detail in guideline systems, it is worth noting the later's response to *Robinson's* own proposals. His ideas that the Commission should "adopt a highly detailed, mechanical guide line system that would aggravate punishments for each and every harm an offender causes and presumably lessen punishment for each and every relevant mitigating background factor,"[222] were the foundation of the Commission's first "July 10" draft of 1986. This was widely condemned for its impracticality by many commentators, including *Judge Frankel*. The Commission itself drew the following conclusion:

> "The reason that Professor Robinson's approach drew so little support from any quarter (academics included) is that it did not provide a practical solution to the problems viewed as important by the different segments of the criminal justice community. Those particularly concerned with lessening disparity in sentencing saw in the complexity of the July 10, 1986, draft, in its need for elaborate new fact-finding, and

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219 *Ibid*, at pp10-12
220 Robinson Dissent, *op cit*, at p11. See especially note 41.
221 Commission Response, at p2.
222 Commission Response, at p1.

in its use of complex mathematical formulae involving multiplication of quartic roots, the likelihood that different judges would apply the system differently to similar cases, thereby aggravating the disparity problem. Those professionally concerned with crime control saw in its fact-finding demands the need for lengthy new hearings, complex arguments and appeals, all of convicted criminals would, in fact, receive appropriate special treatment of unusual cases saw in its rigid, mechanical rules and near total absence of discretion, the elimination of a court's ability to deviate when, for example, unusual facts in a specific case cried out for special treatment."[223]

9.155 In response to *Robinson's* "visionary" ideas, the Commission adopted a more limited view of its role. *Breyer* stresses the compromises necessary to formulate a workable system, the restraints on resources, the imperative of evolutionary reform: "The baseline must always be the *status quo ante,* not an idealised theoretical future."[224]

9.156 One of the key compromises to which *Breyer* refers is that concerning the "intractable sentencing problem" - of concurrent and consecutive sentencing, of the additivity of harms (or of "free" harms). The Commission admitted that it found it especially difficult to develop rules for sentencing defendants convicted of multiple violations of law, each of which makes up a separate count in an indictment - it is felt that while each additional harm must increase the punishment for wrongful conduct, the warranted increase need not be proportionate (if only because the extent of damage or injury caused is often fortuitous). *Breyer* gives the following instance:

"*Column A*		*Column B*	
1.	D, in a brawl injures one person seriously	1.	D, in a brawl injures six persons
2.	D sells 100 grammes of cocaine	2.	D sells 600 grammes of cocaine
3.	D robs one bank	3.	D robs six banks
4	D, driving recklessly, forces another car over a cliff, injuring the other driver	4.	D, driving recklessly, forces another car over a cliff, injuring the other driver and five passengers."[225]

9.157 He suggests that while most people believe that the behaviour in Column B warrants more severe punishment that that in Column A, it should not be six times worse.

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223 *Ibid*, at p2.
224 Breyer, *op cit*, at p32.
225 *Ibid*, at p25.

9.158 In Minnesota, *concurrent* sentencing is the norm in case of multiple offences, based on the most serious charge of conviction;[226] Washington's guidelines call for multiple counts to be served concurrently, each count being added to the "offender" score,[227] (though separate crimes arising from the "same criminal conduct" count as one crime for criminal history). But in both states, an exception is made allowing (in Minnesota) or mandating (in Washington) *consecutive* sentences in cases of multiple offences against the person arising from "separate and distinct criminal conduct."[228]

9.159 Other guidelines have distinguished between types of crimes, requiring, for example, concurrent sentences for multiple counts charging property crimes but consecutive sentences for crimes against the person.[229] This approach is contrary to principle however. In respect of property crimes, column B is treated no more severely than column A; in respect of crimes against the person, it may be far too severe.

9.160 The Federal Guidelines attempt to conform to principle by treating additional counts as warranting additional punishment, but in progressively diminishing amounts. Three types of circumstance are catered for.

(i) The multiple counts may be related , in that one charges an inchoate offence (e.g. attempt or conspiracy) and the other charges the completed version of the same crime. In such cases, the counts are merged, and sentence is imposed for the more serious.[230]

(ii) The multiple counts may all charge similar crimes involving fungible items such as drugs or money - in such cases, the items are added up, and the offender is punished as if there were a single count involving the total amount. As the tables generally increase punishment at a rate less than proportional to the amounts of drugs or money, collapsing the counts and using the tables produces a result that conforms to the principle mentioned by *Breyer* - punishment increases, but at a less that proportional rate.[231]

(iii) The multiple counts are dissimilar e.g. assault and robbery The guidelines dictate a two-stage operation. *Stage one* requires the separating of the subject matters of all counts into separate *events*. Two or more acts which form part of a *single* transaction with a *single* victim (will count as one event; *two* acts with *two* victims (or one victim on two occasions) will count as two events. *Stage two* involves assigning a score in units to each event. These are added and measured against a scale

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226 Minn. Stat. Ann., ch 244 app at IIf.
227 Wash. Rev. Code. Ann., s9.94A 400(1)(a).
228 *Ibid*, s9.94A 400(a)(b); See also Minn. Stat. Ann., *op cit*, at IIf 2. Some other exceptions are permitted in both cases, but are of minor significance.
229 Superior Court of the District of Columbia Sentencing Guidelines Commission, Initial Reports, *The Development of Sentencing Guidelines for the District of Columbia* (1985), at p85.
230 Guidelines, *op cit*, s3D12(b)(1)-(3).
231 *Ibid*, s391 2(d). See e.g. s251.1 (re: amounts of money laundered) or s2D1.1 (re: quantities of drugs).

that assigns more, but declining additional amounts of punishment. for example, the person who robs six banks will receive just over twice (not six times) the punishment of the robber who robs one bank.[232]

9.161 As in most jurisdictions, the vast majority (some 85%) of US federal criminal convictions result from guilty pleas, so that the provision in the guidelines for sentencing in such cases are highly important. The Commission's studies indicated that sentences were an average of 30-40% below those for similarly circumstanced defendants who were convicted as trial.[233] Yet larger reductions could be identified in cases resulting from negotiated pleas.

9.162 The Commission considered but rejected a proposal which would have continued the sentencing judge's very considerable discretion to give a sizeable sentence reduction because of the entry of a guilty plea - this might have led to unwarranted disparity and unpredictability. Nor did it wish narrowly to limit the availability of a sentence reduction for a negotiated plea - this would have involved ignoring the offence of conviction in favour of "real offence" sentencing (which would involve by-passing the higher standard of proof required at trial), and might have led to a reduction in the number of negotiated pleas. A compromise was sought between these two antithetical positions.[234] A further factor in favour of a compromise would be that while "acceptance of responsibility" may be deserving of reward, this should not be so great as apparently to penalise those who avail of their constitutional right to trial. That some reward by way of sentence reduction is permissible may be justified by the possibility of acquittal on some of the charges, or at least of the risk that some of the relevant factors appearing in the pre-sentence report might have been provable, had the case gone to trial.[235] A pragmatic consideration is the saving of prosecutorial and judicial resources which results from a guilty plea.[236]

9.163 S3E1.1 of the guidelines accordingly allows a 2 - level reduction of the offence level where the defendant clearly demonstrates a recognition and affirmative acceptance of personal responsibility for the offence of conviction. This reflects substantially less consideration than typically was given to those pleading guilty. Also, the reduction is not available as of right to those who plead guilty. This is left to the judge's discretion. His or her decision may be based on such factors as the timeliness of the defendant's acceptance of responsibility, his voluntary withdrawal from criminal associations, his or her voluntary payment of restitution to the victim prior to the adjudication of guilt, his or her voluntary surrender to the authorities before changes were filed, and assistance to them in recovering the evidence and proceeds of the offence.[237]

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232 Breyer, *op cit*, at pp27-28.
233 Supplementary Report, *op cit*, at p48.
234 *Ibid*, at p49.
235 *Ibid*, at p50.
236 *Ibid*, at pp50-51. That a sentence reduction for a guilty plea is constitutionally acceptable in the US is confirmed in a number of cases e.g. *US v Quejada - Zurique*, 708 F 2d 857, p861 (1st Cir., 1983); *Frank v Blackburn* 646 F 2d 873 (5th Cir., 1980); *US v Rowen*, 594 F 2d 98 (5th Cir., 1979); *Corbitt v New Jeresy*, 439 US 212 (1978).
237 Guidelines, *op cit*, at p3.12.

9.164 Nor is the reduction available for a guilty plea.[238] The commentary on the relevant provision is as follows:

> "A defendant may manifest sincere contrition and take steps toward reparation and rehabilitation even if he exercises his constitutional right to a trial. This may occur when a defendant decides to go to trial to assert and preserve issues that do not relate to factual guilt, to make a constitutional challenge to a statute, or a challenge to the applicability of a statute to his conduct, or to raise evidentiary issues that may result in an acquittal".[239]

9.165 This provision is quite independent of those which regulate plea-bargaining.

(VI) STATISTICS, STARTING POINTS AND INFORMED JUDICIAL DISCRETION

9.166 We now turn to the notion of sentencing *starting points* and of *informed judicial discretion*. This is a method of influencing and regulating judicial sentencing discretion, but is nonetheless designed to leave that discretion largely intact. As developed on the continent (and especially in Finland), it entails the compilation of a data base on past sentencing practice, which identifies the most important elements in the sentencing decision and attempts to gauge how they affect the penalties actually handed down. This data base provides the starting point from which to begin the process of deciding from which part of the spectrum of penalties for an offence to choose a sentence. The tables which provide the judges' starting points may appear to be similar to guideline matrices, but they are not presumptive. They are merely aids to the conscientious judge who wishes to conform his sentencing to the practice of his colleagues and to the legislatively ordained sentencing policy. Ultimately, only this policy binds the judge, and it is permissible to depart from the starting point tables in order to comply with it. The judge's discretion is preserved, but within the context of a coherent policy framework, and starting points are designed to assist and inform him or her in the exercise of this discretion, rather than to limit or constrain it.

9.167 Though very different from presumptive guidelines in motivation and intended effect, starting point schemes can be devised in a similar manner, and can encounter similar dilemmas and problems, e.g. on levels of detail, on the quantification (objective or subjective) of material factors, on the assessment of criminal history or of multiple sentences. In continental Europe, where the notion of starting points was developed, the schemes adopted have been largely descriptive, i.e. based on present sentencing practice (such practice being informed by a reformed and coherent sentencing policy in the Finnish case). In Canada, an experimental descriptive programme run by *Doob* and *Park* is sufficiently similar in conception to be included in this treatment. The Victorian

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238 S3E1.(b), Guidelines.
239 Guidelines, *op cit*, at p3.13.

Sentencing Committee has proposed what might be called a quasi-descriptive statistical scheme which could also be the nucleus of a model of sentencing characterised by informed judicial discretion, and which will be outlined and discussed below. Common law jurisdictions wary of American-style presumptive guidelines may have a lot to learn from such ideas.

9.168 *Horstkutte* has remarked that in Germany, there have been some attempts to formulate "pathfinders" - these, however, have been abstract in nature and not very helpful.[240] The Federal Court has indicated that the *middle* of the scale is not the starting point for finding the punishment in an average case. As penalty scales cover both the most and least serious cases, and as most cases are, in practical experience, closer to the least serious in terms of gravity, "*de facto* normality" assigns an "average" case to a place on the penalty scale closer to the minimum than the maximum.[241] Attempts, however, to define a "*normative* (as opposed to a *de facto*) average case", to which a "normative average sentence" would be assigned as a comparative starting point, have been rejected by the Federal Court. "The Federal Court thought that the model of increasing and decreasing a "normal penalty" does not sufficiently reflect the complexity of sentencing".[242]

9.169 In the circumstances, then, German judges derive chief guidance in sentencing from their own experience and instincts, and from some felt "tradition". Only in exceptional cases does the Federal Court quash a sentence which is in conspicuous disharmony with prevailing practice.

9.170 The "starting point" scheme in Finland is a great deal more sophisticated than the *de facto* system operated in Germany; but like the German practice, it is rooted much more in descriptive than in prescriptive factors. Chapter 6 of the Penal Code contains a model for the sentencing decision, known in Finland as "the idea of normal punishments", embodied in paragraph 1. This provision requires the judge to pay special attention to the uniformity of sentencing practice. According to the *travaux preparatoires*, this means that the offence may be met with a "normal punishment", i.e. the penal sanction most frequently imposed in similar cases;[243] in exceptional cases, a penalty outside the starting point range can be resorted to.[244] Compiling a set of starting points is a two-stage process:

(i) First the points of comparison are defined -

(a) the most typical cases of the offence in question (the "normal offence"); and

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240 Horstkutte, *Sentencing Practices in the Federal Republic of Germany*, PC-R-SN (90)2 at p7.

241 BGH St 27, 2.

242 Horstkutte, *op cit.* See however the more sophisticated Finnish system of *multiple* normal cases and sentences below. In Norway, the definition of starting points is as simplistic as in Germany. "Experiences has shown that the sentence normally lies within the lower part of the scale, even close to the minimum" (*Sentencing Practice in Norway*, at p7).

243 It should be stressed that these penalties are normal, not *normative* i.e. presumptive.

244 Exceptional cases may in fact be quite common.

(b) the relevant punishment (the normal punishment zone); and

(ii) Secondly the instant case is compared with the typical case. This comparison is founded on the general sentencing criteria and objects which are embodied in the system.

9.171 *Lappi-Seppälä* cautions that references to a normal offence of punishment are simplifications. "Instead of one normal offence it would be better to speak of several 'typical offences', and the corresponding 'zones of normal punishment'".[245]

He goes on to remark that the sentencing judge therefore requires three types of information:

(1) Statistical information about the penalties (zones of normal punishment) - what penalties are used most often in respect of particular offences?

(2) Information about typical cases (descriptions of normal offences) - what is a typical case of the offence charged which corresponds with the penalties most frequently imposed?

(3) Criteria of comparison, aggravating and mitigating factors, etc. - these are discussed elsewhere. The answers to this question are given partly by the legislature, partly by superior courts and partly by legal doctrine.

9.172 Most official statistics (including Ireland's and Finland's before the new system was introduced) do not yield sufficient information to answer the first two questions.

9.173 Ireland's annual Garda Report on Crime gives a detailed account of the number of crimes reported, prosecutions taken and convictions obtained each year on an offence-by-offence basis.

The 1988 Report may be taken as an example.[246] Some salient *offender* characteristics - sex and age group - are recorded in respect of all indictable offences, and of non-indictable traffic offences.[247] Also, the sex, age group and nationality are recorded of all persons *charged* under the *Misuse of Drugs Acts 1977-1984*.[248]

9.174 Some *offence* characteristics are also published, in exceptional cases. Charges under the *Misuse of Drugs Acts* are broken down according to the type

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245 Lappi-Seppälä *Sentencing Practices in Finland* PC-R-SN (89) 25 at p5.

246 See, e.g. *Report on Crime 1988*, at pp12-18 for indictable offences, and at pp25-27 for non-indictable offences; instances where the charges were held proved and an order was made without conviction are also recorded, along with various other outcomes.

247 See the Special table, *Ibid*, at p36.

248 See tables, *Ibid*, at pp32 and 34. Why details are provided of those charged and not only of those convicted is not explained. In all cases, age group data is not as useful as it might be, as over half of those convicted of most offences fall into the general category of "21 years and over".

of drug involved, though this information is not correlated with that provided about those charged.[249]

9.175 A table is provided of the value of property stolen in (i) offences against property with violence and (ii) larcenies, etc. without violence, broken down into the number of instances involving various monetary amounts.[250] Armed robberies, and aggravated burglaries involving firearms are analysed according to geographical location the type of premises affected, and the value of property stolen.[251] In the latter two cases, the tables concern offences committed and reported, not convictions obtained.

9.176 This summary of the relevant contents should suggest that the Garda Report on Crime is not at present of much utility to sentencers, save to illustrate the prevalence and (in a very few cases) the varying seriousness of certain offences. No information is given on dispositions after conviction, nor is such information as is given about offenders and offences correlated in any way. However, the provision of *some* information about offenders and offences does suggest that such information may be accessible in all cases, and may be put to use in future.

9.177 The Annual Report on Prisons and Places of Detention can supply more potentially useful data. Again, the 1988 Report may serve as an example. This includes a table giving the sentence lengths for imprisonment or penal servitude for those committed in that year on an offence-by-offence basis. Thus, for example, of a total of 240 committals for assault, we find 44 persons sentenced for less than three months, and five for over three years.[252]

9.178 Unfortunately, the Report on Prisons cannot simply be read with the Crime Report in order to connect convictions with dispositions. First, no information is provided on sentence other than of incarceration. A second area of disparity is in offence classification - the prison data are rather more general in their definition of offences than the Crime Report.[253] Thirdly, the fact that both reports concentrate on the activities of a calendar year can produce distortions. The 1988 Crime Report concerns itself only with offences which became known to the Gardai in that year. For example, for the 20 murders reported in 1988 there were 5 persons convicted.[254] There were 10 committals to prison for murder in the same period. The reason for the discrepancy is that the Garda figures do not take account of those convicted in 1988 of murders committed in previous years. A conviction for a crime in any calendar year other than that in which the infraction became known to the Gardai is unaccounted for

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249 *Ibid*, at p34.
250 *Ibid*, at p19.
251 *Ibid*, at p21.
252 *Annual Report on Prisons and Places of Detention 1988*, Table 7(a), at 92.
253 Compare, e.g. the different types of offences against property without violence in the *Crime Report*, at p17, and the *Prisons Report*, at p95.
254 *Garda Report*, at p12. 6 more were committed for trial and still awaiting trial and 5 were still pending in the District Court.

in the Garda Report of that year, but will resurface mysteriously in the Prisons Report (and then only if it resulted in a sentence of imprisonment, penal servitude or detention). Obviously, some method of tracking cases from year to year will need to be devised, if the information available to the Gardai and the prison service is to be usefully combined.

9.179 A fourth possible incompatibility lies in the way data are complied. The Garda Report is chiefly concerned with *offences*. It does not indicate whether the same sequence of events can lead to more than one listed offence, or whether a single person may feature more than once in the conviction column, for different offences - both of these eventualities, and particularly the latter, seem very likely. But the Prisons Report concentrates on numbers of *offenders*, or rather prisoners. It advises that in the case of an individual committed under sentence for more than one offence, only the principal offence is recorded in the tables, which is that for which the heaviest sentence is imposed, or for which the statutory maximum penalty is the more severe in cases of equality.[255] A uniform method of counting offenders or offences should have to be devised in order for the two sets of data to be comparable.

9.180 The mode of recording of length of sentence in the Prisons Report may also bear some attention. When an individual is committed to serve concurrent sentences, the longest sentence is recorded; in the case of consecutive sentences imposed at the same time, the sentences are recorded in the tables as one sentence equal in length to the sum of the sentences added together.[256] Such data will be of little use, and probably misleading to later sentencers faced either with a sole instance of the principal offence, or with some combination of offences. At its simplest the failure of the Prisons Report to indicate the proportion of sentences for the various offences which are in fact of composite origin is a considerable oversight. Irish courts have been very properly advised to impose sentence for all counts of conviction, even if all sentences are to run concurrently,[257] and it should be possible to give a more accurate depiction of this process in the figures for imprisonment and other disposals.

9.181 The Prisons Report tables also indicate the sex of offenders, and give a more useful account of the age profile of the various types of offender (with five age groups over the age of 21 years).[258] The number of previous sentences of imprisonment or detention of persons committed on conviction is also recorded; but no information is provided about the number who had other sentences imposed in the past. Thus, those who served sentences of community service, or had a suspended sentence imposed, etc. are placed in the same category as first-time offenders.

9.182 The Annual Report on the Probation and Welfare Service gives very

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255 *Prisons Report*, at p78.
256 *Ibid.*
257 See *The People (AG) v Higgins*, Supreme Court, 22nd November 1985; see discussion at para 1.151, *supra* (Concurrent and Consecutive Sentences).
258 See *Prisons Report*, tables 7(a)-(c), 8(a)-(c), and 9(a)-(c), at pp92-118.

similar information to that in the Prisons Report on some non-incarcerative disposals. However, it only deals with those community disposals which involve supervision by the Probation and Welfare Service.[259] Therefore, unsupervised sentences like suspended sentences of imprisonment are lost in a gap between the fields of coverage of the two reports.

9.183 The Probation and Welfare Service Report is concerned with those offenders placed on probation, under Community Service Orders, on recognisances under the *Misuse of Drugs Act, 1977*, and on supervision during deferment of penalty. Again, potentially useful information is presented, but in a way which fails to correlate the various types of data. One can ascertain the total number of Community Service Orders made during the year, and the aggregate number of hours ordered to be performed;[260] the number of such orders made, categorised by the age and by the sex of the offender;[261] the criminal offence from which such orders originated;[262] and the number of orders for various periods of service e.g. 40-80 hours, 81-120 hours, etc.[263] Roughly similar data are provided in respect of probation orders and other supervised community disposals.[264]

9.184 It will be appreciated that if rather different questions were asked, and if information were mustered and presented in a rather different fashion, much of the data required to institute a Finnish-style quantitative data base for sentencers is already available within the criminal justice system. In respect of crimes of theft, we are already well informed about the prevalence of such offences; about the value of property which is involved; about the number, age and sex of those sentenced to imprisonment therefor, and about the length of sentence imposed. Information on levels of prior conviction (or of previous sentences of incarceration at any rate) seems readily available. Gaps remain, as well as two grave problems. One is the time lag between the two chief present sources of statistics. The other is the lack of correlation between the information we have. How does the average sentence of a woman aged between 17 and 21 years convicted of larceny of property valued between £200 and £300 differ from that of a man aged between 40 and 50 years, with three prior convictions, of over £5,000?

9.185 Finland's deployment of sentencing data in a more meaningful and helpful manner bears further examination. Special analyses have been conducted in Finland of all cases of assault, theft, fraud, and drunken-driving, and are proposed for most common offence-types. *Lappi-Seppälä* describes the process as follows:

> "The empirical analysis of normal punishments can be divided into two

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259 See *Report on the Probation and Welfare Service* with statistics for the year 1988, at p1.
260 See *ibid*, table 4, at p7.
261 *Ibid*, table 5, at p8.
262 *Ibid*, table 6, at p9.
263 *Ibid*, table 7, at p10.
264 *Ibid*, at pp12-28.

steps. The first step is to describe the effect of different sentencing criteria. The next step consists of the description of typical or normal offences. This means that the offence is divided into sub-categories by means of the sentencing criteria already identified during the previous step. The crime description - which covers all forms of manifestation of the crime - is thus divided into narrower descriptions which cover only part of the possible manifestation of the type of crime in question. The final aim of the analysis is to give the judge more exact descriptions of typical situations and corresponding zones of normal punishments. This should lead, in the end, to a more uniform sentencing practice with less and smaller deviations from the decisions made in previous cases".[265]

9.186 For example, cases of theft were classified into sub categories by three factors:

(1) the manner of committing the crime (was there breaking and entering?)

(2) the amount of stolen goods (in four categories)

(3) previous convictions (offenders in three groups).

The following table resulted:

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265 *Op cit.*

TABLE I

PUNISHMENT IMPOSED FOR COMPLETED THEFT

The offender's previous criminality	The amount of stolen goods (FMK 1980) -499	500-999	1000-1999	2000+
GROUP 1 - NO BREAKING AND ENTERING				
A. First offender				
Fines (%)	(90)	(57)	(67)	(43)
Median (dayfines)	24,0	34,4	41,0	..
Median (months)	1,2	2,3	2,8	..
B. Criminal Record				
Fines (%)	(46)	(23)	(23)	-
Median (dayfines)	33,3	38,8	41,4	-
Median (months)	2,1	2,8	3,0	3,8
Intermediate range (mth)	2,0-3,0	2,6-3,8	2,2-4,4	3,5-4,8
C. Recidivist				
Fines (%)	(4)	(2)	-	-
Median (months)	2,4	3,4	4,6	6,6
Intermediate range (mth)	2,0-3,7	3,1-4,6	4,2-5,8	..
GROUP 11 - BREAKING AND ENTERING				
A. First offender				
Fines (%)	(56)	(26)	(14)	(4)
Median (months)	2,4	2,2	2,7	3,8
Intermediate range (mth)	1,8-3,8	2,0-3,5	2,3-3,8	3,3-4,9
B. Criminal record				
Fines (%)	(20)	(8)	(10)	(1)
Median (months)	2,7	3,3	4,0	4,3
Intermediate range (mth)	2,3-3,9	3,5-4,4	3,5-5,5	4,0-5,6
C. Recidivist				
Fines (%)	(-)	(3)	(-)	(-)
Median (months)	4,3	4,6	5,3	6,5
Intermediate range (mth)	3,4-5,8	4,3-5,9	5,1-6,5	5,3-7,9

9.187 The *intermediate range* is the "middle half" of the applied penal scale. It consists of punishments within the latitude between the lower limit of the upper quarter and the upper limit of the lower quarter.[266] This analysis gives courts a firm starting point, enabling them to find out the penalties imposed for offences committed approximately in the same manner, when the amount of stolen goods has been about the same value and when the offenders have had approximately the same kind of criminal record. It is at this point that other mitigating and aggravating criteria (listed non-exhaustively in the Code, and informed by its central sentencing objectives) may be taken into account. "It is important to point out that the empirical analysis does not relieve the judge from normative evaluations; it only provides the relevant information that is needed in order to give the judge a practical 'starting point' for his decision".[267]

9.188 It is this which chiefly distinguishes the Finnish scheme from US-style presumptive guidelines systems. The Finnish scheme is persuasive rather than presumptive, and only furnishes a guide on the point of departure for the exercise of judicial sentencing discretion, rather than dictating the ultimate outcome of that process. *Robinson's* assertion that there exist in the US Federal Guidelines "free harms" - offence features not catered for in the grid - cannot therefore be levelled at the Finnish innovation. In effect, the difference may only be one of approach. In the US, "departures" are possible to take account of unforeseen factors. But these departures must be justified by the judge, and may be subject to rigorous scrutiny (while decisions which adhere to the letter of the guidelines effectively are not). In Finland, it is expected that the trial judge will advance from the point of departure provided by the descriptive table in order to take into consideration all other relevant factors - this is not a step which of itself must be defended. Furthermore, it is a step made easier and more logical by the provision of both an indicative list of possibly relevant factors which might influence sentence, and a coherent core sentencing objective for the entire process.[268]

9.189 Ultimately, the table does no more than marshall the evidence of past sentencing practice - it is the provision to the judiciary by statistical methodology of a useful analytical tool. Therefore, the Finnish model is less ambitious and should be less provocative to the judiciary. The compilation of tables such as that instanced above can be seen merely as an aid to detecting disparity in subsequent decisions, and to appreciating current sentencing patterns. From this, judges can draw their own conclusions. As such, the introduction of such analysis in this country would be a welcome step.[269]

9.190 A word of warning should be voiced however, on a number of counts. First, as *Robinson* pointed out, reliance on past practice only makes sense if one

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266 *Ibid*, at p7. In order to neutralise the effect of other relevant sentencing criteria, some groups were left out and given a later separate analysis, i.e. young offenders, attempts and continuing offences.

267 *Ibid*, at p8.

268 It is the presence of such a coherent core in a sentencing system which alone can justify recourse to descriptive guides.

269 For further discussion, see para 9.268 *et seq*, *infra* (Conclusions and Provisional Recommendations).

is satisfied that that practice reflects the sentencing object(s) which one wishes to achieve. It may therefore be necessary to delay any such scheme until coherent sentencing principles have taken root in judicial practice. Secondly (and again, this cautionary note derives from *Robinson*), this mode of analysis makes no allowance for possible disparities as between offences and the maximum or minimum penalties available therefor. If this is perceived to be a problem, its solution remains within the legislative ambit. Thirdly, the success of such a scheme must be dependent both on the enthusiasm for it of trial judges, and the availability of an effective mode of appeal by both accused and prosecution.[270]

9.191 The Finns have adopted a more prescriptive approach in respect of new or reformed offences, or those which are uncommon (so that statistical analysis of practice might not be very helpful). The example given by *Lappi-Seppälä* is drunk driving. The main aim of the reform of the relevant legislation in 1977 was to cut down the use of unconditional imprisonment and to reduce sentencing disparities. What is termed a "semi-official proposal" for normal punishments was introduced *by the judiciary*. Once this initiative was taken by the judges, the proposal was discussed in training seminars organised by the Ministry of Justice.[271]

9.192 The severity of sanctions was graded mainly according to the blood alcohol concentration (BAC) of the accused. The following table shows the initial proposal and subsequent judicial practice. Comparison suggests that the recommendations were taken seriously, and the second table below illustrates that sentences became more uniform.[272] The diagram in the second table describes the practice of eight courts before and after the 1977 reform, and shows a gratifying and dramatic narrowing of the differences between their sentencing practices for drunk driving.

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270 See Ch 14, *infra* (Prosecution Appeal Against Sentence).

271 *Ibid*, at p8. Unfortunately, no further information is given on this interesting combination of judicial and executive forces.

272 It is a pity that a similar analysis of the effect of the descriptive statistical material on sentencing was not provided though of course such a graph could not indicate the degree by which disparity was reduced, as it cannot take account of the presence or absence of special circumstances.

TABLE J

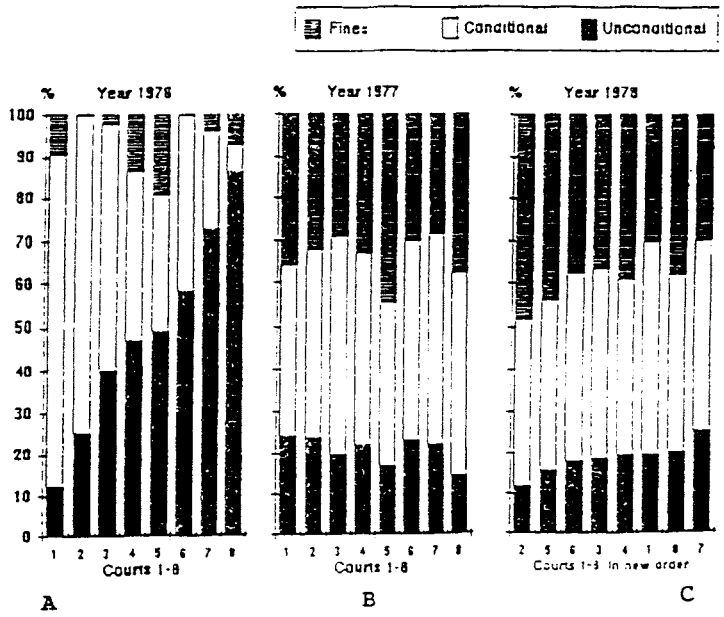
FINNISH DRUNK DRIVING TABLES

Fig. 1

PROPOSED AND ACTUAL PENALTIES FOR DRUNKEN DRIVING

BAC o/oo	Proposed penalties Dayfines	Prison	Court practise Dayfines	Prison (Mean)
0.5-0.9	10-30		22,9	
0.9-1.2	30-40		31,2	
1.2-1.5	40-60		40,1	
1.5-1.9		1 month		1,4 months
1,9-2,19		1,5 months		2,0
2,2-2,49		2 months		2,2
2,5-over		3 months		2,8

Fig. 2 The choice of sanctions for drunk driving of eight courts before and after the introduction of normal punishments.



9.193 The relative merits of the Finnish scheme, are further discussed below, and are compared to those of the statistical system proposed by the Victorian Sentencing Committee in 1988. Unfortunately, we have no information on the practical steps taken to gather the information necessary for Finland's descriptive starting points. *Doob* and *Park* have, however, given an account of their Canadian experiment from its inception. Though similar in many ways to Finland's scheme, theirs addresses some problems which the Finns did not.

9.194 The information system devised by *Doob* and *Park* does not suggest a sentence, nor does it indicate what the 'normal' sentence is; all the system does is to give judges information about the range and distribution of sentences given for each offence and allows the judge to choose for more careful consideration and study those cases that are, in his or her view, comparable to the one before him or her.[273] Their scheme is not as spare and structured as the Finnish, allowing the judge to focus on individual past cases.

9.195 About two thirds of Canadian judges surveyed by the Canadian Sentencing Commission has indicated that "a computer system providing statistical summary information about current sentencing trends would be useful".[274] *Doob* and *Park* set out to supply this demand with a system founded on the premise of "proportionality" and designed to provide descriptive data.[275]

9.196 Work began on the project in 1979. Since it was a system designed for use by judges, all important decisions were made in consultation with the judges using the system.

9.197 Existing data were quickly dismissed as a source of information relevant for the system. It was decided that since judges were most interested in knowing about sentences for cases *as other judges saw those cases*, that the information about cases should come from judges (or at a minimum should be collected under the authority of judges).[276]

9.198 An important constraint on the system was that data had to be collected on a form which judges could complete quickly. This was operationalised by a decision that the data collection sheet could be no longer than would fit on one side of one sheet of paper (including instructions), and it had to be in a "checklist" format. It was felt to be unrealistic to expect a busy judge to spend more than a minute completing the form for routine cases.[277]

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273 ALRC 44, Sentencing: *Procedure*, at p105.

274 Canadian Sentencing Committee Report, *op cit*, at p97.

275 For a proposal for a data base premised on the rehabilitation model, see Hogarth, *Sentencing as a Human Process* (1971) at pp392 *et seq*; Hogarth commenced the implementation of such a scheme in British Columbia in 1985, *per* Doob and Park, *Computerized Sentencing Information for Judges: An Aid to the Sentencing Process* 30 Crim LQ (1987-88) 54 at p58. For a proposal more prescriptive than that of the Victorian Sentencing Committee, see Grainger, *Hard Times and Automation: Should Computers Assist Judges in Sentencing Decisions?* 26 Can J Crim (1984) 231.

276 Doob and Park, *op cit*, at p61.

277 *Ibid.* See tables Z *infra*.

9.199 It was decided to use subjective assessments of relevant sentencing factors, even when some sort of objective quantification might have been possible. The example given by Doob and Park is that of prior criminal record:

> "Without being too imaginative, the following dimensions could be used to define "criminal record": (a) the number of previous convictions, (b) the recency of the last conviction, (c) whether the past record includes violent offences, (d) the length of time since the offender first was convicted, (e) whether the present offence was more serious than the most recent offence he had been sentenced for, and (f) the nature or severity of the offender's most recent sentence. It does not take a mathematical wizard to realise that if there are even as few as three or four levels of each of these six variables, there are over 700 combinations of aspects of this one variable - criminal record".[278]

9.200 Certainly this would be unmanageable, so that it was wise to adopt more general assessments of criminal history: "none, inconsequential or unrelated"; "some but not serious; and "substantial".[279] But it should still be possible to try to streamline judges' perceptions of the seriousness of a prior criminal record by reference to items (a) to (f) quoted above. The provision of guidance on such matters could be achieved by a combination of qualitative analysis of trial decisions and of appellate judgments, and by a sentencing commission/judicial studies board.

9.201 In all, six material case factors were chosen:

(A) Relative severity of the instant offence as compared to other instances of the same offence;
(B) Involvement of the offender in terms of premeditation and participation in the offence;
(C) Previous criminal record of the accused;
(D) Presence of aggravating or mitigating circumstances;
(E) Impact on the victim;
(F) Prevalence of this type of offence in the community.

9.202 Each had three "levels", as described above for criminal history. The factors chosen are rather different from those employed by the Finns, which have as their focus the matters described at (A) and (C). (E) and (F) would probably be impermissible under a just deserts policy such as that proposed in this paper,[280] and factor (B) could very likely be embraced by factor (D)'s catch-all category of aggravating and mitigating factors.

9.203 The inclusion of undefined aggravating or mitigating factors within the statistical calculation marks a considerable point of difference from the starting

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278 *Ibid*, at pp61-62.
279 *Ibid*, at p63.
280 See e.g. para 11.33 *et seq*, *infra* (Role of the Victim).

points scheme conceived by the Finns. That scheme treats such factors as being reasons to depart from the heartland of unexceptional cases which the calculated starting points purport to represent; *Doob* and *Park* treat aggravating and mitigating factors as being integral to the presentation of all cases.

9.204 In fact the Finnish notion of identifying starting points from past practice, from which is an instant case the judge moves to take account of particular factual circumstances (aggravating or mitigating, or relevant to penalty-type) to devise an appropriate sentence, is posited on a *doubtful premise*. It seems to assume either (i) that none, or no significant number, of the dispositions which make up the sentencing statistics was greatly affected by such individual circumstances ie. that it is the relevant offence and offender characteristics employed in the statistical analysis which dictated case outcomes; or (ii) that if significant numbers of outcomes *were* influenced by aggravating, mitigating or other circumstances, that these must have cancelled each other out, so as to achieve the apparent effect described at (i) immediately above.

9.205 Otherwise, the statistics would not provide an accurate starting point from which to consider individual and exceptional case elements - such elements would already be embodied, in an indecipherable melange, in the starting point tables. Nor can one be immediately convinced of the correctness of either of the possible premises just outlined. While skilful reading of past cases should allow the most material case factors to be expressly embodied in the statistical analysis, other factors of great influence on sentencers, perhaps less common, must remain unaccounted for; nor is there any reason to believe in a balance of aggravation and mitigation which negates the effect of both.

9.206 This problem is avoided by *Doob* and *Park* by the express (and correct) acknowledgment of the role special aggravating or mitigating facts must have in influencing sentence in past as well as present cases. But the inclusion of such factors (under a rather too general and unhelpful rubric) *within* the depiction of past cases makes the *Doob/Park* information system ill-suited to be the basis of a starting point system. There can be no useful division of cases into the normal and the exceptional, when the depiction of the "normal" includes an account of the exceptional. Starting points are intended to provide points of departure for the judge who is presented with unusual and relevant circumstances which are deemed not to be accounted for in the data available; but in fact, sentencing statistics are affected by such circumstances, to the degree to which they influences past sentencing decisions. *Doob* and *Park* are right, then, to try to accommodate them in their analysis of the case (though one might question the means employed).

9.207 What, then of Finland's *descriptive* starting points? It might be suggested that the sentencing judge, in every case, should pronounce the appropriate sentence for the basic offence before him (composed from the material case factors), before going on to impose the *actual* sentence or offender circumstances. The former could be recorded for the purpose of starting point statistics. This would have several advantages:

(a) it would keep the starting point tables "pure";
(b) it would indicate the relative importance to sentence of differing sets of individual circumstances, prompting changes, if necessary, in the list of material case factors; and
(c) it would accustom judges to the practice of calculating the relevant starting point, from which point the actual sentence for the case would then be developed.

9.208 It remains doubtful, however, if the answer to the underlying problem of the Finnish scheme lies in this suggestion. Potential drawbacks include:

(a) the danger of mechanistic citation by judges of the sentence average in the statistical tables, before moving on to adjudicate on the final sentence. The tables of starting points would then become self-perpetuating and petrified, rather than being responsive of actual sentencing practice, while the process of decision-making on sentence would be burdened by the insertion of a useless, indeed a fictitious step; and
(b) it is arguable that any such pronouncement, of an "appropriate" sentence not actually applicable in the instant case, could be seen as being quite as hypothetical and non-binding as the data produced by prescriptive or quasi-descriptive methods.[281]

9.209 The foregoing discussion need not conclude with a definite rejection of starting points schemes. It may be decided that the conceptual flaw in the Finnish model is not of such great practical effect as to deprive it of all efficacy; alternatively, a different starting point model - prescriptive or quasi-descriptive could be designed.

9.210 Let us return for the moment to the *Doob* and *Park* information system. A case description sheet is depicted in Table K.

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281 See para 9.248 *et seq. infra* (The Victorian Experience). A similar problem for a Finnish-style system is presented by sentences for multiple offences. However, the proposed solution just discussed would apply better there: judges should pronounce separate sentence on each offence (and these should be separately recorded) before prescribing their cumulative effect. For rather different reasons, this is already recommended sentencing practice.

TABLE K

Case Description Sheet (8 November 1985 revision)

Please fill this in for each person sentenced for an indictable offence or for a hybrid which was proceeded on by way of indictment. For cases with multiple counts, fill out the sheet for the *most serious count only* or, if this is impossible to determine, the first count on the indictment.

Name of accused:

Offence:

Is the accused being sentenced for more than one offence at this time:
_____ No
_____ Yes, for unrelated offences
_____ Yes, for related offences

Date:

Judge:

Please rate the case before you on *each* of the six factors (A through F) by placing an X in front of the phrase that best describes the case before you. *If a factor is completely irrelevant to the particular case, feel free to leave that factor blank.*

(A) Relative severity of this particular offence as compared to other instances of the same offence:
_____ Less severe than most
_____ About the same as most
_____ More sever than most

(B) Involvement of the offender: premeditation of and participation in the offence
_____ Minimal
_____ About the same as most
_____ Substantial

(C) Previous criminal record of the accused
_____ None, inconsequential, or unrelated
_____ Some, but not serious
_____ Substantial

(D) Presence of aggravating or mitigating circumstances
_____ None, or they offset each other
_____ Mitigating
_____ Aggravating

(E) Impact on victim
_____ None or minimal
_____ Substantial, and redressed
_____ Substantial, and not redressed

(F) Prevalence of this type of offence in the community
_____ Not serious in the community
_____ Average
_____ Serious in the community

Now, please circle the factor or factors (A through F) that you feel are the most important dimensions in determining the sentence for this case.

Sentence: Check and complete those that are appropriate:
_____ Absolute or conditional discharge
_____ Probation
_____ Restitution
_____ Compensation
_____ Community Service Order
_____ Fine of $ _____
_____ Imprisonment for: Years __ Months __ Days

Accused in custody awaiting trial: ____ No ____ Yes, but not relevant to sentencing.

OPTIONAL comments: You *may* add a few words if there are special factors or circumstances which aren't covered by the above factors.

_____

_____

_____

9.211 A number of other points of difference from the Finnish scheme can be pointed out. First, this is an "all-purpose" form. There are not the carefully compiled material case factors of the Finnish statistics. This has the virtue of convenience, but probably diminishes the degree to which the data collected can

help judges in future cases. As was already remarked, victim impact and offence prevalence are not matters of which we feel it proper for judges to take cognisance. If these were to be removed, and individual forms were to be devised for separate offences, or offence groups, there would be room to include specifically some of the more common offence features which are thought to be relevant to desert and to sentence. To follow the Finnish example, one might include as the most important factors for theft the amount of stolen goods, and whether or not there was breaking and entering. Another might be of violence. Less common factors would still be accommodated under the rubric of aggravation and mitigation in this way. Some more objective elements could be added to a scheme criticised in some quarters as too subjective.[282]

9.212 Using a computer disk, the judge employing the *Doob* and *Park* information system chooses the relevant offence. A second "screen" of choices then appears, on which the judge can describe the instant case in terms corresponding to the information form featured just above. To do this, the judge simply presses the appropriate key, and then "describes" the record by pointing to the most appropriate of the three descriptions which then appear on the screen in this way. Cases of interest can be selected by using up to the maximum six factors which are contained on the original sheet filled out by the judge. Table L is a replica of this second screen.

TABLE L

245.1(1)(B) - Assault bodily harm [153 PC, 55 CA Cases

You can select from 0 to 6 factors. Select a factor using the "+" key. Remove a factor using the "-" key. The " " and " " keys move the arrow. Pressing "F10" tallies the distribution; "ESC" lets you return.

FACTORS

Relative severity of the offence
Involvement of the offender
Previous criminal record of the accused
Aggravating or Mitigating circumstances
Impact on victim
Prevalence in the community

Previous criminal record of the accused
None, inconsequential
Some, but not serious
Substantial

Table L: Sample "Factors" screen showing the manner in which comparable cases are selected from the population of cases in the system.[283]

9.213 Table L illustrates how a user would instruct the computer to select, simultaneously, those cases where the offender was described by the judge as

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282 See *infra*.
283 Doob & Park, *op cit*, at p65.

having a "substantial" previous criminal record and cases where there were "aggravating" circumstances. The judge will be shown fewer sentences as the number of factors chosen increases. Presumably, however, the range of sentences given those cases will also be narrower.[284]

9.214 A third screen then appears (in between 15 and 45 seconds) giving the distribution of past sentences - presented as the most serious component of the sentence - divided up into ten categories. Two columns show respectively the sentences in the judge's own province, and in the other combined Canadian provinces. A third column gives the decisions in similar cases of the provincial Court of Appeal, and the fourth shows the total distribution of sentences by that court for *all* cases of the instant offence. An example of this screen is given in Table M.

TABLE M

245.(1)(b) - Assault bodily harm [Cases through 87/03/31]
Previous criminal record of the accused Substantial
Aggravating or Mitigating circumstances Aggravating

	Man	Can	CA-Sel	CA-Tot
Discharge, Probation, Restitution, Compensation	0	0	0	0
Community Service Order	0	0	0	0
Fine	0	0	0	5
Imprisonment 1 day to 1 month	0	0	0	4
Imprisonment 31 days to 3 months	0	0	0	7
Imprisonment 3.1 months to 6 months	3	6	1	11
Imprisonment 6.1 to 11.9 months	1	1	0	3
Imprisonment 1 year to 17.9 months	1	1	2	7
Imprisonment 18 months to 2 years less 1 day	0	2	1	8
Imprisonment 2 years or more	0	1	1	5
Composite sentences	0	0	1	5
TOTAL	5	12	7	55

Move the arrow - F5: Print the distribution - F6: Print indiv. cases F7: View Indiv. Cases - ESC: Return to Factors - F1 Begin Afresh

Table M: Sample 'Distribution screen' showing the sentences given for offences described according to the factors listed. The most severe component of the sentence is shown. 'Composite' sentences refer to the situation when an offender is sentences for more than one offence yet the sentence is expressed as a single 'composite' sentence.[285]

9.215 The judge can then, if he or she wishes, examine individual cases more carefully on the screen, or on a computer printout. Summaries of the Court of Appeal's decisions have also been made available. Thus, qualitative date are provided.

9.216 *Doob* and *Park* point out that at least one advantage of having appellate and trial data presented side by side is that one can quickly see that the cases heard by the Court of Appeal and, therefore, the distribution of final sentences,

284 *Ibid.*
285 *Ibid*, at p66.

are different from the Provincial Court cases. If one were to try to infer the overall distribution of sentences, or the "average sentence", from Court of Appeal cases, it appears that one would usually arrive at estimates that are higher than those given at the Provincial Court level. Since it appears that most appeals in Canada are initiated by offenders rather than by the Crown, most sentences would be expected to be at the high end of the distribution. The information system, as designed at present, puts these sentences in context.[286]

9.217 It will be clear that the data provided in the *Doob* and *Park* model are intended to be used rather differently to the information supplied to judges in Finland. It is sought to present it in an intelligent and relevant fashion, but the system does not purport to make any *calculation*, however basic - no median sentence is presented, only a distribution of sentences. Nonetheless, *Doob* and *Park* believe that this information can provide the trial judge with a "starting point". By this term, they appear to have in mind something not unlike the Finnish idea, but which is not characterised by the same element of calculation at the outset. Their model of the sentencing decision is more "fluid" and discretionary at all stages, but it is envisaged that it have a sound foundation of "hard" information:

> "[T]he current Provincial Court data, as "cold" and statistical as they might be ... give the sentencing judge explicit information about the current range and the kinds and severity of sentences that have most often been given in the past. The range and most common sentence might or might not be the same as the range and most common sentence that the judge might have considered. They might be used, then, as a starting point if the judge wanted to use colleagues' decisions for this purpose. The judge might look first at the distribution of sentences given in comparable cases and then consider how the specific characteristics of the case being sentenced should be considered with the normative data in mind ....
>
> Finally, the judge might look at the Court of Appeal decisions in the range being considered. In this way, the number of possible Court of Appeal cases could be reduced to a manageable number. Then the judge could examine the narrower range of Court of Appeal decisions to evaluate the sentence being contemplated."[287]

9.218 It may be that so unstructured an approach is to be preferred. No matter how insistent one might be that a Finnish-style table of starting points was advisory only, there is the danger either that judges would reject them as an intrusion, or else would adhere to them too unquestioningly, thus giving them a *de facto* presumptive quality. Neither of these alternative dangers can be said to be presented by *Doob* and *Park's* information tables.

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286 *Ibid*, at pp68-69. See also Ruby, *Range of Sentence*, (1985-86) 28 CLQ 447, at p453.

287 *Ibid*, at p71. Note however that they anticipate that their scheme could be employed in conjunction with the presumptive guidelines system proposed by the Canadian Sentencing Commission; *Ibid*, at pp69-70.

9.219 Unfortunately, at the conclusion of their project, *Doob* and *Park* were forced to conclude that it had failed in all but one of the provinces (Saskatchewan) where it had been conducted. Initial judicial enthusiasm had evaporated elsewhere, and recourse to the information system had declined. They attributed this to a mistaken premise. They had started with the idea that judges would want to have easily accessible to them knowledge of current sentences being handed down in "comparable" cases. In fact, they concluded that this was not the case.[288]

9.220 This is a disturbing conclusion. They rehearse a number of reasons for it, but ultimately trace it to one central problem: that "we do not have an agreed-upon model of sentencing in Canada."[289] Such is the diversity of approaches to sentencing by trial judges, and the perceived importance of appellate courts in their attempts to introduce some sort of order to sentencing, that trial judges have little incentive to have regard to the practise of their colleagues. it is to be hoped, therefore, that the adoption of a coherent sentencing policy such as that proposed in this paper would bring the added benefit of increased judicial recourse to sentencing information, however compiled and presented.

9.221 A reassuring point about *Doob* and *Park's* scheme is its cost. Though a total of Can$325,000 was spent, this was over an experimental period of some 10 years, and covered five separate provincial jurisdictions. They estimate that "even if one were to develop a completely new system from scratch ... the one-time only costs of development would be less than Can$50,000 with continuing costs of less than Can$5,000 per year (if the data are provided by the province).[290]

9.222 The Victorian Sentencing Committee concerns itself in its 1988 Report with the development of information aids for sentencers.

9.223 It stresses the necessary distinction between quantitative and qualitative data.

A. QUANTITATIVE DATA

9.224 Statistics collected in most jurisdictions fail to provide much necessary information:

> "What is required is a policy incorporating rules prescribing the way in which information about the offence and the offender should be selected, classified and aggregated to determine the appropriate goals of sentence and to give effect to those goals in particular cases."[291]

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288 Doob, *Evaluation of a computerized sentencing aid* (1990) Council of Europe, PC-R-SN (90) 5, at pp4-5.
289 *Ibid*, at p12.
290 *Ibid*, at p13.
291 See Galligan *Guidelines and Just Deserts: A Critique of recent Trends in Sentencing Reform* (1981) LR 297-311.

9.225 As Lane LCJ noted in *Bibi*, consistency of *approach* is the key to combating disparity.[292] This involves:

(i) agreement on determination of material case factors;
(ii) classification of case facts in accordance with these;
(iii) weighting of case factors;
(iv) rules for combining case factors;
(v) and appropriate types and levels of sentence for various combinations of case factors.

9.226 Therefore, statistics must be compiled in the context of coherent policy development.[293]

9.227 For that reason, reliance on statistics presently available in most jurisdictions is suspect. At present, most differentiate according to *outcomes* (sentence type and length) but not according to relevant *inputs* (offence and offender characteristics).[294] The Victorian Committee reviews three proposed schemes for remedying this deficiency - *Wilkins's, Hogarth's*, and *Doob's* - before suggesting its own.

(a) Wilkins's empirically based descriptive guidelines

9.228 This is an attempt to provide statistics linking major offence and offender characteristics, and weights for them, with quanta of sentence. To use this system for a particular case, the judge must allot points in terms of the extent to which the case is characterised by the *offence* and *offender* characteristics identified in the statistical analysis. The scores on the two dimensions identify the appropriate cell on the table. Each cell will have associated with it statistics on the percentage and length of imprisonment in similar circumstances in the past (and each subsequent resort to the grid can be used to keep it up to date). This information comprises the guidelines. It may be necessary to use several tables in any case, each table covering a group of legal offence categories, but *Wilkins* provides rules on how case elements are to be aggregated: the rule of "multiple regressions."[295]

9.229 However, the Victorian Commission has a number of criticisms of this approach:[296]

(i) The statistics are compiled independently of any consideration of the different *aims* of sentence which may justify or motivate judges' sentences in particular cases (a peculiar problem where no central

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292 (1980) 2 Cr App Rep(S) 177, p179.
293 Victorian Report, at p548.
294 For an analysis of available Irish statistics, see para 9.173 *et seq*, *infra* (Statistics, Starting Points and Informed Judicial Discretion).
295 See Wilkins, Kress, Gottfredson, Calpin & Gelman, *Sentencing Guidelines: Structuring Judicial Discretion*, US Dept of Justice, (1978).
296 *Op cit*, at pp551-552.

policy, or hierarchy of policies, is in place, it might be added);

(ii) The employment of *averages* is only valid where sentencing is already quite uniform, rather than when they break down widely disparate sentences for similar cases, such as are believed to prevail at the moment;

(iii) The method, based as it is on *predicting* future sentences based on the *average* of those imposed on the past, can ignore or distort the effect of *uncommon* but material variables, while it cannot prevent incorporation in the statistics (if only indirectly) of common but immaterial factors;

(iv) The sophisticated statistical techniques involved not only in compiling but in *employing* the guidelines e.g. when assessing specific combinations of case variables) make the system virtually incomprehensible to judges and barristers;[297]

(v) Because they are based on actual sentencing decisions, the guidelines do not have the facility readily to incorporate the effects of new *appellate* decisions (which were not, of course, a significant factor in the US when Wilkins devised his scheme). One must wait until lower courts take account of such decisions before their effect permeates the guideline averages, so that the guidelines may lag behind current sentencing practise rather than successfully predicting it.

(b) Hogarth's sentencing data base[298]

9.230 This system is designed to identify the *ranges* of sentence for various combinations of offence and offender characteristics.

(a) material offence and offender traits upon which to base sentences are determined, not empirically but by lawyers conversant with current sentencing policy;

(b) A large data base is compiled of cases, each filed under appropriate category headings based on material offence characteristics, along with the sentence imposed;

(c) Entry into the computer by the sentencer of a case description in terms of applicable categories of relevant factors will produce an output of the sentences imposed in the past with that particular combination of offence and offender characteristics. For example, material factors may include use of a weapon, past record of violence and age; a robbery might be described in terms of categories of each factor, such as

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297 *Ibid*, at p552. But cf the complexity of the US Federal Guidelines, which owe something to Wilkins's approach.

298 See Hogarth *Sentencing Data Base Study: Demonstration Package*, (mimeograph), (Law Courts, Vancouver).

"weapon used", "no past record of violence" and "age 41-50 years."[299]

9.231 One of the chief drawbacks of *Hogarth's* scheme, especially for smaller jurisdictions, is that it is based on a very large number of offence/offender combinations, and a sentencing range should be available for each combination based on a reasonable number of fairly recent decisions. For more serious offences in states like Victoria (or Ireland) the requisite amount of case-law will simply be unavailable to satisfy the scheme's "thirst for cases."[300] *Hogarth's* proposals also share with *Wilkins'* and the Finnish system the possibly unfounded assumption that judges consistently apply a known sentencing policy regarding the scaling, weighting and combining of material case factors.

(c) Doob's sentencing data base[301]

9.232 *Doob* and *Park* recognised the chief weakness of the *Hogarth system outlined above, and sought to simplify it, as we have seen, by confining themselves to six broad case characteristics, each of which had three general categories of seriousness. The Victorian committee suggested that the problem with this approach is that individual judges must assess how the elements of the cases before them fit these qualitative categories. No guidance could be sought from* Doob's scheme in making this subjective decision, so that the scheme failed to fulfil one of the *desiderata* for uniformity in sentencing, namely that each of the offence and offender characteristics should be defined *objectively* in relation to seriousness.[302]

9.233 *Doob* and *Park* are in fact quite enthusiastic about the subjective element in their information system. As they remark, judges are most interested in knowing about sentences for cases as other judges saw those cases.[303] The problems involved in assessing criminal history have already been adverted to by way of example of how almost infinite combinations of objective variables could clog up an information system. *Doob* and *Park* see this as being quite unnecessary:

> "When the judges who were part of the steering committee discussed issues like "criminal record", a number of things became clear. First, they seemed to talk about the variable in broad *subjective* terms, e.g. a "serious" record, or a record which was "irrelevant" and their sentence, it seemed, would be guided by such a judgment. To the extent that this is the case, then, a judge who wanted to know how a case would be sentenced by another judge would be better off getting the answer to the question. "What sentences have you handed down to people with

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299 Victorian Report, at p553.

300 *Ibid.*

301 See Doob & Park *Computerised Sentencing Information for Judges: An Aid to the Sentencing Process*, (1988) 30 Crim L Q 54.

302 Victorian Report, at p554. See para 9.260, *infra* (Qualitative Data).

303 Doob and Park, *op cit*, at p61; see also discussion at para 9.193 *et seq*, *supra* (Statistics, Starting Points and Informed Judicial Discretion).

'serious' criminal records for this offence?" than he or she would be in knowing what sentences had been handed down in cases where the person had three convictions - one fairly recent, and one involving a threat or small amount of violence. If the sentencing judge knew that this hypothetical case had been seen by the other as involving a "serious" criminal record, the sentencing judge could interpret the sentence accordingly. Knowing the "objective" information would not tell the information-seeking judge whether the information-providing judge had seen the record as serious, or as somewhat less serious than that. A strong case, in addition to the practical issue, can be made, then, for the use of "subjective" ratings by the judges as the basis of an information system for judges to use as an aid to sentencing."[304]

9.234 There is much to be said for this approach, but it works on a rather disturbing assumption. It seems, consciously but nonchalantly, to admit disparity by the back door. *Doob* and *Park* would have judges hand down similar sentences based on the perceived similarity of cases; but possibly quite marked differences in the perceptions of different judges do not discontent them.

9.235 This situation is not irremediable. As a quite separate objective, to be pursued by *qualitative* guidance - by appellate courts, sentencing commission or judicial studies board - it could be sought to streamline judges' perceptions and therefore their subjective assessments. To take again the example of a prior conviction record, policy statements could be agreed on how the various objective elements - *number* of past convictions, *recency* of last conviction, *violence, severity*, etc. should be interpreted in assessing (subjectively) the seriousness of an offender's criminal history.[305]

9.236 Also, it is quite possible to introduce to *Doob* and *Park's* scheme a leavening of simple *objective* case factors, depending on the offence concerned. This was suggested above. One must, however, be careful to avoid *Hogarth's* mistake, which was to introduce so great a number of objective variables as to give his system an unquenchable "thirst for cases."

9.237 Concluding that the three most readily available statistical models were inadequate, the Victoria Committee sought to develop an alternative. Only *Wilkins'* scheme had offered a rule specifying how judges could combine numerous case elements in order to reach an overall assessment. it was considered, however, that this rule - multiple regression - was not faithful to the structure of judicial thought. Associated with this failing was the perceived failure of *average* sentences adequately to represent individual judge's sentencing objectives. A satisfactory scheme must commence, the Committee submitted, from an appropriate model of judicial decision-making and objectives. In particular, they sought to distinguish two types of decision within the sentencing

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304 *Ibid*, at pp62-63. Our italics.

305 The approach adopted to the calculation of criminal history score in more advanced US guidelines schemes probably bears examination in this respect.

process:

(i) the *quantitative* decision on the seriousness of the offence and on the appropriate *tariff*, if this is to be applied;

(ii) the *qualitative* assessments in which case characteristics are employed as indicators of the appropriateness of a tariff sentence or an individualised measure (and, if the latter, of the most appropriate rehabilitative measure). This distinction is based on *Thomas'* analysis.[306] It should be noted that Thomas' notion of choosing *between* the tariff or an individualised measure is not in accordance with this paper's proposals. Nonetheless, some of the techniques he employs e.g. for fixing the tariff, are of considerable interest.

9.238 *Thomas* defined the tariff as a framework to which a sentencer can refer in order to determine what factors in a particular case are relevant and the weight to be attached to each of them. He proposed three steps:

(a) *Defining the range*: There is an assumption that within any legal offence, a variety of factual situations involving commission of the offence will recur, and that barring mitigating or exceptional aggravating circumstances, there is an upper and lower limit for each such recurring commission-type within which the sentence in the instant case should fall.

(b) *Fixing the ceiling*: Once the closest comparable commission type is identified, with an attendant sentencing range, the ceiling for the instant case can be raised or lowered within this range depending on special aggravating or extenuating features of the crime under consideration.

(c) *Mitigating factors* are then taken into account to reduce sentence if necessary.

9.239 The committee criticises *Thomas* for choosing a number of combinations of case factors, rather unsystematically, to characterise offences like burglary, when the variety of possible factual scenarios (and therefore of material case factors) is almost infinite. He accordingly failed (probably inevitably) to provide a logical structure in which peculiar combinations of case characteristics could be systematically and precisely related to sentence. The Committee suggests an alternative calculation in accordance with readily calculable dimensions. For burglary, four were suggested, based on reviews of sentencing decisions in several jurisdictions:

(1) *total value* of the theft;
(2) *counts* or burglary;

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306 See, e.g. Thomas, *Principles of Sentencing: The Sentencing Policy of the Court of Appeal Criminal Division* (1979); Victorian Report, at pp555-556.

(3) the degree of *organisation* characterising commission of the crime (and role therein); and

(4) the amount of associated *violence* to victims or property.[307]

9.240 In the case of most offences, it is surmised that this element - the identification of material offence factors - could be easily enough formulated from existing legal literature. The other elements are more difficult - the classification and weighting of case facts in relation to case factors, rules for combining case factors, and ascertaining the appropriate types and levels of sentence for the various combinations of case factors. The statistical technique adopted by the Victorian Committee is "multi-attribute utility measurement" ("MAUM").[308]

9.241 One identifies, or determines:

(i) the decision to be made - the assessment of the seriousness of offences of burglary, in this example;

(ii) the criteria for the decision - the four material offence factors outlined just above;

(iii) a seriousness scale for each of the four attributes;

(iv) the relative weight of each of the four attributes in the overall assessment;

(v) a formal model is constructed specifying how the single-attribute seriousness assessments may be combined, taking account of the weights, to provide an overall assessment of the seriousness of the offence characteristics of the instant case.

9.242 Stage (iii) - severity scaling - is the easiest of the tasks remaining. Whether it be by consultation with judges, sentencing commission study, legislation, or public opinion sampling is a policy decision. If one seeks statistical guidelines which purport to be *descriptive* rather than *prescriptive*, the former option seems more apposite, and was resorted to in Victoria.[309] We call this approach *quasi-descriptive*.

9.243 Judges were asked to rate various degrees of financial loss, or of violence inflicted, on a scale of 0-100, and in relation to 2 extremes (e.g. in respect of financial loss, $100 and $120,000 defined the two extremities of the scale). The results of a consultation of seven County Court criminal judges are indicated in Table N.

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307 Victorian Report, at p557.
308 See, e.g. Edwards & Newman, *Malattribute Evaluation*, (1982).
309 Victorian Report, at p559.

TABLE N

Fig.1

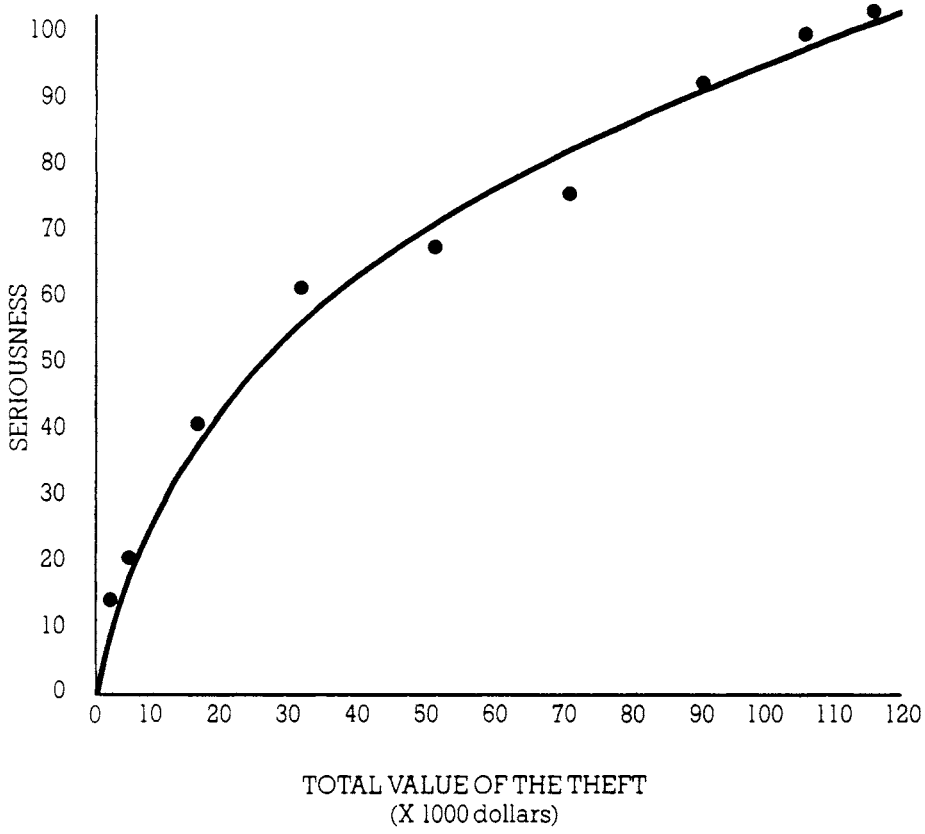

Figure 1 Seriousness Scale for **Total Value of the Theft**

Fig.2

Case-factor level

Scale value	
100	assault of victim - offender initiated
95	assault of victim - victim in pursuit
90	
80	
70	
65	threat of assault of victim - offender initiated
60	threat of assault of victim - victim in pursuit
50	
40	victim at home - offender left when seen by victim
30	offender left out of sight on victim's return
20	victim at home - offender avoided confrontation
10	
0	victim not at home

Figure 2 Seriousness Scale for **Violence to the Victims**

9.244 The judges were then asked to quantify the relative weights of the four factors in the determination of the overall seriousness of an offence stage (iv) in the MAUM process. Each judge's task was to identify, for each of the possible pairs of offence factors, the more important of the two and the importance of this factor relative to the other. An excerpt from their conclusions is given in Table O.

TABLE O

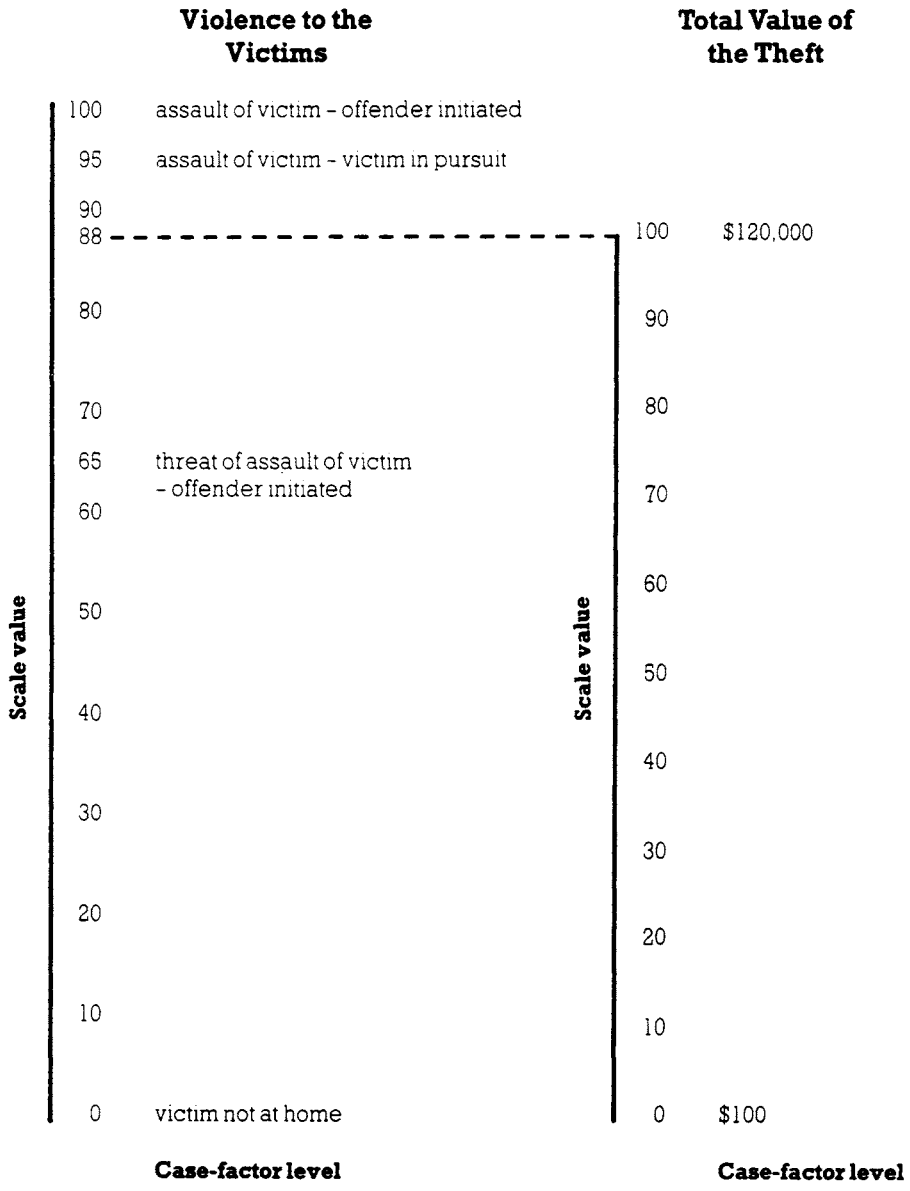

Figure 3
Relative Importance (Weight) of
Violence to the Victims in relation to **Total Value of the Theft**

9.245 This indicates that *total value of the theft* makes .88 the contribution of *violence to the victim* to the assessment of the overall seriousness of the offence characteristics. When the relationship of the four is determined, it is expressed in proportions of 100 (e.g. 31, 25, 22, 22).

9.246 Stage (v) requires the determination of the overall seriousness of the offence characteristics of a particular burglary by aggregating the assessments on each of the component offence factors, having regard to the factor weights. *Thomas* submits from his study of English appellate decisions that the ultimate quantum judgment is reached by adding or subtracting, as it were, points for aggravating or mitigating circumstances relating to the crime.[310] The simplest rule describing the judicial determination of the quantum of seriousness of an offence would be a *weighted additive value function*. This rule states that to determine the overall seriousness of an offence one simply multiplies the single attribute serious assessments of each offence factor by the appropriate factor weight, and then sums these multiples. the equation representing this rule is the formal statement of this element of sentencing policy.[311]

9.247 The final step is to determine the types and levels of sentence appropriate for various combinations of these offence characteristics. Offender characteristics and mitigation enter the equation at this point. *Thomas'* model of sentencing policy is different in its approach to this question from that suggested in this paper, and therefore it is not proposed to discuss the treatment of this topic here. Suffice to say that the judge would complete a detailed proforma covering the relevant offence factors, which would be processed by computer to give the ceiling sentence for that particular combination of case factors. The judge could then at his discretion consider the case for mitigation, or whether there were any material elements of the instant case for which the scoring system did not make adequate or proper allowance, and which warrant an adjustment in sentence.[312]

(d) The Victorian experience

9.248 The Victorian Committee does remark that the offence characteristics may require further consideration, while certain offender characteristics should also be incorporated, e.g. criminal history.[313]

9.249 The Victorian Report goes on to consider how a statistical data base can be used to guide "numerically" the work of sentencing judges. The guidance judgments of the english Court of Appeal (Criminal Division) are outlined, as are the guidelines systems of Minnesota (which it concludes to be unable to cope with multiple case factors) and the federal US. The statistical basis of the latter

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310 *Op cit.*

311 Victorian Report, at p564.

312 *Ibid*, at pp567-569.

313 Victorian Report, at p569. The Committee favours the 'progressive loss of mitigation' approach. Much could be learned from how criminal history has been quantified in some of the more sophisticated US guidelines systems.

is criticised as imprecise and intuitive, while the guidelines themselves masked the conflicts and gaps in sentencing policy and practise for which the US Commission substituted its own judgments. The failure of the US Commission to employ the level of detail originally planned in describing case characteristics is noted - "the Commission abandoned this attempt at developing what is described as a "pure real offence system" on two grounds: (1) it would have had to decide precisely what factors are material to sentence and how the courts aggregate this information; (2) it found no practical way of taking into account the large number of potentially material case factors across a range of circumstances - the proposed solution was so complex that it was impracticable."[314] The frank acknowledgement by the Canadians of their failure to provide a reasonably certain rule for the combination of case information is also cited.[315]

9.250 The ultimate conclusion of the Committee on this point is that some sort of numerical guidance should be attempted, but it does not commit itself to a particular model. The instant proposal is "no more than a numerical aid to the common law approach."[316] In effect, the Victorian Committee's proposed quantitative data base could become the source of quasi-descriptive starting points for the guidance of sentencing judges, on Finnish lines.

9.251 A number of problems may be identified in the Victorian statistical scheme. First, it too relies on *averages* of judges' sentencing assessments, which may diverge widely in fact - in such cases, an average may not be very representative of anyone's position. The danger of such an adverse effect is decreased, however, where one can be satisfied that judges have adopted and fairly consistently follow a single coherent statement of sentencing policy. If such were the case, however, one might be inclined to adopt a more purely descriptive approach than has been advocated for Victoria. The statistics compiled by Victoria are descriptive not of how judges have acted in the past, but of how they believe they would or should act. Even if the answers corresponded exactly for both cases, the former is still the more appealing source of authority. The doctrine of *stare decisis* exercises a strong hold in the common law world, and in other contexts (e.g. in respect of *locus standi*) the courts have been very wary of dealing with hypothetical cases, pronouncements on which will generally be *obiter* anyway.

9.252 One wonders also whether the criticism levelled against *Hogarth* could not also be applied to the Victorian Sentencing Committee's proposal. It was remarked that a sentencing range should be available for the various possible combinations of offence and offender factors based on a reasonable number of fairly recent decisions (which it was feared did not exist in respect of more serious offences). But the Victorian scheme entails a jurisdiction's judges, in a single sitting as it were, making a number of decisions on the seriousness of conduct, and on the relative weight of factors, which decisions become the basis

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314 Victorian Report, at p575.
315 *Ibid.* See Canadian Sentencing Commission *Sentencing Reform: A Canadian Approach* (1987) at p327.
316 *Ibid*, at p576.

for the system's calculated assessment of every possible combination of the chosen case factors. A quasi-descriptive data base which can be compiled, perhaps, in an afternoon may not convince those for whom the justification for a descriptive scheme is the accretion of judicial authority over time. Certainly, if an accurate means of analysing and breaking down the components of actual judicial decisions could be devised, these would be a preferable source of data. Large numbers of individual cases should give rise to and illustrate a pattern of sentencing decision-making of whose authenticity one might be mor confident than of that of entirely hypothetical conclusions.

9.253 However, analysis of sentencing decisions is beset by problems. One cannot isolate individual factors and determine the precise weight attributed to them by judges. it is difficult to exclude factors which are material but uncommon. One can be beset by almost infinite fact combinations and permutations if it is sought to record judges' responses to discrete objective case factors; while the alternative, which is to record their subjective assessments of widely-defined case factors may not satisfy all. As we have seen, these problems need not be fatal. It may be that (in the Finnish case) the distortion is not statistically significant. With regard to *Doob* and *Park's* experiment, a compromise which balanced objective and subjective factors might be sufficient. Nonetheless, the correlation of inputs and outcomes of sentencing decision-making which can be provided by descriptive models is of necessity only approximate.

9.254 This is a problem which does not arise for the Victorian proposal. It produces objective starting point data which are "pure", in so far as they derive from hypothetical case scenarios unadulterated by aggravating or mitigating circumstances other than those chosen as material case factors. It is precisely this hypothetical quality, however, which makes the Victorian scheme less immediately appealing to common lawyers. it is a quality, however, which makes it even better suited than the Finns' own data base for the operation of a starting point system of the Finnish type.

9.255 It might finally be noted that the Victorian scheme does not appear to be very transparent. Though the mode of their calculation seems convincing, the relative weights of case factors, stated as fractions of 100, must be incomprehensible to the onlooker (and possible also to the judges).

Less serious offences

9.256 There is recognition by the Victorian Committee that a less complicated structure should be employed in respect of less serious offences. In this regard, much heed is paid to the ideas of *Ashworth*.[317] His general scheme for devising guidance for sentencers did not include any provision for factor weights derived through trade-offs, but it is concluded that this additional detail is an

317 See Ashworth, *Devising Sentencing Guidance for England*, in Wasik & Pease, *op cit*, at pp81-104.

especially complicating element, while it could make no more than a minor contribution to the sentencing process for less serious offences. The imposed penalties for such offences do not cover a wide range:[318] also (as in the Finnish example of drunk driving) there will rarely be more than a very few relevant case factors.

9.257 The system ultimately recommended is reminiscent of the English Magistrates' Association table of Suggestions for Traffic Offence Penalties,[319] but responds to criticisms of this form of guidance which called for greater detail.[320]

9.258 The scheme is composed of five elements, set out as follows:

(1) differentiate offences within legal offence categories according to the nature of the offending;
(2) divide each of these groups into about six levels to represent offenders with zero to five or more relevant prior convictions/appearances;
(3) set a ceiling and/or recommended sentence for each of the cells;
(4) list the material aggravating and mitigating offence and offender characteristics, together with a qualitative indication of their normal effects on the quantum of sentence, for example, there might be a rule stating that less weight should be accorded to convictions for relatively minor offences than to offences similar in character to the present offence;
(5) set out the kinds of reasoning for determining whether a non-custodial measure is appropriate and, if so, for choosing between those various options and for setting the quantum.[321]

9.259 It is likely that even this level of analysis would be unnecessary for the most prevalent, minor offences of strict liability. Again, the Finnish example of drunk-driving is illustrative of the simplicity of approach which can be sufficient at this end of the scale of offences.

B. QUALITATIVE DATA

9.260 Any proposed quantitative guidance (if only the provision of numerical aids to the common law approach) will need to be complemented by a set of principles governing the exercise of the sentencing discretion. In this regard, the Victorian Committee was more impressed by *Hogarth's* proposals.

9.261 A routinely updated computer data base would aid qualitative decisions of judges availing of three files.

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318 See Victorian Report, at p577.
319 This is described by Ashworth, *op cit.*
320 See, e.g. Tarling, *Sentencing Practice in Magistrates' Courts*, HMSO (1979).
321 Victorian Report, p577.

9.262 *File 1* would contain appellate sentencing decisions, including guideline judgments; these would be classified by legal offence category, and would be available both in summary and verbatim.

9.263 *File 2* would contain a list of the offences and offender factors material to the aim/s of sentence.[322] Factors deemed immaterial to sentence would also be outlined.

9.264 *File 3* would contain statutory and case law covering the choice of the type of sentence, the quantum of sentence and the conditions under which the sentence is to be served.[323]

9.265 These proposals are merely designed to assist the hard-pressed sentencing judge. Certainly, the compilation of sets of relevant sentencing materials for this jurisdiction would be a great boon. Whether this would be by way of computer data base, or in more conventional printed form,[324] will be a matter for judicial preference, and for the Department of Justice which might be responsible for funding it.

Prognosis

9.266 The Victorian Report has led to the circulation of a draft *Sentencing Bill.* In general, its provisions are less detailed, less prescriptive and less comprehensive than the form of guidance envisaged in the Report.[325] More pertinently to the present discussion, the *Judicial Studies Board Act 1990* (as yet unproclaimed) establishes a body with the responsibility of assisting the judiciary and magistracy in developing a system of guidance. (The actual statistical scheme for such a system is not set out, nor was this intended by the Sentencing Committee). However, the Victorian Court of Criminal Appeal has come down firmly against the sort of analysis of decision-making favoured by the Committee in *Young* (a 1990 case). The sentencing judge in that case relied on a method of determining sentence not dissimilar from that proposed by the Committee. He commented that he had "found that approach helpful in that it requires the sentencer to go about the sentencing task in a more orderly way and helps to ensure that all relevant matters are considered". However the Court (Young CJ and Crockett and Nathan JJ) favoured an approach of "intuitive synthesis", and stated:

> "It is sufficient for us to observe that we can find no warrant in authority or justification or advantage from a practical point of view in the adoption of an artificial process for arriving at an appropriate sentence or any process which unnecessarily limits further the discretion of a

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322 Under this paper's proposals, such factors could only determine the applicable *subsidiary* objective. Thomas' 'choice' between the tariff and individualised sentencing is rejected as an option.

323 See Victorian Report, at pp578-579.

324 E.g. like Thomas's *Current Sentencing Practice* (1982).

325 Lovegrove, *Sentencing Guidance and Judicial Training in Australia*, a paper presented at the Conference *Sentencing, Judicial Discretion and Judicial Training*, Manchester University, 28th March 1991, at p17.

sentencing judge. We think that the adoption of such a process is calculated to lead to error and injustice. Until Parliament or the High Court indicates to the contrary we are clearly of the opinion that artificial processes or methods should not be adopted in Victoria."[326]

9.267 Certainly this decision bodes ill for the implementation of a scheme whose success is dependent on judicial co-operation.

(VII) CONCLUSIONS AND PROVISIONAL RECOMMENDATIONS

9.268 We have seen how the rather crude presumptive guidelines devised for Minnesota have been developed and refined over the past decade or more in other jurisdictions. The fear that discretion was being shifted to prosecutors was somewhat allayed, though it was not banished, by the regulation of the charging process e.g. in Washington. In Washington also, criminal history scoring methods were adopted to avoid both prosecutorial manipulation, and simple unfairness to those with numerous but trivial prior convictions. Penalties other than imprisonment were addressed in the US Guidelines. In Michigan, the weights of both offence and criminal history factors are adjusted so as better to reflect their relative gravity *inter se*. In the US Federal Guidelines, sophisticated rules were enacted to govern guilty plea discounts and the effect of multiple offences. Factors contributing to the calculation of sentence were chosen through painstaking analysis of prevailing practice, and according to their reliability in field scoring. If some guidelines schemes (such as the federal one) were built on the sandy foundations of incoherent sentencing policy, this obstacle was surmountable. It must have seemed at times during the discussion above that well-designed sentencing guidelines were the best available method of promoting just deserts and reducing disparity. Certainly the levels of adherence to them in some US jurisdictions seemed to suggest that the war against sentencing disparity could be and was being won. But any such suggestion had to be accompanied by a qualification: adherence to presumptive guidelines can only reduce disparity when those guidelines take account of, and attribute appropriate weight to all the criteria by which we believe offenders should be compared. Failure to incorporate important criteria relating to offence severity and culpability, mitigation and so on constitutes a failure of the guidelines in tackling disparity.

9.269 This leads us to an insoluble problem, highlighted by the debate between *Robinson* and his colleagues on the US Sentencing Commission about "free harms" and levels of detail in presumptive guidelines. If one sees the guidelines as carving out a heartland, embodying only the criteria that exemplify the typical or most common case of each offence addressed, then account must be taken of atypical or uncommon circumstances by a departure from the guidelines. Such untravelled territory is not regulated in the way the heartland is; the factors considered may not be at all reliable in field scoring (i.e. objectively quantifiable); and the decision to depart will usually be discretionary, so that some judges may

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326 This account is taken from Lovegrove, at p15.

choose to do so, and others not. In such circumstances, disparity is to be feared.

9.270 The alternative is to develop guidelines of great complexity. But this too is problematical. Constructing guidelines which one could confidently claim were comprehensive would be an infinite and sisyphean labour. Also, the spectre of disparity again raises its head. As was pointed out by the US Commission, the greater the number of decisions required and the greater their complexity, the greater the risk that different judges will apply the guidelines differently to situations that are in fact similar (or vice versa).

9.271 A compromise such as that attempted in the Federal Guidelines is possible, but it must import elements of both problems into the sentencing process. It still represents a failure of the guidelines movement to live up to its claims.

9.272 One might counter that the problem of disparity also bedevils the sentencing process in jurisdictions which have remained attached to the traditional model of unrestricted judicial sentencing discretion; and that guidelines at least place some order on judicial practice, introduce consistency as between unexceptional, heartland cases, and allow us to highlight the continuing problem of disparity in a more structured context. However, it is submitted that the structure of presumptive guidelines (and this is the chief point of our critique) is itself a force for disparity.

9.273 Presumptive guidelines almost invariably prioritise some relevant sentencing criteria (the simpler, more easily verified, or more common ones) over others. A particular offence is allocated a place in the matrix according to the presence or absence of certain circumstances (violence, criminal history, etc.). Let us imagine a case, where there are other salient circumstances not provided for in the guidelines, e.g. a high degree of intention when the requisite *mens rea* for the offence is only recklessness, or a threat to a peculiarly vulnerable person. The judge who departs from the guidelines to take account of these factors when sentencing must justify doing so; the decision of a judge to ignore them will be unassailable, so that many judges may take this safer but less appropriate route. The Canadian Commission has sought to avoid this by allowing appeals against presumptive sentences as well as against departures. This is exceptional, and it is not clear, in the context of a presumptive guidelines system, that such appeals will be effective.[327]

9.274 Thus, presumptive guidelines tend to establish a two-tier hierarchy of sentencing factors, which cannot be defended. It is possible, however, to replicate some of the benefits of guidelines systems while avoiding this great

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327 Canadian Report, at p291.

shortcoming.[328] The guidelines grid has the great merit, already acknowledged, of regulating sentencing practice in that heartland of uncomplicated cases whose salient features it anticipates. The starting point grid or calculation, however formulated, can perform a similar task; but is not presumptive. A table of starting points is in no way binding. It should serve merely to inform the judges of how they and their colleagues have applied sentencing policy in the past (or how they believe they would apply it), when dealing with instances of an offence with similar characteristics. It is, therefore, only an *aid* or a guide to the application of sentencing policy. The basic statement of sentencing policy remains paramount, and in a particular case may dictate a sentence outside the range suggested by the table of starting points. On appeal, it is conformity to sentencing policy, not to the table of starting points, which the superior court should seek to enforce (and its decisions will hopefully be relied upon to improve the table). The judge's decision on sentence must be defended, if appealed, whether it constitutes a departure from the starting point or not. It is central to the notion of a starting point, as its name suggests, that it constitutes only a point of departure. It is a source of guidance, but there is no presumption of completeness. (The possibility of completeness is an implicit, but impossible, premise of presumptive guidelines, even if this is not admitted). Aggravating and mitigating factors, listed non-exhaustively, have the same status as the factors employed to calculate the starting point.[329] It is as much an error of principle to follow the grid or formula and to ignore other material factors as it is to depart from the grid or formula without good cause. Appellate review, in such a system, is not simply a means of policing and enforcing guidelines - it is a potent vehicle for judicial guidance of sentencing practice, and can help ensure consistent adherence to sentencing policy.

9.275 It should finally be remarked that starting points systems have much to learn from the refinements of guidelines developed in US. Rules for sentencing for multiple offences, for assessing the seriousness and relevance of criminal history, and for the objective quantification of material case factors are all examples of the achievement of a sentencing movement which was, unfortunately, undermined from the start by its own flawed premise and overreaching ambition.

9.276 Appealing though it is, the notion of structured sentencing starting points of the Finnish type, laid out in a form not dissimiliar to a guidelines matrix, is not without its pitfalls. First, there is always the danger that the starting points could become presumptive in practice, which only a vigilant appellate court can prevent. Alternatively, they may be considered by judges to be presumptuous, and rejected outright.

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328 The proposed Canadian guidelines seem to reflect the misgivings of the Canadian Sentencing Committee about the perceived rigidity of US-style matrices. But in trying to preserve the judicial discretion which was rightly perceived as necessary for a full and proper account to be taken of all material case factors, however uncommon, they may have lost that coherent regulation of the heartland of cases which guidelines *can* provide. In the following paragraphs, it is argued that a starting points scheme has a better chance of achieving both these objectives.

329 See Ch 5, *supra*. (Aggravating and Mitigating Factors).

9.277 Secondly, there is the question of how such starting points are to be compiled. The merits and drawbacks of the Finnish and Victorian models have been rehearsed above, and it is not yet possible to reach even a tentative conclusion.

9.278 It may be that a less structured approach should be favoured. *Doob* and *Park's* sentencing information system performs no preliminary steps for the judge, save to marshall in a simple format an account of past disposals in apparently similar cases. The presentation of sentence distributions in cases which are broadly comparable is all the information needed if one conceives of judicial sentencing decision-making as a process of "intuitive synthesis." A combination of a coherent sentencing policy, appellate guidance and relevant information may be sufficient in a small jurisdiction like Ireland to ensure that judicial discretion is exercised in an informed and consistent manner. Also, it may be preferred by those who operate and work in the criminal justice system to the more apparently *dirigiste* options canvassed above. We reserve judgment for the moment.

9.279 Structured starting points are not dissimilar in conception to *advisory* sentencing guidelines, such as were introduced, with little success, in New York. Advisory guidelines also consist of highly structured information on current trends in sentencing. *Wilkins* offers the following definition:

> "The term 'guideline', as we use it ... refers to a system of data which functions as a tool in assisting decision-makers in arriving at individual and policy determinations."[330]

9.280 It is not clear how similar in detail the advisory guidelines designed by *Wilkins et al* are to the starting point models already discussed. Certainly, their statistical bases must be quite different, which could be at least as important as their shared assumption that judicial knowledge of actual sentencing patterns will lead judges to follow them in the majority of cases (a trend which in any event we hope will not become too automatic or uncritical).

9.281 Advisory guidelines have been concluded elsewhere to have been a failure. The Panel on Sentencing Research of the US National Research Council stated in its Report "that formal compliance with voluntary/descriptive guidelines has apparently been limited in the jurisdictions studied."[331]

9.282 Critics' concern with *formal* compliance may be misplaced, however - it has been remarked on several occasions already that considerable disparity could be masked by almost universal adherence to sentencing guidelines. Also, one

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330 Wilkins, Kress, Gottfredson and Gelman, *Sentencing Guidelines Structuring Judicial Discretion: Report on the Feasibility Study* (1978), US Dept of Justice, at p4.

331 Blumstein, Cohen, Martin and Tonry, *Research on Sentencing: The Search for Reform* (1983), vol 1 at p192. Cohen and Tonry add that 'lawyers and judges interviewed in Philadelphia and Denver indicated that few judges made significant efforts to comply with guidelines' in *Sentencing Reforms and their Impacts, ibid*, vol II at p417. See also Gallagher and Carroll, *Voluntary Sentencing Guidelines: Prescription for Justice or Patent Medicine?* (1983) 7 Law and Human Behaviour 361.

must be mindful of the context into which a system of guidance is inserted. It will be remembered that *Doob* and *Park* attributed the failure of their programme largely to the lack of a coherent sentencing policy. There is an almost imperceptible but very material difference between advisory guidelines and starting points in respect of how they operationalise sentencing policy. Even with advisory guidelines, there is some level of presumption that the ordained sentencing ranges will be appropriate in most cases.

9.283 This is betrayed by the tendency to gauge success or failure by reference to levels of compliance. It is envisaged that in a starting points system, whether "structured" or "intuitive", the primary reference point for judges will be sentencing policy - any information provided quantitative or qualitative, is only an aid to its application in given circumstances. This strikes us as an important difference in emphasis.

9.284 The Canadian Sentencing Commission resolved to recommend against the adoption of advisory sentencing guidelines, "wishing to avoid the mistake of importing into Canada a solution which has failed elsewhere."[332] Ours is the reverse approach. We do not wish to impose on judges the levels of constraint associated with presumptive sentencing guidelines, whose success is at the very least uncertain. With judges' cooperation, similar goals of consistency and proportionality in sentencing may be achieved by a system which seeks to inform and guide rather than to restrain and curtail judicial sentencing discretion.

9.285 A number of problems associated with sentencing guidance by the Court of Criminal Appeal have already been highlighted.[333] It seems likely, however, that these are not insurmountable. The obstacle of "lop-sided" case-loads can be overcome by permitting prosecution appeal against sentence.[334] That appeals must be decided, and guidance given, on an individual and case-by-case basis is less problematical within a starting point system with a legislatively ordained, coherent sentencing policy. First, a judge sentencing a case whose circumstances have not been addressed by appellate review is not left without guidance -the policy, the list of aggravating and mitigating factors, and the summary of past (or ideal) sentencing practice which the starting points or data base embody, should all help him reach principled decisions. Secondly, these resources are all available to the appellate court as it attempts to formulate qualitative guidance for the courts below while deciding the cases before it. It is hoped that Irish superior courts will adopt the practice of handing down guideline judgments which go beyond the circumstances of the particular case they hear on appeal, to give their views on how judges can remain consistent with principle while sentencing for other, dissimilar instances of the same offence. If sufficiently specific, some means could be found to embody the substance of such guideline judgments in sentencing starting points, if these are favoured; alternatively, they could constitute a resource of qualitative guidance for judges in assessing how to

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332 Canadian Report, at p302.
333 See para 3.20, *supra* (Judicial or Legislative Sentencing Policy).
334 See Ch 14, *infra* (Prosecution Appeal against Sentence).

use the starting points and to conform to sentencing policy in the actual cases they decide. As was adverted to above, the means of dissemination of such appellate guidance would need to be greatly upgraded.[335]

9.286 It is now possible to reach some conclusions on the diverse subject matter of the foregoing chapter. These conclusions are summarised by the following provisional recommendations; it will be clear, however, that even an interim decision has been deemed unwise on some matters.

9.287 *We provisionally recommend that a determinate sentencing scheme not be adopted in this jurisdiction.*[336]

9.288 *We provisionally recommend that a scheme of presumptive sentencing guidelines not be adopted in this jurisdiction.*

9.289 *We provisionally recommend the formulation of a scheme for the provision of quantitative sentencing information to judges, in the context of a coherent sentencing policy and of sentencing guidance by appellate courts; such information to be compiled over a period after the legislative introduction of a statement of sentencing policy. Information should be provided on sentences resulting from different combinations of material case factors.*

9.290 *We seek views on the design of a sentencing information system. Issues include whether the chosen material factors by which cases are compared should be objectively or subjectively defined; whether a descriptive or quasi-descriptive approach should be adopted; and whether the information compiled should be presented merely in the form of sentence distributions, or in the form of advisory starting points.*

9.291 *We seek views on the most appropriate method of compiling quantitative statistical sentencing information or guidance in respect of less serious offences.*[337]

9.292 *We provisionally recommend the continued supervision of sentencing practice, and the provision of sentencing guidance, by the appellate courts, in accordance with the proposed legislative statement of sentencing policy.*

9.293 *We provisionally recommend that the appellate courts resort to guideline judgments when presented by cases before them with a suitable opportunity to provide more general guidance on the application of sentencing policy to particular offences.*

9.294 *We seek views on how such qualitative sentencing data can be better communicated to sentencing judges.*

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335 See paras 3.20 *et seq* (Judicial or Legislative Sentencing Policy) and 9.260 (Qualitative Data), *supra*.
336 See the discussion at para 9.75 *et seq*, *supra* (Determinate Sentencing: California).
337 See discussion at paras 9.185 *et seq* (Finland) and 9.256 *et seq* (Less Serious Offences), *supra*.

CHAPTER 10: MAXIMUM, MINIMUM AND MANDATORY SENTENCES

Maximum Sentences

10.1 The traditional legislative practice of prescribing maximum penalties has been lauded by some as being the best method of distributing sentencing power between the legislature and the courts:

> "The prescription of a maximum sentence at the legislative level has three conspicuous advantages: it indicates to the subordinate sentencing authorities [i.e. the courts] the degree of seriousness with which the legislature, on behalf of the public at large, regards the offence; by its indefinite character up to that maximum it leaves flexibility and discretion to the subordinate sentencing authorities in their disposition of particular cases; and it protects the interests of the offender himself by setting a limit to restrictions on his liberty or freedom of action beyond which the subordinate sentencing authorities cannot go".[1]

10.2 However, a problem that has developed in all jurisdictions which have adopted this approach is that so often statutory maxima bear no relationship whatever to everyday sentences imposed. The Canadian Commission found that:[2]

> "It seems fair to say that the maximum penalties as they currently stand have little impact upon the sentences handed down by judges and only serve to confuse the public".

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1 Howard, *An Analysis of Sentencing Authority in Reshaping the Criminal Law*, Essays in Honour of Glanville Williams, (Glazebrook ed.), 1978, p406.

2 Canadian Sentencing Commission, *Sentencing Reform: A Canadian Approach*, 1987, pp199-200.

10.3 The Victorian Sentencing Committee noted a similar trend.[3]

Even a cursory examination of the Irish *Annual Reports on Prisons and Places of Detention* will indicate a similar trend here. For example, although the maximum penalty for burglary is 14 years' imprisonment,[4] 27% of those imprisoned for burglary in 1988 received sentences of between one and two years, and 35% received sentences of between two and three years. Less than 10% received sentences between five and ten years, whilst no sentence exceeded ten years in length.[5]

10.4 A second point of concern is the fact that there appears to be no logical or rational basis upon which maximum penalties are set by the legislature, other than by reference to existing sentences for other offences. Many of the maximum sentences which pertain to modern sentencing were set over a hundred years ago, and probably reflect a different view of the severity of crimes to that held today.

10.5 Thus, beyond having a doubtful deterrent[6] effect, it is difficult to see why maximum penalties should be so high.

10.6 This begs the question of whether maximum penalties really do indicate to the subordinate sentencing authorities the degree of seriousness with which the legislature, on behalf of the public at large, regards the offence. If penalties were graded in severity so as to reflect gradations in relative seriousness of conduct, offences carrying the same maximum penalty should reflect a similar level of seriousness. Instead, one finds, for example, that the maximum penalty for blackmail[7] is the same as that for murder - i.e. life imprisonment.[8] One would also expect to find that offences which were more serious would carry higher maximum sentences - yet the maximum penalty for failure to produce books under the *Companies Acts* is 3 years imprisonment;[9] although the more serious offence of abduction of a girl under sixteen has a maximum of only 2 years.[10] Meanwhile, clipping or impairing silver coins carries a maximum term of 14 years penal servitude.[11] The crux is that the current maxima do not accurately reflect society's views on offence seriousness (although constantly the courts rely on them as the principal criteria for determining offence seriousness when considering the minor/non-minor offence distinction)[12]; so a crime intended to be dealt with severely by the legislature may be dealt with leniently - and *vice versa*. At the same time the current maxima do little more than confuse the

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3 *Sentencing*, 1988, p294.
4 *Larceny Act, 1916*, s23 as inserted by the *Criminal Law (Jurisdiction) Act 1976*, ss6, 20(8).
5 See generally *Report on Prisons and Places of Detention, 1988*, pp92-99.
6 See para 4.32 *et seq*, *supra* (Objects of Sentencing and Principles of Distribution).
7 *Larceny Act, 1916*, s29 - "Demanding with menaces" or "accusing with intent to extort" carries a maximum penalty of penal servitude for life.
8 *Criminal Justice Act, 1990*, s1.
9 *Companies Act, 1963*, s168, (as amended by the *Companies (Amendment) Act, 1982*, s7).
10 *Offences Against the Person Act, 1861*, s55.
11 *Coinage Act, 1861*, s4 (as applied by the *Decimal Currency Act, 1969*, s2).
12 *Conroy v AG* [1965] IR 411, Walsh J: "the primary consideration in determining whether an offence be a minor one or not is the punishment which it may attract". See Forde, *Constitutional Law of Ireland*, pp338-344; Kelly, *The Irish Constitution*, pp393-399; Casey, *Constitutional Law in Ireland*, pp250-255.

public and give them the impression that the law treats, say, child abductors, more leniently than counterfeiters (which it does).

10.7 A third cause for concern is the primary emphasis of the current maxima on lengthy custodial sentences. They do not reflect the development of community sanctions. Far from reflecting the attitude that imprisonment is a sanction of last resort,[13] the current maxima may even have the effect of promoting reliance on imprisonment.

10.8 We feel that there is much to be said in favour of a review of the set of statutory maxima that exists in Ireland. Current levels should be rescaled in line with modern perspective. This would have the advantage of at once both providing the courts with a useful reference point for gauging the relative seriousness of an offence against other offences and indicating to the public that the penalties which attach to offending conduct should be proportionate to the seriousness of the conduct.

10.9 In the course of our research we found the following twenty levels to represent the current set of maxima for conviction upon indictment; they are set out with some random examples of the crimes which carry them:[14]

(1)	**Penal Servitude for Life**	Stopping a mail with intent (s50(d), *Post Office Act, 1908*); Abortion (s58, *Offences Against the Person Act, 1861*)
(2)	**Life imprisonment**	Rape, Aggravated sexual assault, *(Criminal Law (Rape) (Amendment) Act, 1990*, s3); Robbery *(Larceny Act, 1916*, s23, as amended)
(3)	**20 years imprisonment**	Causing explosions likely to endanger life or property (s2, *Explosive Substances Act, 1883*, as amended); Usurpation of functions of Government (s6(1), *Offences Against the State Act, 1939*, as amended)
(4)	**15 years imprisonment**	Carrying out unauthorised military exercises, *(Offences Against the State Act, 1939* s6(1), as amended); Unlawful seizure of a ship *(Criminal Law Jurisdiction Act, 1976*, s10)
(5)	**14 years penal servitude**	Forgery of title deeds (s2(2), *Forgery Act, 1913*); Killing an animal with intent to steal (s4, *Larceny Act, 1916*)
(6)	**14 years imprisonment**	Forging a drug prescription (*Misuse of Drugs Act, 1977*, ss6, 7, 27(2); Carrying firearms with criminal intent (*Firearms Act, 1964*, s27(b), as amended by s14, *Criminal Justice Act, 1984*)

13 See para 1.88 *et seq, supra* (Modern Attitudes to Imprisonment).

14 See generally Ryan and Magee, *The Irish Criminal Process*, Appendix H, pp534, *et seq.*

(7)	**10 years penal servitude**	Threatening to damage property (s3, *Criminal Damage Act, 1991*): Poisoning with intent to endanger life (s23, *Offences Against the Persons Act, 1861*)
(8)	**10 years imprisonment**	Aiding an escape from lawful Custody (*Criminal Law Act, 1976*, s6(1))
(9)	**7 years penal servitude**	Counterfeiting copper coins (*Coinage Act, 1861*, s14, as amended); Abduction of a child under 14 (s56, *Offences Against the Person Act, 1861*)
(10)	**7 years imprisonment**	Possession of a controlled drug other than cannabis (ss3, 27(1)(b), *Misuse of Drugs Act, 1977*, as amended); Membership of an unlawful organisation (s21, *Offences Against the State Act, 1939*, as amended)
(11)	**5 years penal servitude**	Misprison of treason (*Treason Act, 1939*, s2); Simple Larceny (s2, *Larceny Act, 1916*)
(12)	**5 years imprisonment**	Making false reports (*Criminal Law Act, 1976*, s12); Sexual Assault (s2, *Criminal Law (Rape) (Amendment) Act, 1990*)
(13)	**3 years penal servitude**	Personation (second offence) at an election (*Prevention of Electoral Abuses Act, 1923*, s6(2))
(14)	**3 years imprisonment**	Unauthorised raising of funds for Credit Union (*Industrial and Provident Societies (Amendment) Act, 1978*, ss5, 28); False statement as to qualification to purchase land (*Land Act, 1965*, s45(6))
(15)	**2 years imprisonment**	Forgery of Vocational Education Certificate (*Vocational Education Act, 1930*, s121); Causing bodily harm by furious driving (*Offences Against the Person Act, 1861*, s35)
(16)	**18 months imprisonment**	Theft of or possession of stolen dogs after previous conviction (*Larceny Act, 1916*, s5)
(17)	**12 months imprisonment**	Malicious publication of a libel (*Defamation Act, 1961*, s11); Obstructing Court Officers (*Enforcement of Court Orders Act, 1926*, s24)
(18)	**6 months imprisonment**	Unauthorised occasional trading (*Occasional Trading Act, 1979*, ss3(1), 9(1)); Keeping a brothel (*Criminal Law (Amendment) Act, 1935*, s13)
(19)	**3 months imprisonment**	Interfering with a witness at a public inquiry (*Witness (Public Inquiries) Act, 1892*, s1); Dredging for Oysters (*Larceny Act, 1861*, s13)
(20)	**1 month imprisonment**	Summary conviction for broadcasting indecent

10.10 We feel that the current set of 20 maxima - or 14 if penal servitude is abolished - is too great, and we believe that in reviewing maximum penalties the legislature should adopt a more limited set. Six to eight levels would be sufficient, depending on the level chosen for the "ceiling" (i.e. highest maximum). The provision of a smaller set has a number of conspicuous advantages. First, it would provide clearer definition and better differentiation between crimes in terms of their gravity -because a smaller set means a sufficiently large interval between the steps on the scale. Secondly, as the Australian Law Reform Commission[15] correctly points out, the wider interval would require the legislature to focus attention more carefully on the gravity of the offence in question when setting the maximum. Thirdly, adopting a smaller set would make the system less unwieldy.[16]

10.11 When choosing the appropriate maximum we would expect it to reflect contemporary views of seriousness and current sentencing practice. However, we would also encourage a concerted effort to reduce the emphasis on imprisonment by keeping sentence lengths to the minimum necessary to reflect offence seriousness.

The Review of Maxima in other Jurisdictions

10.12 The response to this situation in other jurisdictions has been to rescale maximum penalties - in particular, maximum custodial penalties - to bring them in line with modern perspectives on the seriousness of offences. The trend has been towards a reduced set of maximum penalties and a lesser emphasis on custody.

(i) England and Wales

10.13 In England and Wales, the Advisory Council on the Penal System produced its report *Sentences of Imprisonment: A Review of Maximum Penalties* in 1978. The Council examined the sentences imposed by the courts in the years 1974 to 1976, and set a proposed level of maxima at the point where 90% of sentences were imposed. The effect of this was, for example in the case of burglary, to reduce the new maximum from 14 years to 3 years. The choice of 90% as the appropriate level was, upon the council's own admission, "to some extent arbitrary"[17] but it felt that the other 10% would represent the common conception of the level at which an exceptional sentences would be warranted. But it was the Council's proposals on how this 10% should be dealt with, i.e. that the courts should be empowered to impose a determinate sentence of *any* length on an exceptional offender, which led to objection.[18] This would have allowed

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15 See ALRC 44, *op cit*, p31.
16 *Ibid.*
17 *Ibid*, p79.
18 *Ibid*, p89.

the courts an unfettered discretion to escalate the penalty to anything they considered appropriate despite parliament setting a maximum penalty. In effect, this provision defeated the purpose of the other proposals, and as a result, the Council's recommendations are reportedly "gathering dust on the shelves of the Home Office".[19]

(ii) Canada

10.14 The Canadian Sentencing Commission also undertook a re-ordering of their maximum penalties.[20] The Commission reviewed all the offences as they appeared on the statutes and sought to make the maximum penalty structure reflect, to a greater degree, current sentencing practice. In order to do so, the Commission obtained an *aggregate sentence breakdown*[21] of all federal offenders. Examination of the most severe sentence imposed upon these individuals revealed that the average single longest sentence was 12 years. The average single sentence was substantially lower than the most severe maximum provided by the *Code*. The Commission concluded:[22]

> "Having considered the data on the length of time actually served in custody by long-term offenders and in consideration of other aspects of our sentencing proposals, the Commission concluded that 12 years in prison should be the maximum sentence to be imposed for a single offence in all but the most exceptional cases. In recognition that there are particular cases that require exceptional sentences, there is a procedure of "enchancement" of the sentence ...
>
> For offences other than murder and high treason, the Commission recommends that the current penalty structure be repealed and replaced by the following penalty structure:
>
> 12 years
> 9 years
> 6 years
> 3 years
> 1 year
> 6 months
>
> Once the "ceiling" was set at 12 years, the Commission decided that intervals of three years would provide the necessary flexibility and differentiation between the levels of maxima in the upper ranges. It was felt necessary to retain the lowest band of six months, as one year was

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19 Victorian Sentencing Committee, *op cit*, p298.

20 Canadian Sentencing Committee, *op cit*, p201.

21 The Commission explained: "By aggregate sentence we mean the following: if an offender is admitted to a federal institution with a two year sentence for robbery and an additional one year sentence for possession of a restricted weapon, this would be recorded as a three year term for robbery. This point must be borne in mind when considering these data": *ibid*, p202.

22 *Ibid*, p203.

perceived to be excessive for the least serious group of offences which comprise the bulk of the criminal court workload".

10.15 Strangely (considering the Commission's own findings on the reliability of incapacitative sentencing),[23] the Commission proposed an exceptional sentence scheme to accommodate the fewer than 1% of cases where the judge feels that, in the interest of public security, a custodial term longer than the maximum penalty period is necessary.[24] The criteria recommended by the Commission for the enhancement of sentences were:[25]

(i) That the offence related to a serious personal injury; and

(ii) that the offence was so brutal as to indicate that the offender "constitutes a threat to the life or safety or physical well being of other persons"; or

(iii) that, alternatively, the offence forms a pattern of serious behaviour which indicates a "failure to restrain his behaviour and a wanton and reckless disregard for the lives, safety or physical well being of others".

10.16 The Commission attached a great number of procedural safeguards to the proposed system, such as giving the accused a forewarning of an application for enhanced sentence; requiring the consent of the Attorney General; requiring a pre-sentence report and placing the burden of proof of all the criteria upon the prosecution.[26]

10.17 It appears that no legislative steps have been taken on the Commission's proposals as to maximum penalties to date.[27]

(iii) Australian Federal Jurisdiction and Capital Territory

10.18 The Australian Law Reform Commission, too, observed that the existing maxima in Australian jurisdictions were not set by reference to a uniform scheme, and proposed a new system of maxima based on different categories of offence, ranked according to seriousness.[28] This ranking would take into account both public perception and sentencing practice. The Commission tentatively proposed eight categories of offences, A to H, ranging from life imprisonment in category A, reserved only for murder, to fixed monetary penalties in category H for parking violations and minor tax and customs matters:[29]

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23 See para 7.32 *et seq*, (Purposes).

24 *Ibid*, p213.

25 *Ibid*, p214.

26 Canadian Sentencing Commission, *op cit*, p215.

27 In 1990 the Canadian Government's consultation paper proposed a full time Sentencing and Parole Commission "to develop the work of the Canadian Sentencing Commission respecting sentencing guidelines" - which involves the restructuring of maximum penalty levels. See *Sentencing: Directions for Reform*, Dept of Justice, Canada, (1990); *A Framework for Sentencing, Corrections and Conditional Release: Directions for Reform*, Canada (1990); *Corrections and Conditional Release: Directions for Reform*, Solicitor General, Canada, (1990).

28 ALRC DP 30, *Sentencing: Penalties, 1987.*

29 ALRC Summary DP 29, 30, 31 *Sentencing*, 1987 pp8, 9; and ALRC DP 30, *op cit*, para 122-130.

Category A should only contain the offence of murder punishable by a maximum penalty of life imprisonment.

Category B offences should have a maximum penalty of 15 years imprisonment. This category should only extend to offences regarded as extremely serious by the community, such as complicity in or conspiracy to murder, manslaughter and extremely serious forms of drug trafficking.

Category C offences should carry a maximum of 10 years imprisonment. Offences in this category might include armed robbery, hijacking aircraft, aggravated sexual assault, assault intentionally occasioning grievous bodily harm, kidnapping and other offences against the person involving acts endangering life.

Category D offences should carry a maximum of five years imprisonment and include breaking, entering and stealing, serious fraud or misappropriation, arson and driving causing death.

Category E offences should have a maximum penalty of two years imprisonment. This category might include theft, receiving, unlawful possession of stolen goods and reckless driving.

Category F offences should have a maximum of six months imprisonment and could include gaming and betting, theft under $1,000, escape from custody and indecent acts.

For *Category G* offences imprisonment should not be available as a penalty. This category should cover all offences not specifically allocated to other categories.

Category H offences should carry fixed monetary penalties dealt with on an infringement notice basis such as parking violations and minor tax and customs matters.

10.19 The Commission admitted that assigning the maximum penalty to an offence is ultimately a matter for the legislature. However it recommended that the parliament would adopt the eight categories and select the maximum penalty for a particular offence from that set of maximum terms.[30] In making the choice of category, the following would have to be borne in mind: the principle that imprisonment is a sanction of last resort; the fact that, in general, offences which impinge upon personal security are considered more serious than offences which infringe the security of property. There should be a deliberate effort to ensure that offences for which the same maximum prison term is prescribed are of the same comparative seriousness.

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30 ALRC No 44. *Sentencing*, p31, (1988).

(iv) Victoria

10.20 The Victorian Sentencing Committee also reviewed the state of maximum sentences in its jurisdiction.[31] In its opinion the highest maximum sentence should be life imprisonment, but below that, the next most severe would be 12 years - based on the fact that, taking parole and remission into account, a person would have to be sentenced to $18^1/_2$ years to actually serve 12. Since the Committee proposed the abolition of remission, 12 years was a suitable maximum. A three year interval for other maxima in descending order of severity resulted in this scale:[32]

- life imprisonment
- 12 years
- 9 years
- 6 years
- 3 years
- 12 months
- 6 months

10.21 The Committee set out a table of proposed maxima to facilitate the implementation of its proposals. The criteria upon which the review were based included the reduction of the emphasis on imprisonment as a remedy, the contemporary views as to the seriousness of offences, and the rejection of incapacitative strategies.[33]

Provisional Recommendations

10.22 *We provisionally recommend that the legislature undertake a review of the set of maximum penalties which currently exists in Ireland, and re-scales the levels in accordance with modern perspectives on offence seriousness and in accordance with the view that custodial sentences should be regarded as sanctions of the last resort. We provisionally recommend that the set of maximum penalties be diminished - between six and eight levels of maximum penalty would be sufficient.*

Minimum Sentences

10.23 Objection can be taken to the laying down of statutory minima on the grounds that:

> "there can be no rule of general application laying down a specific quantum of punishment that should be inflicted in the case of a particular offence".[34]

10.24 The advantages of minimum sentences are not clear, although a common

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31 Victorian Sentencing Committee, *Sentencing*, 3 Vols, (1988).
32 *Ibid*, p306.
33 *Ibid*, p306.
34 Law Commission of India, 14th Report, Vol II, pp838, 841.

theme in their imposition both at home and abroad has been the belief that the legislative pronouncement of a minimum will lead to sentences having a deterrent effect.[35]

10.25 The Canadian Law Reform Commission concluded:[36]

> "While there are no available objective measurements on the effectiveness of such sanctions, experience does not show that they have any obvious special deterrent or educative effect. Generally, the reported research does not show that harsh sanctions are more effective than less severe sanctions in preventing crime. Other problems arise in denying judges discretion to select the appropriate sanction or the length of a prison term in individual cases. For one thing circumstances vary so greatly from case to case that an arbitrary minimum may be seen as excessive denunciation or an excessively long period of separation in the light of the risk and all the circumstances. Indeed, not every case falling within a given offence will require imprisonment for the purposes of isolation. Similar criticisms could be made of a sentencing provision that denies judges the power to choose between a custodial and a non-custodial sentence".

10.26 The major disadvantages of minimum sentences, therefore, are that they may, on occasion, preclude the sentencer from imposing a sentence proportionate to the seriousness of the offending behaviour, while at the same time there is no clear evidence that minimum sentences serve any useful purpose at all. Any minimum sentences which are still in operation are, generally, a relic of by-gone days.

Provisional Recommendation

10.27 *We provisionally recommend that the legislature refrains from the introduction of minimum sentences in the future, and that those still in force be abolished.*

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35 At the Committee and final stages of the *Criminal Justice Act, 1990*, (Dail Debates, 12 June 1990, col 2023) the Minister for Justice said of the 40 year minimum sentence for capital murder:

> "In deciding what penalty to propose I was guided by a number of concerns ... That we have a largely unarmed Garda Force whose only protection from those with murderous intent is the statutory protection we can afford them by way of a penalty with deterrent effect".

The Law Commission of India found that the principal reason for the introduction of minimum sentences in recent Indian legislation appeared "to be a feeling that courts seldom award sentences which would have a deterrent effect, particularly in certain types of offences, which are necessary to be dealt with sternly in the interests of society," 14th Report, Vol II, p840.

36 Law Reform Commission of Canada, *Criminal Procedure: Control of the Process, (1975)*, p24. In 35 years, every Canadian Commission which addressed the role of mandatory minimum penalties recommended the same thing - that they should be abolished. See Canadian Sentencing Commission, *op cit*, p178.

Mandatory Sentences

10.28 Mandatory sentences are rare in Ireland,[37] and those that are operative can be criticised on the basis that:

> "it is impossible at the legislative level to foresee and provide in adequate detail either for the multitudinous variety of circumstances under which serious crimes are committed or for the sometimes considerable differences of personality, background and intelligence between people who commit them. What is virtually certain is that legislatively imposed fixed penalties for serious crimes will require the frequent intervention of executive clemency".[38]

10.29 That has been the experience in Ireland in relation to the mandatory life sentence, for which the Government, acting through the Minister for Justice, determines when the prisoner should be released. There is now a well established policy at the post-judicial stage of sentencing that a "life sentence is not to be taken literally".[39] In the case of a life sentence, the discretion as to the duration of the term is shifted to the executive under Article 13.6 of the Constitution which provides:

> "The right of pardon and the power to commute or remit punishment imposed by any court exercising criminal jurisdiction are hereby vested in the President, but such power of commutation or remission may, except in capital cases, also be conferred by law on other authorities".

10.30 Such power was conferred on the Government, and the Minister for Justice, by section 23 of the *Criminal Justice Act, 1951.* The result is that a life sentence is in practice an *indeterminate*[40] sentence, because the offender does not know when he or she will be released, or if he or she will ever be released; however the average "lifer" can expect to be released within 8 to 10 years.[41] According to official statistics,[42] the following were periods actually served by 26 prisoners serving life sentences for offences including murder:

> Less than 5 years: None;
> More than 5 years, but less than 8 years: 11;
> More than 8 years, but less than 10 years: 8;
> More than 10 years, but less than 12 years: 5;
> More than 12 years, but less than 15 years: None;
> More than 15 years: 2.

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37 See para 1.132, *supra.* (Mandatory Sentences).

38 Howard, *op cit*, pp408, 409.

39 Howard, *op cit*, p409.

40 I.e. a sentence of confinement in which the actual term to be served is not known on the day of judgment but will be subject to the later decision of some other body.

41 *Dail Debates*, 12 June 1990, Col 2020 - "Life imprisonment ... in many cases turns out to be imprisonment for eight to ten years". - Minister for Justice. It is true, however, that the prisoner remains "on licence" for the rest of his or her life, and may be recalled to prison at any time.

42 *Dail Debates*, 13 May, 1987, col 1777.

10.31 Secondly, although there is no case directly in point, it is not inconceivable that the lack of judicial participation in the determining of a mandatory sentence could amount to a breach of some notion of fair procedures, in some, if not all, cases. Does not the "individual citizen", to use O'Dalaigh CJ's words,[43] need "the safeguard of the courts" as much in the assessment of punishment for crimes which carry mandatory sentences as for others?

10.32 The right of the accused to have the matter tried by an independent court or arbitrator as established in *The State (Healy) v Donoghue*[44] could be read to require judicial participation. What is at stake is the requirement of *audi alteram partem* which Davitt P in *The State (Howard) v Donnelly*[45] found to be an essential of justice. In *Howard* the District Judge acted in excess of his jurisdiction in refusing to hear evidence likely to influence him to acquit the accused. At the sentencing stage, mandatory sentences deprive judges of the opportunity to hear evidence which might lead to mitigation; and thus possibly breach the *audi alteram* requirement.[46] As against that, it can equally be said that in the case of offences warranting a sentence of life imprisonment, it is not unreasonable for the legislature to decide that there was no *alteram partem* to be heard on sentence.

10.33 In relation to murder, the objection has been fuelled in some jurisdictions by the anomalous *felony murder* rule. This anachronism is an attenuation of the ancient common law rule that anyone who kills in the course of commission of a felony is, in effect, strictly liable as a murderer. Time and again it has been argued that it is unjust to sentence on the basis of the offender's imputed, as

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43 See *Deaton v AG* [1963] IR 170.In *Application of Gallagher*, [1991] IR 31, the Supreme Court held that the role of the executive under the *Trial of Lunatics Act, 1883*, in deciding on the duration of detention of a person in relation to whom a special verdict of guilty but insane had been returned was not a judicial function but was, rather, the performance by the executive of its proper role of caring for society and protecting the common good.

44 [1976] IR 325.

45 [1966] IR 51.

46 In the U.S. there has been much recent litigation against the federal sentencing guidelines, which, because of their rigid numerical formulae, are akin to mandatory sentences. In *United States v Ortega Lopez* (684 F Supp 1506, 1513 CD CAL, 1988) the District Court of California held that the guidelines violate due process:

> "Quite simply, the mechanical formulas and resulting narrow ranges of sentences prescribed by the Guidelines violate defendants' right of due process of law under the Fifth Amendment by divesting the Court of its traditional and fundamental function of exercising its discretion in imposing individualized sentences according to the particular facts of each case. See *United States v Barker*, 771 F. 2d 1362 (9th Cir. 1985) (application of mechanical sentencing procedures violates due process) .... The guidelines do require a court to consider certain enumerated factors specific to individual offenders which are unrelated to their offence(s) of conviction. However, the rigid, computerized nature of the guidelines - which assign positive or negative numerical values to various sentencing factors and 'adjustments' - precludes the trial court from *weighing* the offender and the offences of conviction. (*United States v Frank*, 682 F. Supp. 815, 819 (WD Pa. 1988)). This weighing responsibility of the trial judges rests at the core of due process. *Id.*, at 819. Further, the Guidelines offend the guarantees of due process by depriving the defendant of the opportunity to affect the court's weighing of all relevant factors at the time of sentencing".

Ten other Federal District Courts have reached the same conclusion; see Manck, *Do the United States Sentencing Guidelines Deprive Defendants of Due Process?* 37 Drake LR 377. By way of contrast, nine Federal District Courts have held that the guidelines do *not* violate due process. It appears that the United States Supreme Court will agree with the latter, probably because of the guidelines' liberal policy towards departures; see Weigel, *The Sentencing Reform Act of 1984: A Practical Appraisal (1988)* 36 UCLA LR 83. If it is this room for departure which distinguishes the guidelines from mandatory sentences, however, then it remains to be questioned whether *mandatory* sentences violate due process.

opposed to actual, state of mind. The Victorian Law Reform Commission commented that:[47]

> "... the fundamental objection, applicable to all doctrines of constructive murder, [is] that they offend against basic concepts of justice, because they subject persons to the severest of punishments for consequences of their acts which they in no way intend".

Abolition of Mandatory Sentences

10.34 "Apart from revenue and excise offences and offences under the Customs Acts, there do not appear to be many offences in respect of which only one penalty may be imposed - murder, capital murder and treason immediately come to mind".[48] Other jurisdictions have reconsidered the place of mandatory sentences, in particular the mandatory life sentence for murder, in the sentencing process. The abolition of 'ordinary' mandatory sentences has posed no problem; however enormous controversy has surrounded moves to abolish the mandatory life sentence for murder.

10.35 The 11 member Select Committee of the House of Lords in its recent report[49] recommended that the mandatory sentence of life imprisonment be abolished in regard to murder, and the sentence be left at the discretion of the court. The New South Wales Legislature abolished the mandatory nature of the life sentence for murder in 1982[50] as did that of Victoria in 1986.[51] Both questioned the appropriateness of the time to be served by a murderer being determined in private by the Executive rather than in open court by a judge.[52]

10.36 A recurring issue was the general deterrent argument that a mandatory life sentence deters potential killers. There could be found no evidence of this effect, and certainly no evidence that any deterrent effect of a mandatory life sentence would be any greater than that of a maximum but discretionary life sentence.[53] In the Australian State of Victoria, where the life sentence became discretionary in 1986, there has been no increase in homicide.[54] Similarly the incapacitative element of life sentences was found to provide no greater public protection even though it is true that life prisoners remain on licence for life even after release. Murderers were found to present no special dangers to the public upon release, and persons convicted of other offences may present greater risks.[55]

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47 Victorian Law Reform Commission's Report No 1., *Law of Murder (1974)*, p11.

48 *Per* Griffin J in *DPP v Gray* [1987] ILRM 4.

49 House of Lords, *Report of the Select Committee on Murder and Life Imprisonment*, (session 1988-89) HL 78; See Ashworth, *Reforming the Law of Murder, [1990]* Crim LR 75.

50 *Crimes (Homicide) Amendment Act, 1982*, (NSW); See Meng Heong Yeo *Sentencing Murderers: A New South Wales Innovation, [1987]* Crim LR 23, and Woods *The Sanctity of Murder: Reforming the Homicide Penalty in New South Wales (1983)* 57 *Australian Law Journal*, 161.

51 See Stern, *Keep Life Sentences only for the Few*, The Times, 4th Feb 1991.

52 See also *Winder, Judicial Peers Want End to Mandatory Life*, The Times, March 13th, 1991.

53 See para 4.32, *supra* (Deterrence).

54 See Stern, *op cit.*

55 *Report of the Select Committee on Murder and Life Imprisonment*, Vol II, pp40-58.

10.37 Thirdly, the central objection to the mandatory life sentence for murder is, as Finlay CJ and the majority of the Supreme Court noted in *The People (DPP) v Conroy (No 2)*,[56] that some forms of murder are more serious than others, and some manslaughter may even be more serious than some murders:

> "there would not appear to me to be any grounds for a general presumption that the crime of manslaughter may not, having regard to its individual facts and particular circumstances be in many instances, from a sentencing point of view, as serious as, or more serious than, the crime of murder".[57]

10.38 In New South Wales much of the impetus behind the reform was provided by the public outrage at the life sentences received by Violet and Bruce Roberts, a mother and son who had murdered their husband and father Eric Roberts who had brutally terrorised and beaten them for years.[58] The mandatory life sentence, it was felt, gave too much emphasis to the crime and not enough to the criminal.

10.39 One problem which faced reformers was the question of what should replace the mandatory life sentence. If the judge is given discretion, then there is little to distinguish murder from manslaughter. In order to maintain the public perception that murder is dealt with more severely than manslaughter the New South Wales Legislature gave the presiding judge a restricted sentencing discretion in murder cases rather than the unrestricted discretion for manslaughter.[59] In England, the Select Committee recommended only that the judge specify reasons for selecting the sentence and to specify in open court the period of years necessary to "satisfy the requirements of retribution and deterrence",[60] but in that jurisdiction, there is still debate as to whether the law should continue with the murder/manslaughter dichotomy.

The British Debate

10.40 In the British House of Lords during April, 1991, there was an overwhelming majority vote of 177 to 79 in favour of abolishing the mandatory life sentence[61] - which is hardly surprising considering the recommendations of the House of Lords' select committee. A second vote, also carried by a 2 to 1 majority, was in favour of requiring the judge to state the "penal term" (i.e. the term proportionate to the seriousness of the offence and not any extra time which may be necessary for the protection of the public) if and when a discretionary life

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56 [1989] IR 160.

57 *Ibid*, at p163.

58 See Meng Heong Yeo, *op cit*, p23. In this country, the DPP might avoid such situations by prosecuting for manslaughter, despite having all the evidence to prosecute for murder; See Helsinki Institute for Crime Prevention and Control, *Non prosecution in Europe: Proceedings of the European Seminar (1986)* p233.

59 The judge is obliged to begin sentencing with the view that penal servitude for life is the most appropriate sentence. Secondly, he or she must be satisfied that there exist significant mitigating factors before exercising any discretion as to a lesser sentence. See Woods, *op cit*, p163.

60 Ashworth, *op cit*, p78.

61 HL Deb, vol 527, cols 1563-1608.

sentence is imposed. The final group of amendments authorised the establishment of a judicial tribunal to determine the time of release of life-prisoners once the penal term has expired. In the case of murderers, they would always remain on licence for life - even after release. Seven principal arguments for abolition were put; *Ashworth* summarises:[62]

(i) The life sentence involves a transfer of power from the judiciary to the executive, since it is the latter who determines the time served in prison, under existing arrangements. This is anomalous.

(ii) The executive also exercises its power in secret, with no appeal and on no published criteria. This is quite wrong, being contrary to the offender's right to natural justice in determining the duration of his or her imprisonment, and being inferior to judicial process in open court.

(iii) The mandatory sentence prevents justice from being seen to be done, because courts are required to pass the same sentence on murderers of manifestly different culpability. Murder as a crime varies in seriousness just like others, yet the courts are prevented from reflecting this.

(iv) It is wrong to misuse the term "life imprisonment" when everyone knows that it rarely means what it says: the term is debased by being used in respect of people who are only likely to be imprisoned for three, five or ten years, when it should be reserved for the small minority for whom the term would have its natural meaning.

(v) These shortcomings cannot be rescued by the claim that the mandatory life sentence is a more effective deterrent, because there is no evidence for that; indeed, the recent example of the Australian state of Victoria (which abolished the mandatory sentence in 1986) shows no increase in murders.

(vi) Nor can it be argued that murderers must be sentenced to life imprisonment because of their dangerous and unpredictable nature: murders vary greatly in their circumstances, and there may be no higher proportion of "dangerous" people among murderers than among rapists and arsonists, for whom a mandatory sentence has never been required.

(vii) There is no greater difficulty in determining the appropriate sentence for various murders than for variation in other crimes,

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62 Editorial, *Life in the Lords* [1991] Crim LR 401.

and so the task should be left to the judge in the normal way, and subject always to appeal.

10.41 The House of Commons, however, voted down the peers' proposals, by 236 votes to 158, at the instigation of the Home Secretary, *Kenneth Baker*. The turning point in the debate seems to have been the issue of who should decide when to release a life-prisoner rather than the question of whether mandatory sentences serve any useful purpose. *Mr Baker* said:

> "The best and fairest system is the one we have now where the life sentence is fixed by law and the responsibility then passes to the Home Secretary to decide how the sentence should be spent. That responsibility is part of the Home Secretary's general responsibility for the protection of the public, the preservation of the Queen's peace and the maintenance of public confidence in the criminal justice system".[63]

10.42 Amongst the arguments advanced in favour of retention was a direct rebuttal of point (vii) above, says *Ashworth*:

> "It was argued that the judges do not have experience of passing sentence for murder, and it was asked whether judges in this country would be comfortable with passing sentences of up to 60 years and possibly longer. Powerful as the arguments for abolishing the mandatory sentence are, this practical aspect of 'what exactly happens next' has never been described fully by the abolitionists".[64]

10.43 The chief argument in favour of the sentence rested on public confidence. *Lord Waddington*, upon reflection, said:

> "The criminal law has always reflected public attitudes. The public in general do feel that the mandatory sentence is appropriate to mark the heinous crime of murder out from all other crimes and that public opinion has to be listened to".[65]

10.44 Surprisingly, nobody appears to have conducted a public opinion poll to see if this is true.

10.45 In July, the peers responded with a defeat of the government's proposals,[66] re-iterating the proposals that an independent body or *parole board* should have the right to review life sentences and that the judge should state the "penal term". Two more votes removed the Home Secretary's power to delay the release of a prisoner on licence after a parole board decision.

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63 *See Baker rejects judges' appeal to end life sentences for murder*, The Times, June 26, 1991.
64 *Op cit.*
65 *Peers renew revolt in life sentence clash with MPs*, The Times, July 4, 1991.
66 *Ibid.*

10.46 However the peers decided not to press for the ending of the mandatory life sentence because of fears that the whole bill[67] might lapse. *Lord Hailsham* remarked:

> "One day people will see sense, even in the House of Commons, and the hairy heel of populism which they have followed will ultimately disappear. But in the meantime there is no great crisis if the *status quo* is preserved. We should allow them to have their silly way for once".[68]

The European Court of Human Rights

10.47 The mandatory life sentence was introduced as a compromise when capital punishment was abolished in England, because it was felt that discretionary sentencing would be too lenient an alternative to hanging. Now that attitudes have changed and life imprisonment is the gravest penalty in the criminal justice system, it may be suggested that it in turn be replaced by a discretionary sentence. History shows that mandatory transportation, which in the 1800s was introduced to replace mandatory death for felony offences, was quickly replaced itself by discretionary penalties within the space of a few decades.[69]

10.48 It may now be time for this pattern of history to repeat itself. Already the European Court of Human Rights has decided in the recent case of *Thynne, Wilson and Gunnell*[70] that prisoners serving *discretionary* life sentences have the right to regular and open *judicial* review of their sentences under articles 5 & 4 of the European Convention on Human Rights.[71] Thus the discretion as to extent of sentence for life prisoners has been handed back to the judiciary where the life sentence was discretionary. The court noted that the discretionary life sentence differed from the mandatory life sentence, since the former is imposed with incapacitation and protection of the public in mind, while the mandatory life sentence is imposed on deterrent grounds. It is suggested that this distinction promotes the case against mandatory life sentences because those sentenced to a mandatory life sentence usually pose a lesser threat to the public upon release. Consequently, it may be concluded that mandatory life-prisoners should also have the right to regular *judicial* review of their sentences.[72]

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67 Now the *Criminal Justice Act, 1991;* see Chapter 7 *supra.*

68 The Times, 4 July 1991, *supra.*

69 Evidence of Dr DA Thomas before Select Committee; see Lord Windlesham, *Life Sentence: The Paradox of Indeterminacy [1988]* Crim LR 244, p256.

70 Case 399 of 1990, Judgment delivered (1990) Series A.

71 Article 5(4) reads:

> "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful".

72 The Whitaker Committee of Inquiry into the Penal System recommended that long sentences, in particular life sentences, should be reviewed regularly by a Sentence Review Committee presided over by a judge of the High Court with the power to make recommendations to the Minister for Justice. The first review should take place after five years, further reviews to follow at intervals decided by the Review Committee. The review procedure was not intended to replace or interfere with the Government and Minister for Justice's power to remit sentences.

Options for Reform

10.49 At this stage, let us outline some of the options for reform which have been considered in other jurisdictions which might, at some stage, be relied on to reform this difficult area of penal policy.

(a) Unlawful homicide

10.50 In *Hyam v DPP*[73] Lord Kilbrandon said:

> "My Lords, it is not easy to feel satisfaction at the doubts and difficulties which seem to surround the crime of murder and the distinguishing from it of the crime of such manslaughter. There is something wrong when crimes of such gravity, and I will say of such familiarity, call for the display of so formidable a degree of forensic and judicial learning as the present case has given rise to. I believe this to show that a more radical look at the problem is called for, and was called for immediately on the passing of the *Murder (Abolition of Death Penalty) Act, 1965.* Until that time the content of murder - and I am not talking about the definition of murder - was that form of homicide which is punishable with death. (It is not necessary to notice the experimental period during which capital murder and non-capital murder existed side-by-side). Since no homicides are now punishable with death, these many hours and days have been occupied in trying to adjust a definition of that which has no content. There does not appear to be any good reason why the crimes of murder and manslaughter should not both be abolished, and the single crime of unlawful homicide be substituted; one case will differ from another in gravity, and that can be taken care of by variation in sentences downwards from life imprisonment".

10.51 Lord Kilbrandon suggests that the distinction between manslaughter and murder be abolished, and that the sentence for the new crime of unlawful homicide be imposed at the discretion of the trial judge. However, the chief objection to this course of action is that the present difference in labels has a declaratory and symbolic function. The New South Wales' legislature rejected such radical reform on the grounds that it would be unpalatable to the public:

> "In our culture, to describe someone as a 'murderer' is to employ the most bitterly and effectively stigmatising epithet available in the language. To remove that term from the law would be to risk possible public misapprehension and to invite the criticism (rightly or wrongly) that the moral force of the law was being lessened".[74]

10.52 It is unlikely, therefore, that this approach would be favoured by the legislature charged with the representation of public opinion, although logical and

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73 [1975] AC 55, p98.

74 *Per* the then Attorney General of New South Wales, Mr Frank Walker QC, when introducing the amendment to parliament in 1982.

reasonable to the judge, academic, or law reformer.

(b) Varying degrees of murder

10.53 This was an option which was discounted in New South Wales. The idea was that various degrees of murder should be stipulated, and various maximum penalties set for each, somewhat along the lines of the US system so popular in television drama. The sentencer would then exercise his or her sentencing discretion in imposing the appropriate sentence within the limits of the maximum for that degree of murder. The main objection is that enormous difficulties would be encountered in drafting a provision which would satisfactorily demarcate differing degrees of murder.[75] Another problem is that an offender could get off on a technicality if not charged with murder in the correct degree. In New South Wales is was argued that the inclusion of "murder by intent to kill" in first-degree murder (which it would be anomalous to exclude from the category of first-degree murder) would result in a first-degree sentence in the case of domestic killings, and this would have negated an important aim of the intended reform - to allow a sentencing discretion in relation to domestic killings.[76]

(c) Discretionary sentence

10.54 Another option is to simply provide for a discretionary sentence for murder in exactly the same manner as for manslaughter, but retaining the different labels for the crimes. The House of Lords' Select Committee felt that such a move could lead to confusion and the ultimate diminishing of the primary function of the qualified defences, such as provocation and diminished responsibility, to murder. The Committee argued that it is proper to allow qualified defences which reduce the crime to manslaughter when the offence in question is murder, although for other crimes the same factors would simply go to mitigation, because murder is the highest offence and only the most heinous offences should be so classified.[77] *Thomas* argues to the contrary, saying that factors such as provocation and diminished responsibility vary in degrees, so it is artificial and arbitrary to draw a line between provocations which operate as qualified defences and provocations which simply go to mitigation.[78] He maintains that such varying degrees are better left for consideration to the sentencing stage where a judge will decide their strength rather than at the trial stage where a jury will make the decisions. *Ashworth* comments, however, that *Thomas'* views "ignore the argument that juries and the wider public expect the grosser forms of mitigation (e.g. provocation) to be reflected in a lesser verdict than murder".[79]

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75 See Meng Heong Yeo, *supra*, and *Woods, supra*. The US has encountered confusion promoted by the multiplicity of sometimes overlapping definitions.

76 Woods, *op cit*, p163.

77 Ashworth, *op cit*, p82.

78 See paragraph 112B of the Select Committee's Report.

79 *Op cit*, p83.

10.55 Another objection to unrestricted discretion is that it would permit the possibility of sentencers prescribing sentences of thirty, forty of even fifty years, if American experience is anything to go by. *Glanville Williams* remarks:

> "Murders often arouse strong emotion, and if a judge were allowed to sentence to any fixed term he might sometimes specify a very long one, such as 30 or 40 years. If an offender has to be kept in prison for a long time it is probably better that the sentence should be indeterminate, in order that it can be reviewed periodically in a state of detachment".[80]

(d) Restricted sentencing discretion

10.56 A fourth option, adopted in New South Wales, is to provide sentencers with restricted discretion in the sentencing of murderers. The New South Wales reforms retain the murder/manslaughter distinction and current definitions thereof; retain the maximum penalty of penal servitude for life as the sentencing response which the judge will initially consider; allow restricted discretion to mitigate the penalty in appropriate circumstances; but do not permit the imposition of extraordinarily long sentences.[81]

Minor Offences

10.57 Finally, it should be observed that the objections to mandatory sentences do not carry the same weight in courts of summary jurisdiction (the District Court), since they deal with minor offences. Since minor offences carry much slighter consequences upon conviction than serious crimes, the court requires much less discretion to allow for the particular characteristics of the offender and the offence. Consequently there may be a significant gain in efficiency of enforcement of the law in the case of certain minor offences if the use of mandatory sentences were more widespread. The most obvious example of the effective application of a mandatory sentence for minor offences is the "parking ticket" scheme. The benefits of such an efficient system have been shared in England with over 250 other road traffic offences by Part III of the *Transport Act, 1982.*[82] Also in England, the case for mandatory sentences in minor offences is enhanced by the adoption of the Magistrates' Association's list of *Suggestions for Traffic Offence Penalties,* which, although they lack legislative force, set down a scale of fines for different motoring offences by average offenders of average means.[83] Whilst there does not appear to be any similar type of provision in Irish legislation, it would appear that there is a tendency for District Judges to establish their own rules of thumb in the absence of a fixed legal scale for the imposition of sentence for some minor offences. Naturally, not all summary offences are necessarily suitable for the application of mandatory scales of sentence, but often there is a good case for doing so.

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80 Glanville Williams, *Textbook of Criminal Law, (1978)*, p206.
81 Woods, *op cit*, p164.
82 See Turner, *The New Fixed Penalty System* [1986] Crim LR 782.
83 Ashworth, *Devising Sentencing Guidelines for England in Sentencing Reform Pease & Wasik*(ed.) (1986), p83.

10.58 Because of the generally low level of available fines, the sentencing discretion of District Judges is severely restricted at the moment and much could be achieved immediately by implementing the recommendations in the Commission's *Report on the Indexation of Fines*[84] and bringing fines up to date.

Provisional Conclusions

10.59 We have studied already in this paper the various efforts in other jurisdictions to combine reason and fairness in a sentencing policy. In general, the favoured solution is a "just deserts" approach which takes account of both aggravating and mitigating factors. The mandatory sentence is a blunt instrument which could not be tolerated in any sentencing scheme with the slightest sensitivity to a "just deserts" approach.

10.60 No doubt, the mandatory sentence has great emotional appeal to the public, as evidenced by the recent debate in the British Parliament.[85] But the public need little or no convincing that some murders or rapes are more serious than others. They would or should also be aware of the unreality of the mandatory life sentence for murder in the light of the Minister for Justice's power and practice of earlier release.

10.61 In spite of this awareness, there is continued support for mandatory or minimum sentences as we have seen in the reaction to recent sentences for rape and sexual abuse. This is fuelled by distrust of judges whose sentencing practice is perceived to be preoccupied to such an extent with mitigating factors that the "just deserts" element, merited in the light of the offences committed, is significantly displaced in the sentences ultimately imposed. This is a particularly galling perception for rape victims who undergo the impersonal ordeal of a rape trial in order to ensure that rapists are seen to get their "just deserts". The continuing existence of this perception only goes to underline the importance of securing the primacy of the "just deserts" approach by statute, with due regard for mitigating factors, at the heart of a new sentencing scheme and of supporting this approach by giving the prosecution the right of appeal against inadequate sentences.

10.62 *We provisionally recommend the abolition of mandatory sentences for indictable offences.*

10.63 *We provisionally recommend that the question of mandatory sentences for minor crimes be examined in more detail with a view to improving the efficiency of the administration of justice in the District Court.*

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84 LRC 37-1991.

85 See para 10.40 *et seq*, *supra* (The English Debate).

CHAPTER 11: SENTENCING PROCEDURE AND FACT-FINDING

11.1 Generally speaking, the greater the restriction which is placed on judicial discretion in sentencing, then the greater is the importance of reliable fact-finding. Current sentencing practice is quite informal or flexible. Particular facts rarely have a formal and predictable sentencing consequence. Under a guidelines system, on the other hand, the resolution of disputed sentencing factors will often have a definite and possibly quite substantial impact on the sentence. Greater formality than presently exists could be expected were a more coherent scheme to be adopted.

11.2 The US Sentencing Commission gives as an example the rule that an offender who causes serious bodily injury in the course of a robbery should receive an upward severity adjustment of 4 levels.[1] The sentencing process would be undermined if the 4-level adjustment were made when bodily injury was not serious; or if it was serious, but the adjustment was ignored.[2]

11.3 The requirements of rigorous and definitive fact-finding procedures must be balanced against the countervailing consideration of workability and administrative efficiency ie. a compromise must be sought between the individual's and the government's interest.[3]

11.4 A jury, in determining guilt or innocence, may be presented with many complex factual issues, but ultimately, a relatively small number may suffice to be resolved to support conviction. But sentencing can require attention to many more, discrete factual issues, especially in a more structured system, so that a

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1 See Guidelines, *op cit*, s2B3.1(b)(3).

2 Supplementary Report, *op cit*, at p45. See generally Note, *How Unreliable Factfinding can undermine Sentencing Guidelines* (1988) 95 Yale LJ 1258.

3 See e.g. *US v Lee*, No 86-1346 (2d Cir, 1987).

fact-finding process for sentencing decisions which had all the attributes of a formal trial could consume many times the resources devoted to the resolution of guilt or innocence.[4]

11.5 Some state guidelines systems seek to evade this problem by permitting very few factual elements to affect the sentence, basing it almost entirely on the literal offence of conviction. However, a superficial uniformity is thereby achieved only at the price of substantively inappropriate sentences in far too many cases. Nonetheless, for this reason (as well as that of complexity of calculation, and the invitation to disparity of having a surfeit of relevant variables), the US Commission tried to focus on a relatively manageable number of frequently-occurring factors. The sentencing factors also tend to be those closely tied to the elements of the offence (e.g. nature of injury, amount of loss) which, as well as being linked to just deserts notions of culpability, also help ensure that evidence relating to them will be adduced in the event of a trial.

11.6 A second feature of the US approach is the provision for factual stipulations to be reached by the parties, subject to court supervision - stipulations must be accurate and not misleading, and may not omit or misstate facts. All stipulations are subject to review by the sentencing judge, who will have a *pre-sentence report* against which to check its accuracy and reasonableness.[5] This should, hopefully, limit recourse to *fact-bargaining* by the parties.[6]

11.7 In any case, the court is expected to place primary reliance on the pre-sentence report.[7] Each party must indicate in advance of the sentencing hearing its position with respect to all relevant sentencing factors.[8] This helps frame disputed issues for resolution by the court. A pre-hearing conference is also permissible to further this aim.

11.8 The US Commission did not develop a set of procedural rules for dealing with issues which remain in dispute - these were left for development by sentencing courts. Some of the issues which will arise, whether or not a guidelines scheme is adopted, include: When is a sentencing factor reasonably in dispute? To what extent should the formal rules of evidence apply to exclude the kinds of evidence which may be introduced? Which party bears the burden of persuasion (i.e. is it sufficient to prove the asserted factor by a preponderance of the evidence or is a higher degree of certainty required)?[9]

11.9 In Canada, on the contrary, a legislative provision of sentencing rules and procedures has been favoured. Both the Standing Committee on Justice and the

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4 Supplementary Report, *op cit.*

5 Supplementary Report, *op cit*, at p46. This approach is similar to that of the US Commission to plea-bargaining - the court retains a regulatory function.

6 See Coffee, *Hard Choice: Critical Trade-offs in the Implementation of Sentencing Reform through Guidelines* in Tonry & Zimring, *op cit*, 155 at p159. See Ch 12, *infra* (Plea Discussions and Agreements).

7 S6A1.1, Guidelines, *op cit.*

8 *Ibid*, s6A1.2.

9 Supplementary Report, *op cit*, at p47.

Canadian Sentencing Commission noted how sparse and unevenly applied were fact-finding rules governing the sentencing decision, compared to those in respect of the adjudication of guilt.[10] No mere re-enactment of the latter is intended, however. The considerations that apply in protecting the rights of a person presumed to be innocent, that are relevant to the conduct of a trial, will not necessarily apply to the conduct of a sentencing hearing.[11] But the offender is still acknowledged to have important procedural rights, and the public has an interest in the sentence imposed complying with the statement of the purpose and principles of sentencing. Therefore, the Canadian Federal Government has proposed a Code of Evidence and Procedure for Sentencing. This will give the offender a right to speak to sentence (failure to offer which can invalidate the sentence).[12]

11.10 Rules are also set out regarding the burden of proof and the leading of evidence at the sentencing hearing. Both the prosecution and the defence will be asked for submissions on the facts relevant to the sentence, and if disputed, the court is to hear evidence.[13] The party adducing such facts must prove their existence beyond a reasonable doubt - a standard of proof which may seem too high to those concerned with the administrative burden of a sentencing hearing,[14] though it appears to be that also prevailing in Ireland.

11.11 At the same time, the proposed Code is quite lax in allowing (though not, apparently, compelling) the court to accept as proved any facts agreed upon by the prosecutor and the offender.[15] This may allow the sort of unsupervised fact-bargaining which is sought to be prevented by the more inquisitorial approach of the US Federal Guidelines. The provision in the same sub-section for the acceptance as proved of all facts essential to the finding of guilt seems unexceptionable. A problem remains, of course, where a jury returns a verdict of guilt whose factual basis is ambiguous.[16] The present disapproval of questioning the jury after its verdict seems justified, but the putting of questions to the jury when it retires to consider its verdict may have some merit.[17] If such a course is adopted, care should be taken to ensure that the jury is alive to the fact that disagreement on the answer to such questions need not preclude a verdict of guilt.

11.12 In general, it is thought that the provision of rules of procedure would be useful in this jurisdiction, as there is little judicial authority to guide judges.[18] These might be a little more comprehensive than those proposed in Canada. In particular, an indication of the degree of applicability, at this stage, of restrictive

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10 Standing Committee Recommendation 37; Canadian Sentencing Commission Recommendations 12.1-12.12.
11 *Sentencing: Directions for Reform*, at p12.
12 Proposed Code, s7(1) reproduced in Appendix C, *infra*. There remains a danger of merely formulaic invocation of the legislated principles.
13 Proposed Code, s7(2).
14 *Ibid*, s8(1).
15 *Ibid*, s8(2).
16 See para 1.17, *supra* (On a Plea of Not Guilty).
17 See *R v Frankum* (1983) 5 Cr App R (S) 59.
18 See paras 1.11 *et seq*, *supra* (The Sentencing Hearing).

rules of evidence (e.g. re: hearsay, corroboration, etc.) would be beneficial, as there is little precedent on the matter.

11.13 The Australian Law Reform Commission notes that in respect of facts considered relevant by the court after conviction, the rules of admissibility are not applied strictly by sentencing courts to evidence adduced to prove those facts.[19] To apply such rules, it is suggested, would transform the sentencing hearing into an adversarial proceeding, with increased costs and delays. It might also exclude some useful evidence eg. of remorse, or that the offence was out of character. On the other hand, the Commission is alive to the possibility of decisions being based on inaccurate or unfairly prejudicial material, but ultimately does not recommend the imposition in all cases of exclusionary evidentiary rules where facts relevant to sentence are in dispute.[20] "The reasons for requiring strict proof, by admissible evidence, of all relevant facts not admitted by the other party, do not apply to the sentencing hearing."[21]

11.14 The Commission is of the view that if a particular factual dispute assumes specific significance, the court's findings should be based on strict proof. It should be for the Court to determine whether a particular fact falls into this category, either on application or of its own motion. In all other instances, of course, decisions as to evidence would still have to be made rationally and fairly.[22]

11.15 In respect of the burden of proof, the approach, generally adopted in Australia, is that "any dispute as to matters beyond the essential ingredients of the offence admitted by the plea must be resolved by ordinary legal principles, including resolving relevant doubt in favour of the accused."[23] If there is a dispute as to a fact crucial to the severity of the offence, the standard of proof may be beyond reasonable doubt. Facts of less significance may require a correspondingly lower level of proof. This position is summed up by the Victorian Supreme Court in *R v Chamberlain*:

> "It follows that when forming his own view of the facts for the purpose of passing sentence a trial judge cannot be required to be satisfied beyond a reasonable doubt of every fact which he considers relevant. To require a judge to be satisfied beyond reasonable doubt of every relevant fact might lead in some cases to quite undue weight being given to self-serving statements offered by an accused during interrogation or evidence. Moreover, a judge may have to sentence an accused where he does not personally agree with the verdict of the jury. On the other hand, to allow the finding of fact which is critical to the determination of the sentence to be imposed upon a basis that admits of the existence of a reasonable doubt about the existence of that fact would plainly be

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19 ALRC Report No 44, *Sentencing* at p98.
20 *Ibid*, at pp99-100. Cf ALRC Discussion Paper No 29, *Sentencing Procedure*, at paras 79, 87, 89, 90-97.
21 ALRC Report No 44, *op cit*, at p100.
22 *Ibid.*
23 *R v O'Neill* [1979] 2 NSWLR 582 at p588, *per* Moffitt CJ.

unfair. Between those two extremes a large number of possibilities exist."[24]

11.16 The Australian Law Reform Commission makes a proposal similar to that for evidentiary rules: that this "proper balance between flexibility and the need, in some circumstances, to prove important and significant facts to a higher standard of proof" be maintained, with the judge determining which facts fall into the latter category. It recommends that legislation in the area should do no more than require that the court be *satisfied* of the relevant facts.[25]

11.17 There is no clear Irish authority on how factual disputes should be resolved at the sentencing hearing. English precedent suggests that the judge may either reach a conclusion based on counsel's submissions, or hear evidence from both sides (with witnesses, cross-examination, etc.). In the latter case, proof beyond reasonable doubt appears to be necessary, and restrictive evidentiary rules seem to apply. The position is less clear in the former case, but the English decisions state that the benefit of any doubt must be given to the defence.[26]

11.18 If this is indeed the applicable law in Ireland, it may be comparable to the Australian position - save that different procedures as well as (or instead of) differing standards of proof or evidentiary rules apply in respect of factual disputes of greater or less significance. For the moment, we reserve judgment on the desirability of such an arrangement.

11.19 *We provisionally recommend the adoption of a code of procedure and evidence for the sentencing hearing, on Canadian lines.*

11.20 *We provisionally recommend judicial scrutiny of the accuracy and completeness of evidence agreed by both parties at the sentencing hearing, on US lines.*

11.21 *We seek views on the desirability of applying restrictive and exclusionary rules of evidence to factual disputes at the sentencing hearing.*

11.22 *We seek views on the most appropriate standard of proof for the resolution of factual disputes at the sentencing hearing.*

11.23 There is considerable debate on two issues of evidence and procedure:

(i) the role of prosecuting counsel;

(ii) the role of the victim.

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24 [1983] 2 VR 511, p514.
25 ALRC Report No 44, *op cit*, at p101.
26 See discussion at paras 1.15 (On a Plea of Guilty) and 1.16 (Standard of Proof), *supra*.

(i) The role of prosecuting counsel

11.24 As was earlier adverted to, prosecuting counsel must not attempt by advocacy to influence the court in regard to sentence in this jurisdiction,[27] and there is English authority, motivated by a similar rule, requiring the prosecution to take care not to depart from factual stipulations when giving evidence of character and antecedents.[28]

11.25 *Zellick* has identified five possible roles for prosecuting counsel in the sentencing process, of which that presently prevailing is the most minimal:

(i) that he or she can make objective remarks about the facts of the case, and the accused's previous record.[29]

The others are:

(ii) making submissions as to the relevant sentencing principles, norms and the *tariff*;

(iii) calling for a specific *type* of sentence;

(iv) the intimation of a *range* within a given sentence; and

(v) the recommendation of a particular *quantum* of sentence.[30]

11.26 There are a number of arguments for the extension of the prosecutorial role into at least some of the fields described immediately above.

(a) The increasing complexity of the sentencing system requires full and thorough argument, and an extension of the adversarial system to the sentencing stage.[31]

(b) "The State, through the prosecutor has a very real interest to protect through the trial, conviction and sentence. It is not the function of the judge to represent the State or to reflect community desires in particular cases. Rather, such interests can best be put forward by the prosecutor."[32] A counter argument is that once the accused has been convicted, the judge is no longer a neutral umpire: he or she personifies the public and *is* the public interest.[33]

(c) It may be that by holding judges to appropriate sentences consistent with the tariff and the principles, fewer defendants would seek to appeal

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27 Rule 9.20, Code of Conduct for the Bar of Ireland, discussed at para 1.21 *et seq*, *supra* (Character).
28 See *R v van Pelz*, [1966] 2 ALER 922.
29 *The Role of Prosecuting Counsel in Sentencing* [1979] Crim LR 483, at p493.
30 *Ibid*, at pp493-494.
31 *Ibid*, at p494.
32 Law Reform Commission of Canada *Studies on Sentencing* (1974), at pp21-22.
33 Zellick, *op cit*, at p496.

against sentence.[34]

(d) If the prosecution can appear at a defendant's appeal against sentence, is it not incongruous to silence the prosecution at the trial in respect of the same matter.[35] It should be noted, however, that in this jurisdiction (as in England) the State does not stand over or defend sentences on appeal as it would in respect of a conviction. Its role at this stage is not dissimilar to that it plays at the initial sentencing hearing.[36]

11.27 Considerable arguments can also be mustered against such an extension of the prosecutorial role.

(a) The profundity of counsel's knowledge of criminology and penology may be questioned. It may be presumed, however, that such knowledge would be acquired if necessary. In any event, what is envisaged, it is sometimes said, is a process of ascertaining the relevant *legal* principles and criteria of sentencing together with any relevant guidelines, and that there should be an open discussion in which arguments can be tested and probed, just as precedes other types of judicial decision.[37]

(b) Such an extended role might detract from counsel's function, which is not to win at all costs, but to see that justice is done. Even if counsel were not permitted actually to recommend a specific quantum of sentence, this would be difficult to prevent in practice if prosecutors could contribute more generally to the sentencing decision. Against this, it is said that the role of prosecuting counsel as an impartial administrator of justice is not very credible - that he or she is there to secure a conviction, even if there are limits on the lengths to which he or she may go to obtain it. In reality, the prosecutor is already intimately connected with matters of "low visibility" which have a bearing on the sentence, such as selection of charges, determining mode of trial and engaging in plea negotiations.[38] *Zellick* adds that "to allow prosecutors this role would actually strengthen the appearance of the impartiality of *judges*, inasmuch as they would seem to be acting more within a prescribed framework and less in a capricious way or purely on their own initiative.[39]

(c) An extended role in the sentencing hearing would strengthen the prosecution's hand in striking a bargain with the accused - far from articulating the public interest and dispassionately advising the judge from a position of enterprise, these aims might be subverted, "putting

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34 *Ibid.*
35 *Ibid*, at p497.
36 See further the discussion at Ch 14, *infra* (Prosecution Appeal Against Sentence). If permitted, it would make greater prosecuting involvement at the initial sentencing stage seem more logical.
37 *Ibid*, at pp497-498.
38 *Ibid*, at p499.
39 *Ibid*, at p500.

both professional ethics and the traditional conception of the prosecutor's role to a stern test."[40] Zellick suggests that this aims at the wrong target. "If objection is taken to plea bargaining, control plea bargaining; and if joint recommendations [by prosecution and defence] are deprecated, forbid them."[41]

(d) It is feared in some quarters that such a change would have the effect of increasing sentence lengths. However, quite the opposite view is also sometimes expressed: that at a time when recourse to imprisonment, and the length of prison sentences, are sought to be reduced, the prosecutor may have a valuable part to play.

> "Since the executive cannot directly influence the judiciary, and even the legislature cannot effectively reduce sentences without at the same time unduly limiting the courts' discretion, counsel with appropriate instructions could perform an invaluable educative role, indoctrinating the judges from a unique vantage point. A judge who was minded to pass a sentence in excess of that urged by crown counsel might at least think twice before doing so and running a risk of being successfully appealed".[42]

11.28 Evidence of this is afforded by the recent decision of the Northern Ireland Court of Appeal in *R v Orr*.[43] Hutton LCJ, remarked, reducing a sentence in pursuance of two English guideline judgments, that these and other authorities had not been cited to the trial judge:

> "If he had been assisted in this regard by counsel his Lordship had no doubt that a sentence in the range of three years [rather than the four imposed] would have been imposed. Whilst it was usually inappropriate for counsel to make submissions to a judge as to the length of sentence which he should impose in respect of a common type of offence which comes before him frequently, in an unusual case counsel should carry out research to see whether the Court of Appeal in Northern Ireland or in England had laid down guidelines, and if such guidelines have been laid down counsel should refer the judge to those decisions before he passed sentence."[44]

11.29 Whether this decision will prompt a further relaxation of the prohibition on a wider prosecutorial role in sentencing remains to be seen, though it is quite cautious in its tone.

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40 Ashworth *Prosecution and Procedure in Criminal Justice* [1979] Crim LR 480 at p488.

41 *Op cit*, at p501. "Sentence - bargaining" is not thought to be acceptable, as it is inconsistent with judicial sentencing discretion and is not susceptible to effective judicial supervision. For this reason as well as others, it is thought undesirable that prosecution counsel be permitted to recommend specific sentences.

42 *Ibid.*

43 Irish Times, 11th February 1991.

44 *Ibid.* Presumably this task would fall largely on the shoulders of prosecution counsel, though it opens up the possibility of debate between counsel for both sides on the precedents.

11.30 The jurisdictions in Ireland and Britain are quite unusual in their maintenance of this prohibition. Submissions on sentence are the norm in the USA, and are permitted in Canada.[45] The Australian Law Reform Commission has recommended a more active role in the sentencing hearing for prosecution counsel, which it believes can be achieved without compromising their duties to be fair and to assist the court.[46] Prosecution submissions on sentence seem also to be common in civil jurisdictions on the continent, and to be an important aid to judges.[47]

11.31 With the present incoherent state of sentencing principles, an extension of the prosecution's role in the sentencing process seems unlikely to be helpful. If, however, a set of principles were adopted like those proposed elsewhere in this paper, the sentencing decision could more legitimately be considered a domain where legal argument would be constructive. Prosecution and defence could then seek to promote the proper interpretation of sentencing norms and their attendant jurisprudence. Precisely this point is made by the Victorian Sentencing Committee.[48] Advocating the introduction of prosecution appeals of sentence, it remarks as follows:

> "It seems quite absurd that a prosecutor should sit quietly and not make any submissions during the course of a court considering the appropriate sentence to be passed in a particular case, and then turn around and criticise the judge on appeal for failing to take account of various factors or failing to give adequate weight to relevant factors."[49]

11.32 It is not envisaged by that Committee, nor by this Paper, that particular sentences be sought; rather, an opinion might be offered on the *range* of sentences or nature of the penalty. Prosecutors would assist the court to ensure that the principles of sentencing provided for in legislation were adhered to, by bringing to its attention any relevant facts (as at present), any relevant principles, and any relevant information about sentences passed by other courts.[50]

We provisionally recommend that prosecution counsel be permitted at the sentencing stage to make submissions to the court not just on the facts of the case, but also on relevant legal principles and precedents. We do not recommend that he or she make specific submissions on the appropriateness of a particular sentence.

(ii) The role of the victim: mandatory victim impact statements

11.33 Throughout the last decade there has been a growing interest in how victims of crime are treated by the criminal justice system. Many of the demands for improvement are couched in the language of victims' rights. Historically, in

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45 See e.g. s7(2)(a), Proposed Code, though the practice is already in place - see e.g. Zellick, *op cit*, at p495.
46 ALRC Report No 44, *Sentencing*, at p105.
47 See Ch 8, *supra*. (Disparity in Continental Europe).
48 Report of 1988, Volume II.
49 *Ibid*, at p624. See Ch 14, *infra* (Prosecution Appeals Against Sentence).
50 *Ibid*.

for improvement are couched in the language of victims' rights. Historically, in common law systems compensation or restitution have not been seen as functions of the criminal law but of the civil law, therefore there is no coherent body of law on victims' rights in the criminal law because the criminal law has not been analysed in those terms. However, it has been frequently observed that the criminal justice system revolves around the offender, that the concerns of victims of crime have been largely ignored and that there is no official recognition of the victim's interest in the prosecution of a defendant.

11.34 These arguments have been made not just by victim support groups and academic lawyers but also by the United States Congress, state legislatures and the Supreme Court.[51] What maybe seen as evidence of recognition of the concept of victims' rights in Ireland was the request by the trial judge in *The People (D.P.P.) v. Thornberry*[52] for a victim impact statement prior to sentencing. Further recognition is evidenced by section 5 of the recently introduced Criminal Justice Bill, 1992.

11.35 Three important issues concerning victims in the criminal justice system have emerged:

> First, the issue of the victim's right to information about the progress of the case. It has been argued that victims are not always paid the fundamental courtesy by police and prosecutors of being informed of significant events and developments in the prosecution of those cases in which they have a personal and legitimate interest in the outcome.
>
> Second, the issue of victim's right to compensation, adequate orders for restitution by the courts and the right to appropriate support services.
>
> Third, there is the role, if any, of victims in the sentencing process. The fundamental question here is: to what extent should the impact of a crime on a victim be taken into account when sentencing the offender?

It is the third issue which we will consider here.

11.36 Formalized victim participation in sentencing is usually through the procedure known as the victim impact statement. Moves have been made in many jurisdictions to introduce this procedure. For example, since 1978, many US states have implemented a wide range of legislation that allows victims a more active role in judicial proceedings. Congress mandated the inclusion of the victim impact statement in federal pre-sentence reports. The relevant section states that the pre-sentence report shall contain:

> (c) information concerning any harm, including financial social,

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51 Talbert, *The Relevance of Victim Impact Statements to the Criminal Sentencing Decision*, 36 U.C.L.A. L. Rev. (1988) 199.

52 3 Frewen 141.

psychological and physical harm, done to or loss suffered by any victim of the offence; and

(d) any other information that may aid the court in sentencing including the restitution needs of any victim of the offence.

At least 36 states have *adopted this provision* in state legislation. Several other states have introduced similar legislation.

11.37 The various kinds of legislation underpinning victim impact statements differ in two major ways: (a) in the type of information allowed for consideration and (b) in the type of victim participation.

The type of information allowed for consideration

11.38 Four types of information are allowed: (i) the circumstances and manner of the crime (ii) the identity and characteristics of the victim (iii) the effects of the crime on the victim and the victim's family and (iv) the opinion of the victim or the victim's family opinion of the defendant and of the appropriate sentence. The last three form the core of victim participation at sentencing, as the first type of information is normally provided during the trial phase. Advocates of victim participation tend to define the 'circumstances of the crime' somewhat more broadly than do opponents. In general such evidence is similar to that provided by an ordinary witness and thus does not require new legislation.

11.39 With regard to the victim's identity and characteristics, most victim impact statement legislation requires *the victim's identity* to be included in the statement, but vary in how much additional information is required. Specific characteristics that render the victim particularly vulnerable to the defendant, such as age or handicap, or being in a dependant role in relation to the defendant might be relevant. Some jurisdictions allow information on the victim's background but courts have warned that this might lead to the judge and jury basing their decision unduly on the victim's 'social worth'. Thus, victim impact statements should exclude information going beyond the victim's identity unless it clearly establishes the circumstance of the crime, or is relevant to an aggravating factor.

11.40 With regard to the level of victim harm, the critical issue here is how victim harm should relate to punishment, which in turn raises the question as to whether the consequences of a crime should affect sentencing at all. One view is that the consequences should effect the sentence. Others argue that it is the defendant's frame of mind, or intention that determines guilt and responsibility. For example, a homicide could be intentional, reckless, negligent or innocent. In each case, the harm caused to the victim is the same, but the penal consequences will be different in each case.

11.41 One approach is to ask whether the defendant could reasonably expect such harm to occur as a consequence of his/her acts. Such a question very often

harm suffered by a victim is an unexpected consequence? For example, the 'commonsense' view up until very recently, was that victims of crime 'got over it'. This was, and to some extent is, particularly evident in cases of child sexual abuse since the 'commonsense' view was that children forget things that happen them. It was only by presenting evidence as to the long term negative emotional consequences of such crimes on victims that this 'commonsense' view was challenged.

11.42 With regard to the victim's opinion of the defendant and of what sentence should be handed down, this is undoubtedly the most controversial type of information; This aspect was rejected by the United Nations Victims' Charter in 1985. The rationale for this type of information is that it restores dignity to the victim by giving him/her a real say in what happens the offender. It could also act as a deterrent since the knowledge that a potential victim might to the smallest degree determine the severity of sentence could prevent much of the gratuitous violence and humiliation visited on victims in the course of the crime. It is hardly surprising that victim support groups might favour such a development, since the victim could reflect society's moral outrage at the small amount of attention given heretofore to the victim, who has been described as 'the forgotten link in the chain of justice'.[53]

11.43 However, there are a number of troublesome aspects to such information. It may divert sentencing from its primary object of determining the most appropriate sentence in accordance with the agreed goals of sentencing and towards satisfying the victim's personal wishes. It is also argued that it would introduce an unnecessary degree of personal conflict and tension into the proceedings.

The type of victim participation

11.44 Statutes vary considerably in the type of victim participation permitted. Some statutes require the inclusion of a victim's statement in the pre-sentence report only when the victim is willing to cooperate, while others allow the statement only when ordered by the sentencing court. If the defendant waives his/her right to a pre-sentence report, the victim's right to a statement is effectively nullified. Some allow the victim to write the statement and allow much latitude with regard to format, while others mandate that a probation officer should be responsible. As mentioned earlier, some statutes insist on objective measurement of harm. Some statutes allow the victim to speak at sentencing proceedings.

11.45 As we have seen, Section 5 of the *Criminal Justice Bill* introduced by the previous government made it mandatory for the court to "take into account", any affect (whether long term or otherwise) of the offence on the victim in determining the sentence. The Court could if necessary receive evidence or

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53 Martha Hoffman, Note, Victim Impact Statement, (1983) 10 Western St Univ L Rev 221, at 227.

determining the sentence. The Court could if necessary receive evidence or submissions concerning such "effect". We would hope this Paper will be published before the Dail debates the Bill or, if it lapses, any succeeding Bill and that it will assist the debate. A disadvantage, from the Commission's point of view, is not knowing exactly what the Government had in mind in certain instances. For example, in providing for "submissions", did the Government envisage separate legal representation for complainants? The Explanatory Memorandum is silent on this point.

Summary of the arguments in favour of mandatory victim impact statements

11.46 (i) *Victims' rights*: victim impact statements act as a formal recognition that victims have rights arising from their status as victims, and that society has a responsibility to protect its citizens. These rights include a role in the sentencing of the offender.

(ii) *Restoring confidence in the criminal justice system*: the victim can represent the wider community and increase public satisfaction with the law. Many people are extremely concerned at what they perceive to be the indifference of the courts to the suffering of victims. Furthermore, victims of crime who feel excluded from the trial process, may feel themselves to be mere instruments in the prosecution and may have their own confidence in the law shattered, and by extension, the confidence of a wider circle of family, friends and victims of the same type crime. As a consequence, there may be a general reluctance to report *such crimes* in the future.

(iii) *Psychological benefit to the victim*: providing victims the opportunity of significant participation in their own case is likely to make them understand better the nature of the proceedings and consequently to feel more satisfied with the outcome. Participation may also act as a kind of psychological catharsis and help the victim recover. What is more likely however, is that participation restores the victim's sense of control, which is usually the first casualty after a crime, and constitutes the core of the stress created.

(iv) Studies of victims show that, contrary to the fears of the opponents of victim participation they are not always motivated by vengeance. It is likely that there will be a wide variety of victim responses, and as the courts become familiar with individual variation, they will become more adept at judging what weight to attribute to the victim's response and at discriminating the probative from the prejudicial elements in the evidence.

(v) *Redressing the balance*: victim participation would introduce a sense of fairness to the criminal justice system, redressing the perceived imbalance created by the concentration of resources and attention upon offenders. This is not to argue that the balance should be tilted in favour of the victim, rather that the victim is allowed a voice and a role that reflects the importance of his/her role in the proceedings. 'This defendant oriented theme, nurtured and encouraged in the past several decades, is currently being tempered by a long-overdue concern for the economic and psychological outrage suffered by victims.'[54]

(vi) Victim participation does not imply moving away from or abandoning the idea that intention should be the basis of culpability. Rather it represents an expansion of intention by providing information on the circumstances of the crime. For example, the particular frailty of a victim may have been known to the offender before the crime was committed. A detailed account of the demeanour of the offender and the treatment of the victim during the crime may go a long way to challenging the offender's claim that he meant no harm to the victim, or that the impact was unforeseen.

(vii) Finally, as Ira Glasser, Executive Director of the American Civil Liberties Union has stated 'Victims do not benefit when the innocent are convicted'.[55] Victims do not undermine the safeguard for the defendant, but a victim's right ought to be considered and ought to be equal to those of the defendant in the sentencing part of the trial.

Summary of the arguments against mandatory victim impact statements

Unnecessary

11.47 (i) In any prosecution for an offence of violence, proof of the physical harm sustained by the victim is the very essence of the case to be proved. For example, in any prosecution for a non-fatal offence under the Offences Against the Person Act, 1861, the State must proof the actual bodily harm, the wound, the maiming, disfiguring or the nature of the disablement inflicted and suffered. Medical evidence would be given as a matter of course in all prosecutions for serious violence.

(ii) It should not be necessary, in 1993, to convince judges in every

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54 *Id.*

55 Keisel, *Crime and Punishment: Victim Rights Movement Presses Courts, Legislature*, 70 ABA J 25, 26 (Jan 1984).

case that, for example, child sexual abuse can have profound and lasting effects. The immediate effects of child abuse will be proved as a matter of evidence in each prosecution.

(iii) The occasional inadequate sentence would be better dealt with by prosecution appeal.

(iv) It should be left to individual judges to seek particular evidence of victim impact when it is necessary to do so, as is the practice of the moment.

(v) The objective is to produce a sentencing scheme which is coherent, balanced and well 'trimmed'. The Commission has provisionally recommended[56] that sentence be determined on a basis of just deserts and measured in proportion to the seriousness of the offending behaviour. The seriousness of the offending behaviour is to be measured, in turn, by reference *to the harm caused or risked by the offender* and the offender's culpability in committing the crime.

Again, the Commission has provisionally recommended[57] that in assessing the harm, culpability and circumstances which tend to aggravate an offence statutory provision be made that the sentencer shall give special consideration *inter alia* to exploitation of weak and defenceless victims, to exploitation of a position of confidence or trust and to *any other circumstances which increase the harm caused or risked by the offender.*

To provide in addition for mandatory victim impact statements would amount to statutory 'overkill'. An example of such 'overkill' was the provision made in s28 of the Misuse of Drugs Act, 1977 for compulsory medical and vocational reports on persons convicted of possession of drugs including possession for supply. In most cases these reports proved to be totally unnecessary and only served to postpone sentence. The section was amended by s14 of the Misuse of Drugs Act, 1984 to the effect that the procuring of such reports was left to the discretion of the Courts in appropriate cases.

Noting that victim impact statements may already be tendered in the sentencing hearing and their earlier recommendation that this position should continue, the Australian Law Reform Commission do not recommend any change in existing law which would make such statements mandatory generally or in specific circumstances.[58]

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56 Para. 4.109 *supra.*
57 Para. 5.119 *supra.*
58 Law Reform Commission of Australia, Report No 44, Sentencing [1988] para. 192.

Unfair

11.48 (i) It is not the function of the criminal justice system to compensate or vindicate victims as individuals or to secure their rights. Under the Constitution, prosecutions are brought specifically in the name of the people as a whole and the principal concern, in the trial of an offence, is for the rights of the accused. The rights of victims as witnesses cannot be ignored in the criminal process but the civil courts are the appropriate forum for the vindication of their personal rights. In addition, the rights of individuals injured by crime were secured up to some years ago by a scheme of statutory compensation, the variation of which scheme is greatly to be deplored.

(ii) The sentence of the accused should be determined in accordance with his subjective guilt and not by objective factors outside his contemplation. The Commission has consistently recommended the standard of subjective recklessness in its reports and it would be inconsistent with this approach to have sentence determined to any extent by objective, victim impact considerations outside the contemplation of the accused and not already covered by the relevant evidence in the case.[59]

The Victorian Sentencing Committee, referring to the criminal justice system in that state say:

> "it is simply incorrect to say that there is an imbalance between the rights of victims and the rights of offenders in the existing system. What exists is an approach by the law which takes an objective rather than subjective account of the impact of offences on victims. The necessity for such an objective assessment of impact on victims arises from the very nature of the criminal justice system itself, and in particular the underlying principles of what constitutes an act as criminal as opposed to a non-criminal act. The Committee reiterates it is the culpability of the offender as determined by his intent ... which determines the level of appropriate punishment, not simply the impact of the criminal act itself".[60]

(iii) Strictly speaking, one should not speak of a complainant as a victim of crime before an accused is convicted. However,

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59 Where death has resulted from careless driving, the fact that death has been caused should not be taken into account in determining the length of any period of disqualification to be imposed. *The Queen v Megaw*, Court of Appeal, Northern Ireland reported in Irish Times 1 Feb 1993.

60 Victorian Sentencing Committee Report [1988] para. 13.3.19.

although the contrary may be argued, the fact that an accused is convicted does not render admissible for the first time evidence of harm to the complainant, now victim, which was not admissible before conviction. The accused should only be given a sentence which is justly deserved by the particular accused for the particular offence charged, as provisionally recommended above. It is felt that the provision in section 5 of the Criminal Justice Bill 1992 for receiving evidence or submissions in respect of the effect of the offence on the victim, opens the door, at least, to victim participation and therefore to separate legal representation for victims. Referring to separate legal representation for complainants in its report on Rape,[61] the Commission was not satisfied:

> "that the complaints made as to the manner in which the present system operates are a sufficient ground for introducing so radical a change in the law as the extending of representation to a person who is not a party to the proceedings and whose interests do not necessarily coincide with the paramount objective of the trial, the ascertainment of the guilt or innocence of the accused".

(iv) *Procedural difficulties*: victim participation would introduce further complexity into the trial since the offender must be afforded the right to challenge the factual basis on which any escalation of penalties occurs. Disputes on the causes, extent and prognosis of injury or damage would increase the length of the sentencing process, would increase the demands on the courts' resources and prosecution resources and on the time of witnesses.

Conclusions

11.49 *As for the desirability of providing for mandatory victim impact statements, opinion in the Commission is at present divided. We would be glad to obtain as many views as possible on the subject before making our final recommendations.*

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61 LRC 24-1988 para. 42.

CHAPTER 12: PLEA DISCUSSIONS AND AGREEMENTS

12.1 It is probably a mistake to construct a model of sentencing for this, or most other common law jurisdictions, which assumes that it is after a trial that a conviction takes place. In the majority of cases in Ireland,[1] sentence is imposed subsequent to a plea of guilty by the defendant to at least some charges. While no verifiable figures exist, practitioners suggest that very many of these pleas are the result of negotiations with the prosecution - what is generally known as "plea-bargaining", but which will be described in this treatment of the subject by the more neutral terms "plea agreements" or "plea discussions".[2] They have been defined by the Canadian Law Reform Commission as "any agreement by the accused to plead guilty in return for the prosecutor's agreeing to take or refrain from taking a particular course of action."[3] In a recent article, *Gareth Williams* QC, Chairman of the Bar, describes two forms of plea-bargaining. "One is the acceptance by the prosecutor and sometimes the judge, of guilty pleas to offences less than those that have been or could be laid. The other is an arrangement by which the defendant knows what sentence is likely."[4]

12.2 The types of agreements which might be reached subsequent to such discussions in the various jurisdictions studied, include the following:

"A reduction in the charge to a lesser offence;

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1 Needham found that 69% of those charged with an indictable offence in Galway District Court pleaded guilty. (*The District Court - An Empirical Study of Criminal Jurisdiction* (1983), cited by the Whitaker Report, *op cit*, at p221). 61% of all defendants charged in the Dublin Circuit Court in 1981 pleaded guilty (*ibid*, at p226). It has been remarked that "[t]he main work of the Irish criminal courts consists of the processing of guilty pleas" (*ibid*, at p230).

2 However, plea bargains or plea discussions are not so much a feature of our system as they are elsewhere. Morris has remarked: "Plea bargaining is, of course, the main dispositive technique in our urban courts. It is the leading and distinctive characteristic of the American criminal justice system." (cited by Byrne, *Plea bargaining* (1988) 62 ALJ 799, at p800.

3 LRC Canada, *Plea Discussions and Agreements* (Working Paper 60, 1989), at p3.

4 *Bargains with best results* The Times, 3rd March 1992.

The withdrawal of other outstanding charges;

A promise not to institute or proceed with other possible charges;

An undertaking to list other offences on a schedule to be taken into account on sentence but which does not expose the accused person to the risk of a greater maximum penalty;

A reduction or withdrawal of charges in exchange for the accused person's testimony against the co-accused, or for information which might assist in the arrest or prosecution or other offenders;

A promise not to charge another person, particularly a friend or family member who might be peripherally involved in the offence;

A promise to proceed summarily rather than on indictment where the prosecution has such a choice;

An undertaking by the prosecution that it will not make submissions contrary to those put by the accused person in support of a particular type of penalty. In some cases this may involve the prosecution in expressly supporting submissions made by the accused person as to the appropriate penalty;[5]

An undertaking to have the matter listed for hearing at a time and place convenient to the accused person;

A promise that if a certain penalty is imposed the prosecution will not recommend that there should be an appeal against the inadequacy of the sentence;[6]

A promise to delete references to aggravating factual circumstances of the offence;[7]

A promise not to oppose release on bail pending the determination of the case."[8]

12.3 Also, *Boyle* has remarked that in Ireland there exists a structured feature of the courts system which constitutes "a form of statutory plea bargaining". Nearly all offences can be tried summarily if the defendant is willing to plead guilty, so that the restricted sentencing powers and wide jurisdictional competence of the District Court provide an inducement to enter such a plea.[9]

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5 This latter course is not really available in this jurisdiction; nor should it be even if the role of prosecuting counsel is reformed as recommended. It is with the non-involvement of the judge in the negotiation process.

6 This will only be possible if prosecution appeal against sentence is introduced.

7 This is peculiarly problematical.

8 Byrne, *op cit*, at p799.

9 Boyle, NESC Report No 77 (1984), at p208.

However, a District Judge must not deal with any indictable offence summarily unless he is satisfied it is a minor offence fit to be so tried.[10]

12.4 It is necessary for the success of the model of sentencing policy propounded in this paper that it be consistent with such of these practices as prevail in Ireland.

12.5 It is not uncommon for plea discussions to be viewed as an evil- improper, unjust, secretive, unfair and irrational - though most would accept them as necessary, given the existing strain on the trial capacity of our courts. But we concur with the Canadian Commission in its view that "it would be a mistake to dismiss plea negotiation as a distasteful practice made necessary only by the unhappy reality of an overburdened criminal justice system."[11] In particular, it should not be seen, on a theoretical level, as entirely unprincipled, as it embodies complementary principles of *efficiency* and *restraint*. Nor is efficiency characterised solely by expediency - it can also entail the goal of *accuracy*, which requires that any offence to which the accused pleads guilty be a realistic reflection of his or her criminal conduct (to the extent it can be proved).[12] Also, the principle of efficiency demands an acknowledgement that the concept of cost has moral and human (not just monetary) dimensions.[13]

12.6 *Byrne* summarises in more pragmatic terms some of the practical benefits conferred by plea agreements. For public agencies, they include the following:

> "Time and labour are saved;
>
> In serious cases, the expense of a jury trial is averted;
>
> The result is certain and may be preferable to the possibility of the accused person being acquitted of a number of charges or of a more serious charge;
>
> The higher the ratio of guilty pleas to contested cases, the less strain is imposed on court time. Put simply, guilty pleas reduce the congestion of the criminal lists, thus allowing contested cases to be heard earlier than they otherwise might be;
>
> In some cases, it may allow the investigating and prosecuting authorities to obtain information about other, often more serious offenders;
>
> It may be used to avoid the impact of provisions of the substantive criminal law which would be unjustifiably harsh in the circumstances of the case;

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10 *The State (McEvitt) v Delap* [1981] IR 125.
11 *Ibid*, at p8.
12 See Brannigan & Levy, *The Legal Framework of Plea Bargaining*, (1985) 25 Can J Criminology 399, at p407.
13 See Boyle, *Principles for Legal Procedure*, (1986) 5 Law and Philosophy 33, at pp45-50.

Witnesses, and particularly the victims of criminal offences, are not subjected to the ordeal and inconvenience of giving evidence."[14]

12.7 For the accused person, the advantages of a plea of guilty vary, but may include the following:

"The likely penalty is less than if the accused person were convicted of all charges or of a more serious charge;[15]

The case will be disposed of relatively quickly without the need to suffer the ordeal of a trial;

The speedy disposition of the case by a guilty plea will probably make it less likely that the case will attract publicity;

The accused person will not suffer the stigma of having a conviction recorded for the more serious offence or for a greater number of offences;

Where the accused person is paying for his or her legal representation, the costs incurred in proceedings where there is a plea of guilty are considerably less."[16]

12.8 A number of regulatory issues arise in respect of plea discussions, which will be dealt with below. First, however, two fundamental issues of policy need to be addressed. These concern the role of the courts in plea negotiations and the place of plea agreements in a "just deserts" system of sentencing.

12.9 Three models of judicial involvement in plea discussions and agreements will be discussed below. They are:

(i) full judicial involvement in the process of discussing and agreeing pleas and charges (and possibly even sentences);

(ii) judicial supervision in open court of the terms of plea agreements;

(iii) judicial indication, at the request of either defence or prosecution, of likely sentences for various charges, based on the evidence available.[17]

12.10 A fourth possible model is, of course, that of the abstention by the courts from any role at this stage, the situation which obtains at present. However, such

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14 *Op cit*, at p800.

15 Irish practice seems to support this conclusion (see the Whitaker Report, *op cit*, at p230).

16 *Ibid.*

17 We are grateful to Una Ní Raifeartaigh, Reid Professor of Criminal Law, Criminology & Penology at Trinity College, Dublin for suggesting these models.

is the importance of plea agreements to the ultimate sentencing stage, and the importance of likely sentence to the conduct of plea discussions, that the establishment of some system of interaction between judiciary, prosecution and defence to ensure that all parties are fully informed and that policies pursued at the two stages are consistent should be considered.

12.11 At the moment, judges do not play a part in plea discussions in Ireland. The Victorian Court of Criminal Appeal spoke, in *R v Marshall* of a form of "plea bargaining" in which "counsel for an accused and counsel for the Crown attend the judge in his private chambers and discuss an arrangement whereby, upon the judge indicating the probable sentence and the Crown indicating that it will accept a plea of guilty to a particular charge, the accused through counsel indicates that he or she will plead guilty".[18] This it strenuously opposed:

> "Anything which suggests an arrangement in private between a judge and counsel in relation to the plea to be made or the sentence to be imposed must be studiously avoided. It is objectionable because it does not take place in public, it excludes the person most vitally concerned, namely the accused, it is embarrassing to the Crown and it puts the judge in a false position which can only serve to weaken public confidence in the administration of justice."[19]

12.12 This statement seems to take no account of the fact that counsel for the accused should be assumed to act in his or her client's interest. Such meetings between counsel and judge are common in US jurisdictions, and an argument has been made for permitting them in this jurisdiction. It has been pointed out that one of the perils of plea agreements for prosecutors is that judges often impose quite low sentences even for the lesser charge to which a defendant pleads guilty, even though the prosecution might expect that it be close to the maximum, given the circumstances of the case. One means of avoiding this would be to include the judge in the negotiation process.

12.13 Certainly, if plea agreements are to be made which are in all respects justifiable, it is to be hoped that they would not be undermined by sentencing judges. But this can probably be achieved by less radical means. The arguments against actual judicial participation in discussions are considerable. One is that suggested by *Ferguson* and *Roberts*, that such participation is inconsistent with the judge's role as impartial adjudicator.[20] Besides impairing the court's image as a dispassionate overseer, judicial plea negotiation may, in practice, cloud the perception of the presumption of innocence in any trial which might follow the breakdown of negotiations, in which the accused had indicated willingness to plead guilty.

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18 [1981] VR 725, at p732.

19 *Ibid.*

20 See Ferguson and Roberts, *Plea Bargaining: Directions for Canadian Reform*, (1974) 52 Can B Rev 497; See also Clark, *The Public Prosecutor and Plea Bargaining*, (1986) 60 ALJ 199.

12.14 Another reason not to adopt such a procedure is that judicial negotiation may amount to an improper inducement for accused persons to plead guilty.[21] Given the unequal relationship between the accused and the trial judge, the procedure might exert pressure on an accused to plead guilty rather than be tried by a judge whose suggested agreement he or she has rebuffed.[22] It is highly improbable that an independent judiciary would take such an active role in the proceedings as would give rise to pressure on the accused. Again, it would be the duty and role of counsel for the accused to divert such pressure from his or her client.

12.15 *Byrne* adds that it is preferable that plea agreements should not bind or be seen to bind the court in the determination of the penalty for the offence.[23] We believe, that it is desirable that such agreements be observed by the courts.

12.16 One means of reaching a plea agreement with a good chance of observance by the court is to seek in advance a "sentence indication" by the prospective trial judge. This is advocated by *Byrne*, who says that "[r]ather than being seen as an inducement to a plea of guilty, this procedure can fairly be described as affording the accused person the opportunity to make a more informed decision as to the plea to be entered."[24] He suggests that the court be bound by the indication given unless the facts of the case prove to be materially different to those initially outlined to it. Such an approach would commend itself to us. However, it was disapproved of by the Victorian Court of Criminal Appeal in *Marshall:*

> "If a judge is asked to give an indication of the sentence which is likely to be imposed following a plea of guilty he is likely to feel inhibited from subsequently passing a more severe sentence. If he succumbed to the inhibition, he would fail to pass the appropriate sentence. If he did pass a sentence more severe than he had previously indicated, the accused would undoubtedly, and in most cases with justification, harbour a feeling of injustice. He would in the colloquial sense have got more than he bargained for. Moreover, notwithstanding that the course could not preclude an appeal by the Attorney-General, an accused person who received from this court after an appeal a sentence greater or more severe than that previously indicated ... would also be justified in feeling that he had been unjustly treated."[25]

12.17 We are not convinced by this reasoning. So long as the judge is adequately informed of the evidence available in the case, by both sides, such changes of mind by the judge should be rare. It is unlikely that the prosecution would withhold material which might lead to an increase in the severity of the

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21 See Note, *Plea Bargaining and the Transformation of the Criminal Process*, (1979) 90 Harv L Rev 564, at pp583-585, discussed by the Canadian Sentencing Commission in its Report, at p425.

22 Canadian LRC, *Plea Discussions and Agreements*, at pp16-17.

23 Byrne, *op cit*, at p802.

24 *Ibid.*

25 [1981] VR 725, at p733.

predicted sentence; and if the accused is less than honest at this stage, and is later exposed, he or she can hardly complain if the actual sentence imposed is greater than that initially indicated.

12.18 It appears that the practice of defence counsel seeking an indication of likely sentence does exist in England, but only in exceptional cases. Prosecution counsel should be present during such a consultation.[26] However, the information which the judge may impart only relates to the *type* of sentence he is minded to give, and not to the actual quantum:

> "The judge should, subject to ... one exception ..., never indicate the sentence which he is minded to impose. A statement that on a plea of guilty he would impose one sentence but that on a conviction following a plea of not guilty he would impose a severer sentence, should never be made. This could be taken to be undue pressure on the accused, thus depriving him of that complete freedom of choice which is essential ...
>
> The only exception to this rule is that it should be permissible for a judge to say, if it be the case, that whatever happens, whether the accused pleads guilty or not guilty, the sentence will or will not take a particular form, eg. a probation order or a fine, or a custodial sentence.
>
> Finally, where any such discussion on sentence has taken place between judge and counsel, counsel for defence should disclose this to the accused and inform him of what took place."[27]

12.19 One judge of the State of Victoria, *Mr Justice Hampel*, has argued for a more detailed indication of intentions to be the norm, in these terms:

> "When considering whether to plead guilty and attempting to assess the likelihood of acquittal and the possible sentence on a plea of guilty or upon conviction, the accused is often in the dark about the very matter he wants most to know; what will be the likely end result of each course open to him. Yet, unlike in the case of predicting the result of a trial, there is a source of better information as to the likely result of a plea of guilty. That source is an informed sentencing judge."[28]

12.20 This proposal is in accordance with our own thinking on the matter. It might be remarked that the fears expressed above by the English Court of Criminal Appeal in *Turner*[29] would be of little substance if the normal practice of giving a discount after a plea were expressly acknowledged and if sentencing were normally a fairly predictable process. The Court's anxiety to preserve the confidentiality and uncertainty of sentencing until sentence is in fact handed

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26 Boyle & Allen, *op cit*, at p218.
27 English Court of Criminal Appeal in *R v Turner* [1970] 2 QB 321.
28 *Plea Bargaining: A Judge's Involvement* (1985) Law Institute Journal 1304, at p1305.
29 *Op cit.*

down is more consonant with the present incoherent "lottery" quality of sentencing in many jurisdictions.

12.21 An alternative means of ensuring judicial observance at the sentencing stage of the expectations of both parties to a plea agreement is to institutionalise judicial supervision of such agreements in advance of this stage.[30]

12.22 At present such supervision is not possible. The terms of plea agreements are not publicised, and the trial judge is not in a position to question the entry of a *nolle prosequi* by an independent public prosecutor in respect of the more serious charge in return for a plea to an offence of lesser gravity.[31]

12.23 This brings us to the second fundamental issue of policy which was mentioned at the outset -the place of plea agreements in a sentencing system with just deserts and proportionality of punishment as its objectives. There is a danger that agreements are, or will be, reached on the acceptance of a guilty plea to charges which do not fully reflect the seriousness of the offender's behaviour. This may be acceptable up to a point, first due to the other gains made thereby (in saving victims and witnesses the trauma of a trial, etc.[32]); and secondly because, dependent upon the quality of the State's evidence, the prosecution can, by assessment of probabilities, weigh the certainty of conviction of a lesser offence against the likelihood or possibility of acquittal or conviction of a more appropriate charge. Nonetheless, it is desirable that the ultimate offence of conviction be reasonably closely related to the conduct for which the defendant was responsible.

12.24 It is also necessary to consider the evidence which is made available by the prosecution at the sentencing stage. It appears that, in practice, evidence of offences other than that for which a guilty plea is accepted, or of aggravating circumstances which might suggest that a more serious charge would have been more appropriate, can be withheld by agreement.[33] This, indeed, is consistent with the maxims derived from the principle *nulla poena sine lege* which are outlined above, e.g. that where an offender pleads guilty to some counts, but not to others, he or she must be sentenced only on the charges in relation to which there has been a plea of guilty.[34]

12.25 As appears from the treatment of the Federal Guidelines, the position in the US is rather different. Factual stipulations agreed by the parties must be accurate and not misleading (and can be checked by the judge by comparing

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30 This, of course, is not really a means of binding the judge to the agreement; rather, it operates on the expectation that the judge will act in accordance with the presuppositions of an agreement which he or she has earlier approved of.

31 See Ryan & Magee, *op cit*, at p284. Discussion here centres on *charge* negotiations; even if the prosecution role in sentencing is expanded, it is not anticipated that counsel for the State will be involved in debates about the precise *sentence* to be imposed, which might then be the subject of bargaining.

32 *Ibid*, at p283.

33 See Ryan & Magee, *op cit*, at p285.

34 See para 1.41 *et seq*, *supra* (Determining the Factual Basis). See especially the judgment of Walsh J in *The People (AG) v O'Callaghan* [1966] IR 501.

them to the pre-sentence report).[35] However, this should not result in the imposition of sentences which breach the principle *nulla poena sine lege* because it attempts to ensure that the charges reflect the actual seriousness of any criminal conduct of which the State has evidence. In federal courts, the terms of all plea agreements are to be disclosed and justified. The trial judge reviews charge reduction agreements to ensure that, under the circumstances presented, an appropriate sentence may be imposed that will not undermine the purposes of sentencing.[36] In order for the prosecution to dismiss any charges, the *court* must find and state on the record that the remaining charges "adequately reflect the seriousness of the actual offence behaviour."[37]

12.26 In Canada, the trial judge may be justified in refusing to accept a plea of guilty to any offence other than the one initially charged.[38] In respect of plea agreements, it has been remarked, in *R v JEJ,* that "the discretionary powers of the Crown are not so 'unfettered' as to preclude the Court from exercising its inherent powers to control those powers should that be seen as necessary to prevent an abuse of the Court's process."[39] Nadeau J went on to disapprove the "systematised sham" of withholding evidence on matters which the Court might consider relevant to sentence:

> "Where the Crown intentionally suppresses circumstances which cannot but aggravate the seriousness of the offence, in order to persuade the court of the appropriateness of the sentence which he has as a result of negotiations with the accused's counsel agreed to advance as appropriate, he is in breach of his obligation both to the Court and to the community."[40]

12.27 However, there does not exist in Canada the same obligation on the prosecutor to justify a plea agreement as exists in the US, though such an innovation has been recommended.[41]

12.28 If a trial judge were to examine and accept a charge reduction pursuant to an agreement, and to approve of that agreement, it is then to be expected that in sentencing he or she will be mindful of the terms of that agreement. It is likely, in most cases, that a sentence close to the maximum available for the lesser charge will be warranted, with a discount, where appropriate, for a guilty plea. The defendant will still probably benefit from that maximum being lower than that for the more serious offence for which he or she might have been prosecuted.

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35 S6A1, 2 Guidelines; See Supplementary Report, *op cit*, at pp46-47.

36 *Ibid*, at p51; See S6B72(a), Guidelines.

37 See Rule 77(e)(4), Federal Rules of Criminal Procedure; see Ossorio, *Sausages and Sentencing: Federal Criminal Practice*, (1988) J Miss B 383, at p387.

38 See Criminal Code, s606(4).

39 (1987) 2 WCB (2d) 65 (Ontario Provincial Court), per Nadeau J, at p17 of the original judgment.

40 *Ibid*, at p18 of the original judgment. Though it is not proposed to permit prosecution sentence recommendations, the point made is equally applicable to any agreement to withhold evidence.

41 Canadian Sentencing Commission Report, *op cit.*

12.29 If such a procedure of judicial supervision were to be introduced, it would presumably be necessary to amend s12, *Criminal Justice (Administration) Act, 1924*, which was held by the Supreme Court in the *The State (Killian) v AG* to give the Attorney General an unreviewable power to enter a *nolle prosequi.*[42] A positive requirement that the existence and terms of any plea agreement be revealed for the scrutiny of the court, in advance of the entry of any *nolle prosequi* or guilty plea, would also be necessary.[43]

12.30 Such judicial supervision might reduce the degree to which plea agreements cause disparity in sentencing. Empirical research in jurisdictions where there is greater public awareness of the prevalence of plea negotiation tends to confirm that people are more likely to expect that a sentence imposed following a negotiated guilty plea and joint submission will be appropriate if they are assured that the presiding judge has been apprised, in open court, of the process by which the agreement was reached.[44] As well as being *perceived* as fair and rational, public scrutiny makes it more probable that the decisions of participants in the criminal trial process will *in fact* be fair and rational, by ensuring accountability.[45]

12.31 We wonder, however, whether such a step is really necessary or desirable. Arguments for judicial supervision of plea agreements are predicated almost entirely on the need, in a "just deserts" system, to ensure that charges (and therefore sentences) reflect adequately the gravity of offending conduct. While the situation may be different in other jurisdictions, we are satisfied that the prosecution authorities in Ireland are not under such pressure that they habitually allow accused persons to get away with what *Professor Robinson* calls free harms. In theory, the prosecution is not concerned with the sentence. It follows, again in theory, that the prosecution should not engage in plea negotiation either. Given that plea negotiation is a fact of life and that the prosecution engages in it, prosecutors must ensure that a penalty, adequate on the facts, is available for the accused when he or she is convicted. In general, a prosecutor would only "undersell" from the point of view of available penalty in order to ensure a conviction for *some* offence, e.g. in a case where a young witness could be spared the ordeal of giving evidence or where a witness might be nervous and not likely to do him or herself justice when giving evidence.

12.32 Except, perhaps, to indicate the sentence he or she has in mind, the judge should not become embroiled in the plea bargaining process. The DPP should be free to prosecute or not to prosecute for an offence without permission

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42 See 92 ILTR 182, at pp183-184; see Ryan & Magee, *op cit*, at p259.

43 It may be that professional ethics require that the prosecution always pursue the charge which seems most appropriate on the evidence, though this is unenforceable where a *nolle prosequi* is entered; Archbold, *Criminal Pleading, Evidence and Practice*, (1982, 41 ed) remarks (at para 4-60) that 'where nothing appears on the depositions which can be said to reduce the crime from the more serious offence charged to some lesser offence for which a verdict may be returned, the duty of counsel for [the prosecution] would be to present the offence charged in the indictment.' See also paras 4.47 and 4-60 of Archbold, (1988, 43ed)

44 See e.g. Canadian Sentencing Commission, Report, recommendation 13.9 and commentary at pp422-423; Canadian LRC, *Plea Discussions and Agreements*, at p13; Byrne, *op cit*, at p807; National District Attorney's Association (US), *National Prosecution Standards* (1977), at p217.

45 Canadian LRC, *Our Criminal Procedure* (1988), at p27.

or supervision. It is felt that adopting a scheme which requires or predicates judicial participation or intervention in plea negotiations might be both unnecessary and inimical to the independence which both the judiciary and the prosecution must maintain.

12.33 Judicial indication of likely sentence would enable both sides (defence and prosecution) to reach an agreement of whose outcome they could be reasonably certain, as the judge would find it difficult later to depart from his or her indication. At the same time, it would preserve the role of the judiciary outside the plea discussion process. As *Williams* says:

> "The defendant often wants and may need certainty, the ability to put his affairs in order, the knowledge that he can wipe the slate clean and a reasonable idea of what will happen to him.
>
> My experience is that many defendants would plead guilty if they knew what the sentence was to be. A great number would plead guilty if they were certain of community service, probation or a suspended sentence. So why do we adamantly prevent it?"[46]

12.34 If sentencing is a fairly consistent process, a judge cannot be accused of influencing the discussions unduly, or of pressurising the defence, merely by outlining his or her likely response to certain charges and evidence.

12.35 Another argument in favour of the judge's involvement is to ensure at least a degree of acceptability of the plea agreement system by the victims of crime. It is fair to say that, in general, the victims of crime or the next of kin of deceased victims do not wish to see any reduction in the seriousness of the charges to be met by the accused. When there is a plea to a less serious offence followed by a very light sentence, victims are very discomfited indeed. Bearing the understandable and justifiable feelings of victims in mind, the prosecution would like to know that a sentence of reasonable severity will be imposed before committing itself to a bargain.

12.36 It may be thought necessary or desirable that an accused who decides, after discussions and a sentence indication, not to plead guilty should have his or her case heard by a different judge. If this course were followed, it is suggested that, if convicted, the sentence indication be furnished to the second judge to guide his or her decision on sentence. Otherwise, the offender might indeed get more than was bargained for.

12.37 Having the case heard by a different judge would present significant problems outside Dublin, i.e. in "one judge" Districts and Circuits. The Commission is satisfied that judges would be able to proceed to try a case absolutely fairly having earlier indicated the sentence they would give on a plea

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46 *Op cit.*

of guilty. Judges proceed with trials every day having ruled out statements of admission. The ability to clear the mind of matter already disclosed is part of the judicial art. We would certainly not favour a defendant's seeking a sentence indication from one judge after another until finding the sentence that suited him or her. However, we appreciate that it might be difficult to secure and maintain public acceptance of a judge's ability to clear his or her mind after giving a sentence indication.

12.38 The Commission, for all the reasons set out above[47] is in favour of some system of plea agreement, whatever effect it might have on the purity of a sentencing schema. The Commission would rather maintain the system as it is than risk its losing acceptability by involving the judge. In any event, the more coordinated and consistent sentencing becomes, the less advantage would be derived from involving the judge in the procedure.

12.39 While the substance of plea agreements need not be the object of judicial scrutiny, in order to facilitate both prosecution and defence in reaching acceptable plea agreements, guidelines could be formulated in respect of the procedure to be followed. Such guidelines have been promulgated by the Commonwealth DPP in Australia, and have been recommended for the Australian States.[48]

12.40 It has been suggested, for example, that there should be no initiation of plea negotiations by the prosecution; and that a comprehensive system of compulsory disclosure of evidence in the possession of the prosecution should create an atmosphere in which the probable plea to be made by the accused is more likely to be indicated at an early stage in the proceedings, and would enable plea negotiations to be conducted in a more informed manner.[49]

12.41 If it were thought necessary to do so, the prosecution's pre-trial negotiating procedures could be strictly regulated. The American Law Institute has provided a persuasive precedent.[50] Three prosecutorial negotiating tactics are prohibited:

(i) laying, or threatening to lay, a charge that the prosecutor does not believe to be supported by provable facts;[51]

(ii) laying, or threatening to lay, a charge that is not usually laid down with respect to an act or omission of the type attributed to the accused;[52] and

(iii) threatening that a not guilty plea entered by the accused may

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47 See para 12.6, *supra*.
48 See Clark, *op cit*, p212; Byrne, *op cit*, p808; Victorian Sentencing Committee, *op cit*, Vol 2, at p623.
49 Byrne, *op cit*, at p801.
50 See ALI Model Code of Pre-Arraignment Procedure (1975).
51 *Ibid*, section 350.3(3)(a), at p244.
52 *Ibid*, section 350 3(3)(b), at p245.

result, upon conviction, in a sentence more severe than the sentence that is usually imposed upon a similar accused who has been convicted following a not guilty plea of the offence with which the accused is charged.[53]

12.42 The ALI Code seeks to ensure, generally, that plea discussions are conducted in a manner that is consistent with the type of prosecutorial practices that would normally be engaged in if the conclusion of a plea agreement were not a goal.[54] This seems a good basis on which to construct a scheme of prosecutorial guidelines. Improper inducements pose a particular danger because they threaten the genuineness and factual accuracy of guilty pleas. For the same reason, *defence* counsel should be careful not to pressurise the accused into pleading guilty to an offence of which he or she protests innocence. In order to maintain what in civil law jurisdictions is called "equality of arms", the prosecution should negotiate only with defence counsel and not with the defendant personally.

12.43 In Ireland, while no written guidelines for plea negotiation exist, there is, in fact, a strict prosecution code. The code is that:

(a) Negotiations cannot be initiated by the prosecution;

(b) Prosecuting counsel cannot make any plea agreement without the approval of the DPP or his professional officer;

(c) The investigating Garda in charge of the case has to be informed in advance of the agreement. He or she does not have to approve of it.

12.44 If it were thought necessary to reproduce the code and perhaps, elaborate it in written guidelines, this could be done.

12.45 *Our provisional recommendation is to leave things as they are and not interfere with present practice, although we would welcome views on sentence indication by the judge.*

12.46 The more detailed recommendations of the Canadian Law Reform Commission, are contained in Appendix D with annotations; extracts from other relevant codes and reports are also contained there.

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53 *Ibid*, section 350 3(3)(c), at p245. This abuse does not present such a danger in a jurisdiction where the prosecution does not expressly recommend any particular sentence.

54 *Ibid*, Commentary to s350.3, at p614. Relevant sections of the Model Code are contained in Appendix D.

CHAPTER 13: REASONS FOR SENTENCE

13.1 Not surprisingly strong objection can be taken to any judicial reluctance to state reasons for choice of sentence. Four independent grounds of objection are apparent.[1]

13.2 First, for the defendant, the failure to state reasons may well amount to a breach of natural justice and the rule of *audi alteram partem.*[2] One might conclude that any important decision made in a court of law should be supported by a careful and accurate statement of the reasons for that decision. If reasons are not given then the defendant is deprived of the opportunity to challenge the reasoning of the sentencer. It has been observed of the giving of reasons that

> "It is of assistance to the defendant both in accepting what has happened and, where he does not accept it, in preparing his appeal."[3]

13.3 Secondly, the failure to provide reasons hinders the rationalisation of sentencing generally. The mystery of the sentencing decision where reasons are not given does little to promote confidence in the sentencing process in which people are entitled to expect that the decision will be made on a rational and just basis. There are a number of people besides the defendant who need to know the reasons for sentence:[4]

(a) Other sentencers;

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1 Thomas, *Sentencing - The Case For Reasoned Decisions*, [1963] Crim LR 243.
2 See *The State (Howard) v Donnelly* [1966] IR 51.
3 Devlin *Sentencing of Offenders in Magistrates' Courts*, (1970) p58.
4 See generally Burns and Mattina, *Sentencing* (1978) p197.

(b) Victims;

(c) The public;

(d) Probation and welfare services;

(e) Prison authorities;

(f) Members of inter-service review meetings who discuss temporary release;[5]

(g) The Government and Minister for Justice in deciding on remission;[6]

(h) Appellate Courts;

(i) The legislature when it is formulating penal policy.

13.4 Thirdly, the failure to state reasons has the conspicuous disadvantage of hampering and distorting the review of sentence by the appellate courts. The end result may be a reluctance to interfere with the findings of the lower courts. In *The People (Attorney General) v Poyning*[7] the Court of Criminal Appeal refused to interfere with the sentence imposed on the appellant -even though more severe than that imposed on two co-accused - not because it agreed that the reasons for the sentence were correct, but because they *might have been* correct. The Court of Criminal Appeal had tried to uncover the reasons for the trial court's choice of lighter sentence for the co-accuseds, but met with some difficulty, as Walsh J explained:[8]

> "With a view to informing itself, as well as it could, on the background and antecedents of the co-accused and of the factors which moved the High Court to impose sentences which were very much lighter than those imposed by the Circuit Court, this Court directed the Registrar of the Court of Criminal Appeal to apply to the County Registrar of Dublin for a transcript of the shorthand note of the proceedings in the case of [the co-accused] dealing with the sentences, the evidence given there and the considerations which were applied ... As no appeal was pending in the case of [the co-accuseds] the President of the High Court [the trial judge] was not in a position to sanction the issue of a transcript in relation to the proceedings heard before him. Unfortunately the lapse of time has made it undesirable for this Court to prolong this matter further by inquiring into this aspect of the case ... Unfortunately this course leaves this Court without the benefit of the views expressed by

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5 See para 15.16 *et seq*, *infra* (Temporary Release).
6 See para 15.12 *et seq*, *infra* (The Power to Commute or Remit).
7 [1972] IR 402, see para 1.57 *et seq*, *infra* (Differing Principles).
8 *Ibid*, p409.

the learned President of the High Court when dealing with the case."

13.5 If the President of the High Court, the trial judge in the case of the co-accused, had given reasons pronouncing sentence, then the Court of Criminal Appeal would not have found itself "without the benefit of the views expressed by the learned President of the High Court when dealing with the case", and the final result might arguably have been very different.

13.6 Finally, the lack of reasons does little to promote consistency within the sentencing process. Other sentencers in similar cases do not have the benefit of a colleague's reasoned experience, so they may rely on a wholly different set of reasons. They are not even afforded the opportunity to consider the opinions of other judges as to what reasons are relevant - even if they do not agree with them - because those opinions are nowhere to be found.

13.7 If an obligation was placed on sentencers to give reasons for their choice of sentence, then not only would these problems be diminished but there would also be the added advantage that sentencers would be forced to give more careful consideration to the various decisions made at the sentencing stage, since they would have to disclose "publicly" their reasoning in due course.[9]

13.8 The only objection to an obligation to give reasons is that it would cast an intolerable burden on the courts and cause excessive delays.[10] However, we should be loath to sacrifice fairness and accuracy at the altar of speed. Nonetheless, in the District Court this objection may carry more weight, at least in relation to the more trivial summary offences punishable by small fines, and such cases could safely be exempted from the requirement, as could any cases in which the sentence is mandatory and fixed by law.

13.9 *We provisionally recommend that there be a statutory obligation on sentencers to give reasons for the choice of sentence in all cases apart from trivial cases where the penalties are slight or cases where the penalty is mandatory and fixed by law.*

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9 All Israeli criminal courts are required to give reasons for the choice of sentence. An Israeli juvenile court judge, Reifen, considers this to be a helpful procedure because "it compels the judge to review for himself the reasons for his decisions"; see Thomas, *op cit*, note 16, p247.

10 Thomas, *op cit*, p252.

CHAPTER 14: PROSECUTION APPEAL AGAINST SENTENCE

14.1 As has been seen, there is at present no general prosecution right of appeal against either acquittal or sentence upon conviction in the Irish criminal justice system. An exception exists under Article 34.7.3 of the Constitution, whereby such appeals may be made against acquittals from the Central Criminal Court to the Supreme Court. This facility has been undermined, however, by the latter court's reluctance to disturb the findings of lower courts - a policy rather less justified (if followed) in respect of sentences than it is with regard to verdicts.[1] There is no prosecution appeal from verdicts in the Circuit Court. It must now be asked whether the prosecution should be afforded in all cases, including Circuit Court cases, the opportunity to appeal sentences which it believes to be too lenient.

14.2 Two options are possible - for an appeal to take place simply to clarify principles for the future, without altering the instant sentence; or for the Court of Criminal Appeal actually to increase (or decrease) the sentence under consideration. If prosecution appeals are to be permitted, the latter course may seem more in keeping with present practice, in so far as appellant defendants may have their sentences remitted, reduced *or increased* or otherwise varied by the Court of Criminal Appeal, under s34, *Courts of Justice Act, 1924* - this jurisdiction does not adhere to the principle of prohibition of *reformatio in peius* which prevails on the continent.[2] It might be argued, on the other hand, that any general prosecution right of appeal against sentence should mirror the provisions of s34 of the *Criminal Procedure Act, 1967*, which allows the prosecution to make a case stated without prejudice to the verdict. It has been argued that such a procedure would be worthless - it would aggravate rather than relax public disquiet, by drawing attention to injustices which cannot be

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1 See para 1.162 *et seq, supra* (Appeals to the Supreme Court).

2 See Section F, Appendix X, *Infra* (Council of Europe Recommendations).

remedied, to the grave dissatisfaction not only of the community at large, but also of crime victims, and of convicted people who had received appropriate sentences.[3]

14.3 The *Criminal Justice Bill, 1992* introduced by the last Government gave the Director of Public Prosecutions a power to appeal any sentence on conviction. Section 2 provided *inter alia*:

> "(1) If it appears to the Director of Public Prosecutions that a sentence imposed by a court (in this Act referred to as the "sentencing court") on conviction of a person on indictment was unduly lenient, he may apply to the Court of Criminal Appeal to review the sentence.
>
> (2) An application under this section shall be made, on notice given to the convicted person, within 28 days from the day on which the sentence was imposed.
>
> (3) On such an application, the Court may either:
>
> (a) quash the sentence and in place of it impose on the convicted person such sentence as it considers appropriate, being a sentence which could have been imposed on him by the sentencing court concerned, or
>
> (b) refuse the application."

14.4 Discussion will, therefore, be concentrated on an appeal procedure which includes a power to vary sentences.

(i) One of the chief arguments against such a procedure is that it is "contrary to the immemorial traditions of the common law,"[4] and "a complete departure from our tradition that the prosecutor takes no part, or the minimum part, in the sentencing process."[5] This characterisation of common law practice (which attributes prosecution appeals to the continental system) is fallacious. Prosecution appeal was introduced in both Canada and Australia in the 1920's, and is now common in the US and the Commonwealth. The argument that any increase in the prosecutor's present role in sentencing would be self-evidently wrong is not accepted by this paper;[6] nor is it the case that the prosecution has little influence on sentencing, though it exercises it in less visible ways

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3 This is also a telling argument against the procedure under the 1967 Act, which is not, however, our immediate concern.

4 Lord Elwyn-Jones, speaking against the *Prosecution of Offences Bill, 1984* in the House of Lords, cited by Byrne, *Prosecution Appeals Against Sentence*, 52 ALJ (1988) 465, at p465. Other opponents of that bill (which did not allow alteration of sentence) included Lords Scarman, Denning and Edmund-Davies.

5 Report of the Interdepartmental Committee on the Court of Criminal Appeal (Donovan Committee) (1965) Cmnd 2755 para 798.

6 See para 11.24 *et seq, supra* (The Role of Prosecution Counsel).

eg. through choice of charges, etc.[7]

(ii) It would undermine the independence of the judiciary. *Spencer* is impatient of this view, describing it as "preposterous." "How could a power in the Court of Appeal to reverse a sentence because it is excessively lenient undermine the independence of the judiciary -any more than it is undermined by the existing power to review sentences which are excessively severe?"[8]

Byrne approaches the issue in more measured terms, citing the fear that judges would pass sentence "with one eye on the prisoner and the other on the Court of Criminal Appeal", and the words of King CJ in *R v Osenkowski*:

> "It is important that prosecution appeals should not be allowed to circumscribe unduly the sentencing discretion of judges. There must always be a place for the exercise of mercy where a judge's sympathies are reasonably excited by the circumstances of the case. There must always be a place for the leniency which has traditionally been extended even to offenders with bad records when the judge forms the view, almost intuitively in the case of experienced judges, that leniency at that particular stage of the offender's life might lead to reform."[9]

Byrne counters, however, that while courts must have a wide discretion in sentencing, it must be exercised in accordance with established principles. "If it is legitimate for Courts of Criminal Appeal to make rulings which establish a ceiling over the imposition of severe sentences, is it not legitimate for them to make rulings which construct a floor beneath which lenient sentences should not be permitted to fall? In between the floor and the ceiling there is ample room for the exercise of the broad discretion available to the sentencing judge."[10]

Experience in New South Wales should be borne in mind. Prosecution appeals there got "somewhat out of hand" in the 1970s,[11] but were brought under control by a set of policy guidelines issued by the State DPP in response to a comment by King CJ in *Osenkowski* that it was the role of prosecution appeals against sentence "only occasionally to correct a sentence which is so disproportionate to the seriousness of the crime as to shock the public conscience."[12]

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7 *Ibid.* See also Spencer, *Do we need a prosecution appeal against sentence?* [1987] Crim LR 724, at p733.
8 *Op cit*, at p730.
9 (1982) 30 SASR 212.
10 *Op cit*, at p468.
11 See Rinaldi, *Crown Appeal against Sentence in Australia* (1984) 8 Crim LJ 1.
12 *Ibid.*

The Irish superior courts' own reluctance to alter verdicts or sentences save in case of manifest error should similarly allow the maintenance of judicial discretion and independence in trial courts.[13]

(iii) Prosecution appeal against sentence is in breach of the rule against double jeopardy. *Spencer* points out that this is to misunderstand the principle against double jeopardy. This has two possible meanings. One is that it is wrong to punish someone twice for the same offence; the other that we do not allow someone to be put in peril of conviction twice. A prosecution appeal, against inadequate sentence does not, he submits, offend against the rule on either interpretation, as guilt, by definition, has already been adjudged, and it is not double punishment to order an adequate to replace an insufficient punishment.[14] His point is borne out by the finding of the US Supreme Court by a majority that prosecution appeal against sentence does not breach Article V of the Bill of Rights (which incorporates the rule against double jeopardy).[15]

Byrne states the principle a little differently:

> "When a person appears before a court for sentence, he or she is theoretically in jeopardy of the loss of liberty or other punishment to the extent allowed by the legislation which prescribes the maximum penalty for the offence in question. If, after the court's decision, the case can be referred to another court for the purpose of imposing a more severe penalty, the amount of punishment between that imposed by the court at first instance and the maximum available is once again in jeopardy."[16]

He is mindful of the "understandable sense of grievance" of an offender whose sentence is made more severe, especially if imprisonment is substituted for some other penalty. This *Spencer* describes as "thoughtless sentimentality": "How dare we be so moved by the guilty man's disappointment at not getting away with it after all, when we are unmoved by his innocent victim's disappointment, shattered sense of security and outrage that his attacker has not got his just deserts?"[17] Nonetheless, there is something in *Byrne's* point that "humanity and justice clearly demand that the particular circumstances of the offender must be taken into account."[18] It is submitted, however, that this concern is provided for by courts' general unwillingness to increase sentences save in cases of manifest inadequacy, in which case this

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13 See para 1.162 *et seq*, *supra* (Appeals to the Supreme Court).
14 *Op cit*, at p735.
15 See *State v di Francesco* (1980) 449 US 117.
16 *Op cit*, at p468.
17 *Op cit*, at p736.
18 *Op cit.*

concern must be outweighed by the demands of principle, and of justice to victims, fellow offenders and the community at large.

(iv) Prosecution appeals might lead to a general increase in severity, and make prison overcrowding worse. It is submitted that *Spencer* is right to be dismissive of this point. He remarks:

> "[P]rison overcrowding is a desperate problem which needs to be tackled at its roots, not made the excuse for failing to tackle over-lenient sentencing, which is another independent evil ... If we opt for fewer prisoners, then the reduction should be done in a rational and consistent way, not by maintaining a double standard, with tough sentences dished out by courts which are not afraid of appeals and limp ones falling from those which are."[19]

14.5 The arguments in favour of prosecution appeals against sentence are more persuasive. In general, where mistakes are capable of being made, they should be capable of being corrected.[20] The effect of unduly lenient sentences throughout society can be such as to make it imperative that some remedy be made available:

> "[U]nduly lenient sentences cause outrage to the victims of crime, they blunt the deterrent effect of the criminal law, they demoralise law enforcement and prosecuting agencies, engender bitterness in those who have received more severe but at the same time appropriate sentences for offences of a similar kind, undermine public confidence in the administration of justice and in some cases create a real risk to the public by the premature release into the community of a dangerous offender."[21]

14.6 Perhaps more pressing of all is the point that the absence of the right of the prosecution to appeal promotes the development of an unhelpful set of sentencing precedents, as appeal courts have little occasion to give guidance as to what is inappropriately lenient in a given case. The result is what *Ashworth* calls " a lop-sided set of precedents:"

> "The Court hears appeals only against sentences which are thought by the offender to be too severe, with the result that there are myriad precedents on the aggravating features of serious offences but very few decisions at all on non-custodial sentences or the least serious kinds of manslaughter, rape and robbery. It is hardly too much to say that the more frequent the type of case, the less appellate guidance there is likely

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19 *Op cit*, at p731.
20 Byrne, *op cit*, at p467.
21 *Ibid.* See Spencer, *op cit*, at pp724-728 for a more detailed discussion.

to be."[22]

14.7 *Ashworth* suggests that even when it formulates guideline judgments based on ranges of hypothetical facts less serious than the case before it, the Court of Appeal's palate is so affected by a continuous diet of heavy sentences that the guidance is sometimes over-severe.[23] Ultimately, these arguments seem more convincing than those against.

14.8 *We provisionally recommend the introduction of a prosecution right of appeal against sentence.*

14.9 Should prosecution appeals be allowed from the District Court? All of the arguments rehearsed above apply in this case as in any other, and one should of course aim for consistency of principle and practice throughout the criminal justice system. Nonetheless, there is an argument that prosecution resources might be better employed than in pursuing appeals at this level. In respect of an equivalent debate in New South Wales about extending the right of prosecution appeal to the magistrates' courts, *Byrne* remarks as follows:

> "We have seen that a Court of Criminal Appeal will only interfere on an appeal by the prosecution where it is satisfied that the penalty imposed at first instance is manifestly inadequate. Because the range of the sentencing discretion available to a magistrate is so confined when compared with a judge dealing with a matter on indictment, it may be argued that whatever penalty is imposed by a magistrate, it can never be so far removed from the appropriate penalty as to be fairly described as "manifestly inadequate"."[24]

14.10 Difficult policy questions of resource allocation arise in this respect. *We seek views on whether a right of prosecution appeal should be extended to the District Court.*

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22 *Sentencing and Penal Policy* (1983), at p39.
23 *Ibid* at p41. See also Rinaldi, *op cit*, at p3.
24 *Op cit*, at p469.

CHAPTER 15: PENAL POLICY

15.1 Once a more coherent sentencing policy is put in place, the legislature will need to take a close look at its *penal policy* to see what changes are necessary in order to co-ordinate penal policy with sentencing policy. While a comprehensive review of the changes necessary is outside the ambit of this Paper, we can nonetheless point to some of the issues which will merit detailed examination. Two matters which are of vital concern are (i) a review of the sentencing options which are available to the courts and (ii) an examination of the law and procedure relating to the administration of sentence.

(i) *Sentencing Options*

15.2 The range of sentencing options presently available to the sentencing courts and the difficulties which follow them in practice have been set out in detail elsewhere in this Paper.[1] In 1985 the Whitaker *Committee of Inquiry into the Penal System* issued its Report.[2] The Committee made a number of recommendations on the reform of the law in relation to existing sentencing options and proposed some further sentencing options. The Committee's proposals, which are supported in principle by this Commission, deserve immediate legislative attention.

15.3 *We provisionally recommend that the legislature undertake a comprehensive review of the law and procedure in relation to the present range of sentencing options with a view to better co-ordination of penal and sentencing policy. The recommendations of the Committee of Inqiry into the Penal System in this regard should be given special consideration.*

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1 See Ch 1, *supra* (Overview of Irish Sentencing Law and Practice).
2 *Op cit.*

15.4 One matter which could be disposed of immediately is the abolition of penal servitude and imprisonment with hard labour in favour of imprisonment *simpliciter*.[3] Although these sentences effectively amount to sentences of imprisonment, the residual disqualifications which attach to them and the inabilty to order a sentence of penal servitude which operates from some time in the past mean that offenders who receive them are treated differently to other, often more serious, offenders.

15.5 *We provisionally recommend that penal servitude and imprisonment with hard labour be abolished and imprisonment substituted in their place.*

(ii) *The Administration of Sentence*

15.6 Once the court has pronounced its sentence and all appeals against conviction or sentence are concluded, the sentence becomes final and the courts lose their *seisin* of the case. Thereafter it is the executive, acting through the Minister for Justice and the penal authorities, which is responsible for the administration of sentence. Any decisions in relation to the sentence are then made by the executive. It has been held that:

> "It is part of the judicial function to determine the nature and extent of the sentence, whenever the general rule laid down by statute or by common law gives a range of choice. Thereafter it is within the power of the Government, or the Minister for Justice as its delegate, to commute or remit, in whole or in part, any punishment imposed by a court exercising criminal jurisdiction."[4]

15.7 During the administration of sentence, the executive, acting through the Minister for Justice, may alter the sentence imposed by the sentencing court in two ways:

(a) by *commuting* or *remitting* the sentence;

(b) by ordering the *temporary release* of the offender.

15.8 It should be noted that the executive has no power to increase a sentence imposed by a court.[5] The methods listed here are, thus, ways in which the executive can *reduce* a sentence imposed by a court exercising criminal jurisdiction.

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3 See para 1.80 *et seq*, *supra* (Deprivation of Liberty).

4 *Per* Henchy J, *The People (DPP) v Cahill* [1980] IR 8. Cf *The People (DPP) v Aylmer*, Supreme Court, unreported, 18 December 1986, where it was held that a sentencing judge had made a valid order which retained the power to review sentence after a specified part of the sentence had been performed, also *The State (Woods) v Attorney General* [1969] IR 385.

5 *The State (Sheerin) v Kennedy* [1966] IR 379.

(a) The power to commute or remit

15.9 The basis for this power is to be found in Article 13.6 of the Constitution, which provides:

> "The right of pardon and the power to commute or remit punishment imposed by any court exercising criminal jurisdiction are hereby vested in the President, but such power of commutation or remission may, except in capital cases, also be conferred by law on other authorities."

15.10 Section 23 of the *Criminal Justice Act, 1951* conferred such power of commutation or remission on the Government and the Minister for Justice. The power to pardon seems to have been implicitly reserved for the President. There would appear to be no set of rules or guidelines which governs the power to commute sentence, but in capital cases the power is exercisable only by the President on the advice of the Government.[6]

15.11 The President may commute any other punishments, and so may the Government and the Minister for Justice except for disqualification from holding a driving licence[7] which may only be lifted by the President.

15.12 As regards remission, the *Prisons Act, 1907* enabled provisions to be made for prisoners undergoing a sentence of imprisonment to earn remission of a portion of their sentences by special industry and good conduct. The *Rules for the Government of Prisons, 1947*[8] set out the maximum periods of remission which may be granted for industry and which may be granted for industry and good conduct to prisoners serving custodial sentencers. There is no provision for a maximum amount of remission in respect of other forms of sentence. A person undergoing a sentence of imprisonment in excess of one calendar month may earn a remission of up to 25% of his or her imprisonment, provided such remission does not result in the sentence being discharged in less than one month.[9] A male undergoing any term of penal servitude may earn up to 25% remission of sentence,[10] and a female undergoing penal servitude may earn up to $33^1/_3\%$ remission.[11] The power of remission does not apply to disqualification from holding a driving licence, which, thus, can only be reduced by the President.[12]

15.13 The Whitaker Committee recommended that the present standard remission for good conduct, which is 25% for sentences in excess of one month, should be raised to 33.33% in line with European standards.[13]

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6 Article 13.6 *supra*. Forde, *Constitutional Law of Ireland*, p108. Capital punishment was abolished as of 11th July 1990 by the *Criminal Justice Act, 1990*, s1.

7 *Road Traffic Act, 1961*, s124.

8 SI 320 of 1947.

9 *Ibid*, rule 38(1).

10 *Ibid*, rule 38(2).

11 *Ibid*, rule 38(3).

12 *Road Traffic Act, 1961*, s124, *supra*.

13 Whitaker Report, *op cit*, para 2.27.

15.14 The rationale for remission appears to be that it provides an incentive for prisoners to obey prison rules.[14]

15.15 In 1988 11.3% of those serving custodial sentences were discharged upon remission of a proportion of their sentences.[15]

(b) Temporary release

15.16 The system of temporary release is a flexible system which has been developing since the 1960s. Section 2 of the *Criminal Justice Act, 1960* empowers the Minister for Justice to:

> "make rules providing for the temporary release, subject to such conditions (if any) as may be imposed in each particular case, of persons serving a sentence of penal servitude or imprisonment, or of detention."[16]

15.17 However, the Act provides only the barest of outlines for the temporary release scheme, and the *Prisoners (Temporary Release) Rules, 1960,*[17] merely set out the formalities which a prisoner undergoing temporary release must comply with - such as the temporary release which he or she must sign, and the penalties for breach of conditions.

15.18 It would appear that the provision of temporary release was intended originally as a compassionate measure to be exercised only sparingly,[18] but now has grown to be a full-blown parole system. The professed basis for the system as it exists today is rehabilitation; The *Annual Report on Prisons and Places of Detention, 1982* said:

> "The objectives of temporary release, generally, are to enable the offender to keep in touch with his family and the community and, in the latter stages of the sentence, to reintegrate him into society on a gradual and phased basis. There are various forms of temporary release. On "daily temporary release" the offender leaves the prison or place of detention each morning to attend work or training and returns each evening. On "full temporary release" the prisoner is released outright subject to conditions, one of which may be that he be supervised by a Probation and Welfare Officer."

15.19 However, in truth, the situation with pressure on prison accommodation is such that a high proportion of short term offenders have to be released on full

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14 See *Dáil Debates*, 12 June 1990, col 2046.

15 *Annual Report on Prisons and Places of Detention, 1988*, p90.

16 *Criminal Justice Act, 1960*, s2(1). See generally Byrne, Hogan and McDermott, *Prisoners' Rights: A Study in Irish Prison Laws* (1987); and Byrne, *Procedural Protections and Temporary Release After Murphy*, (1983) 5 DULJ (ns) 69.

17 SI No 187 of 1960.

18 52 *Seanad Debates*, cols 1999-2000, 13 July 1960 - Mr Traynor, Minister for Justice, introducing the Bill. See Byrne, *op cit*, note 2, p69.

temporary release without supervision. In, 1988 those numbers were as follows:

Full Temporary releases for the year 1988[19]

Number Released	Number supervised by Probation & Welfare Service	Number un-supervised by probation & Welfare Service
1504	32	1472

15.20 Decisions in regard to temporary release are made following discussion at the inter-service review meetings which are held at all prisons regularly to review each offender's case. Those meetings may be attended by prison staff, probation and welfare officers, chaplains, psychologists, and, normally, an official from the Department of Justice. It is also usual to consult the Garda Síochána in relation to the prisoner in question. These meetings do not have any decision making function, and their primary value lies in allowing the views of the various participants as to how the cases of individual offenders might best be dealt with to be explored fully. The aim of the meeting is to come up with a "recommendation" for or against temporary release. *The Report on Prisons and Place of Detention, 1982* continues:

> "Following recommendations made at local review meetings a prompt decision on the grant or refusal of temporary release may be made having regard to general guidelines which have been established and accepted by successive Ministers for Justice."

15.21 The substance of these guidelines is not clear, but *The Report on Prisons and Places of Detention, 1988* comments:

> "Among the factors taken into account in assessing cases for release are nature of offence, previous record, length of sentence served, behaviour while in custody and a Garda assessment of the likely risk which may be posed to the community by a release. As indicated in previous reports an over-riding factor in reaching decisions must be the need to protect the public."

Problems with Commutation, Remission and Temporary Release

15.22 Commutation, remission and temporary release clearly have some positive values, not the least of which is the possibility of inducement to reform which may result from their operation. However, from the sentencing point of

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19 Source *Annual Report on Prisons and Places of Detention, 1988*

view, they may have lead to a number of undesirable consequences:

(1) The possibility of an offender earning up to 25% remission of a custodial term (or up to $33^{1}/_{3}$% if she is a female offender undergoing penal servitude) may influence the sentencing judge such that he or she imposes a longer sentence to counteract the effects of possible remission.

(2) Because the policies at work in the decision to allow temporary release are totally independent of those followed by the sentencing judge, temporary release can operate at cross-purposes to the sentencing process. An offender sentenced to a lengthy sentence proportionate to the seriousness of the offending conduct could be released on temporary release on the basis of rehabilitation.

(3) Temporary release may, without a proper structure, render the sentencing system a farce. A lengthy sentence justly imposed will be pointless if the offender is back at large a short time later.

(4) There is some evidence that the criteria relied upon in granting temporary release bear little relevance to the likelihood of further offences being committed upon release. This is compounded by the "prison crisis" described by the Whitaker Committee, because many of those unsuitable for temporary release may still have to be released to ease the accommodation difficulties which face the prisons daily. Many offenders, particularly short term prisoners, are released once they have displayed good behaviour, although it is far from established that good behaviour is a reliable indicator of likely future law abidance on the part of the released prisoner.

15.23 *We provisionally recommend that the legislature undertake a detailed review of the law and procedure governing the administration of sentence with a view to ensuring close co-ordination with sentencing policy. Particular attention should be paid to the provision of express guidelines on commutation and remission of sentence and temporary release.* The Report of the Whitaker Committee of Inquiry into the Penal System is useful in this respect.

CHAPTER 16: SENTENCING STUDIES

16.1 Two discrete but connected tasks remain to be considered. One is the compilation of information on sentencing, whether descriptive or quasi-descriptive, and its dissemination to the judiciary, counsel and the public. The other is the institution of what in England are called judicial studies. Both of these functions could be undertaken by a distinct body. The matter of information-gathering has already been considered at length above, so discussion will be concentrated for the moment on the second potential function of such a body. According to one's preferences, it might be known as a judicial studies board, a sentencing commission or council, or a judicial centre. For consistency's sake, it will be referred to throughout as a judicial studies board - this has the added advantage of not confining its field of study to sentencing.

16.2 Sentencing is a complex task, which requires knowledge of sentencing principles, law and procedure, and the capacity to select and evaluate relevant facts from a potentially wide range of facts about the offence and the offender. Concern has been expressed in many quarters about the fact that many, or most, judges come to the bench from practices which involved little criminal work, so that their experience of sentencing is limited.[1]

16.3 Also, qualification for admission to either of the legal professions does not require even the most elementary acquaintance with modern social science as it affects sentencing.[2] This may be considered a considerable weakness:

> "The judge should have a sound understanding of how the various facets of the penal system work in practice, and of those difficult and

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1 See ALRC Report No.44, at p152; Thomas, *Sentencing: Training of Judicial Officers* in *Crime, Law and the Community* (1976) 113, Younger, *Sentencing* (1973).

2 *Ibid.*

controversial fields of knowledge concerned with the springs of criminal behaviour and the likely effects of different penal procedures on the criminal. No one requires of the judge that he be penologist, criminologist, or psychologist; but it is entirely reasonable to expect him to know what penologists, criminologist, and psychologists are thinking."[3]

16.4 Furthermore, in one jurisdiction almost two thirds of the respondents in a Judicial Officer Survey either favoured or strongly favoured formal training as one method of promoting uniformity in sentencing.[4] As the application of sentencing policy to specific circumstances is an evolutionary process, a systematic updating process would be beneficial in conjunction with an induction process upon a judge's appointment.[5]

16.5 *Thomas* has written in some detail about the sort of educational tasks which should be undertaken in respect of sentencing.[6] His syllabus would be comprised of the following areas:

(a) the *law* on sentencing, i.e. the dispositions available in various cases, the appellate case law, etc;

(b) sentencing *policy* and theory;

(c) *practicalities*, i.e. the penal resources available, the conditions in penal institutes, the educational psychiatric, medical and other facilities available, etc;

(d) *process*, i.e. the sentencer must be fully and critically aware of all aspects of the process of gathering the information which is to provide the foundation for his or her decision, and of its adequacy and accuracy;

(e) *perspective* on the broad lines of development of criminological theory.[7] The reason for this is stated by *Younger*:

> "It is precisely because of the high degree of independence which our system gives to the judges that the judiciary must accept responsibility for taking intellectual initiatives in adapting our ancient sentencing system to modern needs. I do not think it is sufficient for them to respond to the initiatives of others."[8]

16.6 Commentators are eager to point out that all these are areas in which the conscientious judge can, upon appointment, set about acquiring an expertise. But it is clear that an actual process of induction would make this much easier. A

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3 Working Party on Judicial Studies and Information in the United Kingdom, Lord Chancellor's Office (1978) at p18.
4 In Australia. See ALRC Discussion Paper No 29 (1987) at p82.
5 Victorian Report, at p186.
6 *Sentencing: The Training of Judicial Officers.*
7 *Ibid*, at pp116-118.
8 *Op cit.*

judicial studies board could also take efforts to make relevant material more accessible, and to illustrate to judges the usefulness of the statistical and other sentencing information which it published.

16.7 It might be added that it is not only judges who need such knowledge - a lawyer appearing in a criminal case cannot discharge his or her professional responsibilities to a client without it. Greater emphasis on sentencing and criminology at university and professional course level would, therefore, be a boon. But if we rely only on legal education, it will be a long time before we begin to see any practical benefit. *Thomas* stresses that it is essential to develop simultaneously a series of courses for sentencers and for lawyers involved in criminal litigation - a task calling for sophistication and expertise.[9] He is particularly anxious to emphasise that such a development should not encroach upon the independence of the judiciary, by indoctrination - the object of judicial studies must be to equip the sentencer with the fullest range of available information so that he may exercise his discretion judicially and in an informed manner.[10] We would also emphasise that any scheme adopted should have the confidence and support of the judiciary; otherwise it is bound to fail. Judges must see the merit of courses, seminars or conferences, or such innovations will be useless. Therefore, any recommendations in this area should be implemented only in consultation with the judiciary.

16.8 *Thomas* recommends a course of study composed of the following elements:

(i) He anticipates that the most effective method would be *seminars*. Sentencing exercises can both convey sentencing norms and practices to newly appointed judges, and provide a vehicle for *all* judges, on a basis of equality, to discuss possible changes and developments in their current practices and policies. Judges could also gain a broader appreciation of the sentencing process by discussing hypothetical cases with others who are involved in that process - prison administrators, probation officers, social workers, psychiatrists, etc.[11]

(ii) Group visits to penal institutions would also be helpful.[12] The same could be said of visits to community service locations, or even visits to offenders with police or probation officers.

(iii) Some lectures might be useful, simply to impart new technical or factual information.

(iv) Specific course material would be very valuable. The UK's

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9 *Op cit*, at p119.
10 *Ibid*, at p115.
11 *Ibid*, at p120.
12 *Ibid*, at p121.

booklet, "The Sentence of the Court"[13] is cited as an example.[14] Statistical information, with guides to its interpretation on the lines discussed in an earlier chapter, could also be included in such material, if regularly updated.

16.9 *Thomas* envisages the ultimate foundation of a judicial staff college, on the lines of those which exist in the US for state and federal judges.[15] This for the moment seems rather too ambitious for this jurisdiction, and might not be greeted with enthusiasm by those who still see an active practice as the best preparation for judicial office in the common law system.

16.10 The Judicial Studies Board in England reflects some of the ideas cited above - and indeed, *Dr Thomas* is Studies Consultant to the Board.[16] It has a number of training functions in respect of family and civil law, and tribunals but we shall concentrate on its dealings with sentencing.

16.11 Some recommendations of the Bridge Committee[17] have not been followed - for example, the Board has not been attached to an academic base such as a university law faculty.[18] However, as well as *Dr Thomas*, a number of academic lawyers are members of the Board's committees, and assist with lectures and discussions at its seminars. The Board has a staff of 10, but is "judge-run"[19] in that all Board members are judicial officers of the superior courts. Induction courses are largely run by judges, and the form and content of all seminars are decided by the Board's committees, in which judges predominate Senior members of the Bench have a substantial involvement with refresher courses.

16.12 The Induction Course includes a mock criminal trial, which runs throughout the conference in two-hour spells, with adjournments for lectures, seminars and discussions. Periodic refresher courses[20] have a higher sentencing content. Also, all members of the judiciary are required to attend a one-day Sentencing Conference each year on his circuit.[21]

16.13 The Board publishes a quarterly bulletin summarising leading sentencing decisions and occasionally reporting research developments. Recently appointed judges spend a few weeks "sitting in" with an experienced judge engaged in sentencing.[22]

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13 *The Sentence of the Court, a Handbook for courts on the Treatment of Offenders* (HMSO, 1979).
14 *Ibid.*
15 *Ibid*, at p122.
16 For an account of the development of the present board, see Lord Justice Gildewell, *Sentencing, Judicial Discretion and Judicial Training*, Manchester Conference 1991.
17 The Working Party on Judicial Studies and Information, chaired by Lord Justice Bridge, which reported in 1978, *supra*.
18 Gildewell, *op cit*, at p2.
19 *Ibid*, at p3.
20 Judges attend every five years.
21 *Ibid*, at pp3-4.
22 See Ashworth, *Closing Summary* in *Sentencing in Australia*, p543 (cited Australia ALRC 44). For a defence of the English Judicial Studies Board against traditionalist criticisms, see Victorian Report, at pp187-190.

16.14 The Victorian Sentencing Committee has recommended a similar body for that jurisdiction.[23] The Australian Law Reform Commission has also recommended more formal judicial education, as well as judicial interaction through seminars, etc.[24] The Judicial Commission of New South Wales, established in 1986, has as one of its functions the organisation and supervision of continuing education for judicial officers. Part 4 of the *Judicial Officers Act, 1986* (NSW) deals with the commission's functions. With regard to sentencing, section 8 of the Act provides that:

> (1) The Commission may, for the purpose of assisting courts to achieve consistency in imposing sentences -
>
> (a) monitor or assist in monitoring sentences imposed by courts; and
>
> (b) disseminate information and reports on sentences imposed by courts.
>
> (2) Nothing in this section limits any discretion that a court has in determining a sentence.
>
> (3) In this section, 'sentence' includes any order or decision of a court consequent on a conviction for an offence or a finding of guilt in respect of an offence."

Section 9, dealing with judicial education, provides that:

> (1) The Commission may organise and supervise an appropriate scheme for the continuing education and training of judicial officers.
>
> (2) In organising such a scheme, the Commission shall -
>
> (a) endeavour to ensure that the scheme is appropriate for the judicial system of the State, having regard to the status and experience of judicial officers;
>
> (b) invite suggestions from and consult with judicial officers as to the nature and extent of an appropriate scheme;
>
> (c) have regard to the differing needs of different classes of judicial officers and give particular attention to the training of newly appointed judicial officers; and
>
> (d) have regard to such other matters as appear to the Commission to be relevant."

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23 *Ibid.*

24 ALRC Report No 44, at p154. ALRC Discussion Paper No 29, at pp89-94.

16.15 In New Zealand, the Penal Policy Review Committee, in its 1982 report (the Casey Report), recommended that a Sentencing Research Council be established on a statutory footing, with the following functions:

> "to provide judges and others involved in the sentencing process with information about the purpose of specific penal measures as they are introduced;
>
> to provide them with information about the content of penal measures and their effectiveness;
>
> to provide them with cultural and other relevant information to help in choosing the most effective way of dealing with offenders belonging to minority cultural and ethnic groups or those with special problems;
>
> to provide them with statistical and other services to assist them to carry out sentencing functions effectively and to promote an appropriate level of consistency in sentence;
>
> to provide such other information and services necessary to or desirable to assist the courts in developing and applying an appropriate penal policy for New Zealand."[25]

16.16 It was recommended that it be a small specialist body, with the following composition:

> "The Chief Justice (or nominee);
>
> The Chief District Court Judge (or nominee);
>
> The Secretary of Justice;
>
> a member of the Department of Justice 'concerned with penal policy';
>
> a representative of the Law Society;
>
> a university representative 'associated with criminal law or criminology';
>
> a person 'having the ability to represent a Maori point of view';
>
> a lay person to represent 'a responsible community view'."[26]

16.17 Sentencing education through seminars and conferences is also among the

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25 New Zealand Report, at pp157-158.

26 *Ibid*, at p158. Whether such a body would be sufficiently trusted to maintain total judicial independence remains to be seen.

recommendations of the Council of Europe[27] and the Canadian Sentencing Commission.[28]

16.18 *We provisionally recommend that organised judicial studies in sentencing be initiated by a body charged with the development and supervision of judicial education, and with the compilation and publication of sentencing statistics and other information and materials.*

16.19 *We seek views on the composition of such a body, and on the precise ambit of the responsibilities and functions which it should undertake. A governing condition must be that judicial independence and dignity not be undermined.*

27 See Appendix A.
28 Canadian Report, at pp439-40.

CHAPTER 17: SUMMARY OF PROVISIONAL RECOMMENDATIONS

Information

1. We provisionally recommend that a national agency be established for the compilation and dissemination of statistics relevant to sentencing. (Introduction and Chapter 9)

Policy

2. We provisionally recommend that the legislature formulate in statutory form a coherent policy governing sentencing. (Chapter 3)

Severity of Sentence

3. We provisionally recommend that the legislature set out by way of statute a clear statement that the sentence to be imposed on an offender be determined by reference to the "just deserts" principle of distribution whereby the severity of the sentence be measured in proportion to the seriousness of the offending behaviour, and the sentence not be more severe than the sentence for more serious offending behaviour nor less severe than the sentence for less serious offending behaviour. The legislative statement should highlight the following concerns:

   (1) The severity of the sentence to be imposed on a person found guilty of an offence should be measured in proportion to the seriousness of the offending behaviour.

   (2) The seriousness of offending behaviour should be measured by reference to:

      (a) The harm caused or risked by the offender in

(b) The culpability of the offender in committing the offence.

(3) The sentencer should not have regard to:

(a) The rehabilitation of the offender; or

(b) The deterrence of the offender or others from committing further crime; or

(c) The incapacitation of the offender from committing further crime;

when determining the severity of the sentence to be imposed. (Chapter 4)

Type of Sentence

4. We provisionally recommend that the statutory statement of the principles of distribution of sentence implement a "choice of method hybrid" for the determination of which of two or more competing sanctions of equal severity should be imposed in individual cases. The statement should highlight the following concerns:

(1) A sentencer, in choosing between two sanctions of equal severity, may have regard to:

(a) the rehabilitation of the offender;

(b) the deterrence of the offender or others from committing further crime;

(c) the incapacitation of the offender from committing further crime;

(d) providing redress to the victims of the offence or to the community;

and should choose the sanction which is more likely to achieve rehabilitation, deterrence, incapacitation or redress as the case may be.

(2) In all cases, a sentence of imprisonment should be regarded as a sanction of last resort, and should only be imposed:

(a) when no other form of sentence, being equal in severity, would incapacitate sufficiently the offender from committing further crime; or

(b) when there is no other form of sentence which is equal in severity and which would reflect the seriousness of the offending behaviour; or

(c) when the offender has shown wilful non-compliance with the terms of another form of sentence and there is no other form of sentence which, being equal in severity, would compel compliance. (Chapter 4)

Aggravation of Offence

5. We provisionally recommend the introduction of a statutory provision governing sentencing which would highlight the following concerns:

In assessing the harm, culpability and circumstances which tend to aggravate the offence, the sentencer shall give special consideration to:

(a) Whether the offence was planned or premeditated;

(b) Whether the offender committed the offence as a member of a group organised for crime;

(c) Whether the offence formed part of a campaign of offences;

(d) Whether the offender exploited the position of a weak or defenceless victim or exploited the knowledge that the victim's access to justice might have been impeded;

(e) Whether the offender exploited a position of confidence or trust, such as where the offence is committed by a law enforcement officer;

(f) Whether the offender threatened to use or actually used violence, or used, threatened to use, or carried a weapon;

(g) Whether the offender caused, threatened to cause, or risked the death or serious injury of another person, or used or threatened to use excessive cruelty;

(h) Whether the offender caused or risked substantial economic loss to the victim of the offence;

(i) Whether the offence was committed for pleasure or excitement;

(j) Whether the offender played a leading role in the commission of the offence, or induced others to participate in the commission of the offence;

(k) Whether the offence was committed on a law enforcement officer;

(l) Any other circumstances which;

(i) increase the harm caused or risked by the offender, or which

(ii) increase the culpability of the offender for the offence. (Chapter 5)

Mitigation of Offence

6. We provisionally recommend the introduction of a statutory provision governing sentencing which would highlight the following concerns:

In assessing the harm, culpability and circumstances which tend to mitigate the offence, the sentencer shall give special consideration to:

(a) Whether the offence was committed under circumstances of duress not amounting to a defence to criminal liability;

(b) Whether the offender was provoked;

(c) Whether the offence was committed on impulse, or the offender showed no sustained motivation to break the law;

(d) Whether the offender, through age or ill-health or otherwise, was of reduced mental capacity when committing the offence;

(e) Whether the offence was occasioned as a result of strong temptation;

(f) Whether the offender was motivated by strong compassion or human sympathy;

(g) Whether the offender played only a minor role in the commission of the offence;

(h) Whether serious injury resulted or was intended;

(i) Whether the offender made voluntary attempts to prevent the effects of the offence;

(j) Whether there exist excusing circumstances which, although not amounting to a defence to criminal liability, tend to extenuate the offender's culpability, such as ignorance of the law, mistake of fact, or necessity.

(k) Any other circumstances which;

(i) reduce the harm caused or risked by the offender, or

(ii) reduce the culpability of the offender for the offence. (Chapter 5)

Mitigation of Sentence

7. We provisionally recommend the introduction of a statutory provision governing sentencing which would highlight the following concerns:

Having arrived at a sentence which is proportionate in severity to the seriousness of the offence, the sentencer should give reasonable consideration to whether there are any special reasons, by way of exception to the general principle of proportionality between offence and sentence, why a sentence of lesser severity should be imposed, such as where:

(a) The offender has pleaded guilty to the offence;

(b) The offender has assisted in the investigation of the offence or in the investigation of other offences;

(c) The offender has attempted to remedy the harmful consequences of the offence;

(d) The sentence, whether by reason of severe personal injury suffered by the offender in consequence of the offence, age, ill-health, or otherwise, would result in manifest hardship or injustice to the offender or his or her dependents. (Chapter5)

8. We would welcome views on the matter of whether the sentencer should be empowered to allow some reduction in sentence for the fact that the offender has done some spectacular good deed in the past. (Chapter 5)

Review of Statutory Provisions

9. We provisionally recommend that the statutory lists of aggravating and mitigating factors be reviewed by the legislature from time to time in order to take new developments into account. We recommend that any alterations or amendments be made in consultation with the proposed Judicial Studies Board in order to ensure that they do not undermine or conflict with sentencing policy. (Chapter 5)

Prior Criminal Record

10. We provisionally recommend that the proposed "just deserts" approach

include a consideration of relevant prior criminal record as a factor aggravating the culpability of the offender. However, we would welcome views on the merits of adopting a "progressive loss of mitigation" approach in preference to this. (Chapter 6)

11. We provisionally recommend a statutory provision which confines the role of prior criminal record in the determination of the severity of sentence to situations in which it aggravates the culpability of the offender in committing the offence. The provision should highlight the following concerns:

    (a) The sentencer, in determining the severity of the sentence to be imposed on an offender, may have regard to any offences of which the offender has been found guilty in the past which may be considered to increase the culpability of the offender.

    (b) In considering whether such prior offences aggravate the culpability of the offender for the offence for which he or she is being sentenced the sentencer should have regard to:

        (i) the time which has elapsed between the prior offence or offences and the offence for which the offender is being sentenced;

        (ii) the age of the offender at the time of commission of the prior offence;

        (iii) whether the prior offence or offences are similar in nature to the offence for which the offender is being sentenced;

        (iv) whether the prior offence or offences are similar in seriousness to the offence for which the offender is being sentenced. (Chapter 6)

Policy Implementation and Information

12. We provisionally recommend that a determinate sentencing scheme not be adopted in this jurisdiction. (Chapter 9)

13. We provisionally recommend that a scheme of presumptive sentencing guidelines not be adopted in this jurisdiction. (Chapter 9)

14. We provisionally recommend the formulation of a scheme for the provision of quantitative sentencing information to judges, in the context of a coherent sentencing policy and of sentencing guidance by appellate courts; such information to be compiled over a period after the legislative introduction of a statement of sentencing policy. Information

should be provided on sentences resulting from different combinations of material case factors. (Chapter 9)

15. We seek views on the design of a sentencing information system. Issues include whether the chosen material factors by which cases are compared should be objectively or subjectively defined; whether a descriptive or quasi-descriptive approach should be adopted; and whether the information compiled should be presented merely in the form of sentence distributions, or in the form of advisory starting points. (Chapter 9)

16. We seek views on the most appropriate method of compiling quantitative statistical sentencing information or guidance in respect of less serious offences. (Chapter 9)

17. We provisionally recommend the continued supervision of sentencing practice, and the provision of sentencing guidance, by the appellate courts, in accordance with the proposed legislative statement of sentencing policy. (Chapter 9)

18. We provisionally recommend that the appellate courts resort to guideline judgments when presented by cases before them with a suitable opportunity to provide more general guidance on the application of sentencing policy to particular offences. (Chapter 9)

19. We seek views on how such qualitative sentencing data can be better communicated to sentencing judges. (Chapter 9)

Maximum, Minimum and Mandatory Penalties

20. We provisionally recommend that the legislature undertake a review of the set of maximum penalties which currently exists in Ireland, and re-scales the levels in accordance with modern perspectives on offence seriousness and in accordance with the view that custodial sentences should be regarded as sanctions of the last resort. We provisionally recommend that the set of maximum penalties be diminished -between six and eight levels of maximum penalty would be sufficient. (Chapter 10)

21. We recommend the implementation of the proposals in our Report on the Indexation of Fines. (Chapter 10)

22. We provisionally recommend that the legislature refrain from the introduction of minimum sentences in the future, and that those still in force be abolished. (Chapter 10)

23. We provisionally recommend that mandatory sentences for indictable offences should be abolished and the power to impose a discretionary

23. We provisionally recommend that mandatory sentences for indictable offences should be abolished and the power to impose a discretionary sentence within the limits of a maximum sentence be substituted in their place. (Chapter 10)

24. We provisionally recommend that the question of mandatory sentences for minor crimes be examined in more detail with a view to improving the efficiency of the administration of justice in the District Court. (Chapter 10)

Sentencing Procedure

25. We provisionally recommend the adoption of a code of procedure and evidence for the sentencing hearing, on Canadian lines. (Chapter 11)

26. We provisionally recommend judicial scrutiny of the accuracy and completeness of evidence agreed by both parties at the sentencing hearing, on US lines. (Chapter 11)

27. We seek views on the desirability of applying restrictive and exclusionary rules of evidence to factual disputes at the sentencing hearing. (Chapter 11)

28. We seek views on the most appropriate standard of proof for the resolution of factual disputes at the sentencing hearing. (Chapter 11)

29. We provisionally recommend that prosecution counsel be permitted at the sentencing stage to make submissions to the court not just on the facts of the case, but also on relevant legal principles and precedents. We do not recommend that he or she make specific submissions on the appropriateness of a particular sentence. (Chapter 11)

30. We seek views as to whether provision should be made for mandatory consideration of victim impact statements at the sentencing stage. (Chapter 11)

31. We provisionally recommend that the conclusion of plea agreements between the prosecution and the accused be specifically permitted. (Chapter 12)

32. We seek views as to whether judges should participate in plea negotiations to the extent of indicating the sentence they would intend to impose. (Chapter 12)

33. We provisionally recommend that there be a statutory obligation on sentencers to give reasons for the choice of sentence in all cases apart from trivial cases where the penalties are slight or cases where the

34. We provisionally recommend the introduction of a prosecution right of appeal against sentence. (Chapter 14)

35. We seek views on whether a right of prosecution appeal against sentence should be available in respect of decisions of the District Court. (Chapter 14)

Penal Policy

36. We provisionally recommend that the legislature undertake a comprehensive review of the law and procedure in relation to the present range of sentencing options with a view to better co-ordination of penal and sentencing policy. The recommendations of the Committee of Inquiry into the Penal System in this regard should be given special consideration. (Chapter 15)

37. We provisionally recommend that penal servitude and imprisonment with hard labour be abolished and imprisonment substituted in their place. (Chapter 15)

38. We provisionally recommend that the legislature undertake a detailed review of the law and procedure governing the administration of sentence with a view to ensuring close co-ordination with sentencing policy. Particular attention should be paid to the provision of express guidelines on commutation and remission of sentence and temporary release. (Chapter 15)

Sentencing Studies

39. We provisionally recommend that organised judicial studies in sentencing be initiated by a body charged with the development and supervision of judicial education, and with the compilation and publication of sentencing statistics and other information and materials. (Chapter 16)

40. We seek views on the composition of such a body, and on the precise ambit of the responsibilities and function which it should undertake. A governing condition must be that judicial independence not be undermined. (Chapter 16)

APPENDIX A: COUNCIL OF EUROPE RECOMMENDATIONS ON SENTENCING

The document which follows is a merger of the Draft Recommendations on Consistency in Sentencing of the Committee of Ministers of the Council of Europe (prepared by the Select Committee of Experts on Sentencing, document PC-R-SN (90) 12), with the commentary of Professor Ashworth on his immediately preceding draft recommendations (PC-R-SN (90) 11), which were in all material respects the basis of the recommendations quoted.

Introduction

The Committee is convinced of the value of a consistent approach to sentencing, but is also mindful of the need to retain judicial discretion which allows flexibility in cases which present unusual features. The recommendations do not propose the replacement of judicial discretion with rigid rules: that might create inconsistency through treating different cases as if they were alike. The Committee believes that the best approach to consistency is one of structured discretion: this preserves judicial discretion but establishes clear aims of sentencing and general principles on such matters as aggravation, mitigation and recidivists, supported by requirements to give reasons for sentence. This is the theme of the draft recommendations below, and it will be developed in greater detail in the future work of the Committee.[1]

A. *Aims of Sentencing*

1. A primary aim of sentencing should be declared.

2. If it is thought that there should be a place for the pursuit of another

1 Ashworth, PC-R-SN (90) 11, at p1.

aim or other aims, the law should attempt to indicate how to resolve possible conflicts between such aims.

3. The law should also attempt to indicate the types of case or circumstances in which each of these other aims may or should be pursued.

4. The aim or aims of sentencing should be reviewed from time to time.

5. Sentencing aims should be consistent with current policies, in particular in respect of reducing the use of imprisonment and of ensuring the compensation of victims.

6. Sentences must not discriminate against offenders on account of race, colour, gender, nationality, religion or political belief. Factors such as unemployment, cultural or social conditions of the offender should not influence the sentence in a discriminatory way.

7. Courts should take into account the probable impact of the sentence on the individual offender.[2]

The Committee has concluded that to allow courts a relatively free choice to impose sentences motivated by deterrence, reformation, desert, incapacitation, etc, is likely to produce subjective disparity in sentencing. The Committee does not believe that pursuit of a single aim of sentencing is the only way to achieve consistency; nor does it believe that pursuit of a single aim would necessarily achieve consistency, because it might produce disparity by requiring different types of case to be sentenced in a similar way. The Committee recognises that certain types of case might require different approaches, and therefore ... it urges member states to attempt to identify the classes of case which might be approached on different principles.[3]

B. ***Penalty Structure***

1. Maximum penalties for offences and, where applicable, minimum penalties should be reviewed so that they form a coherent structure which reflects the relative seriousness of different types of offence.

2. The range of available sentences for an offence should not be so wide as to afford little guidance to courts on its relative seriousness. States, therefore, should consider the grading of offences into degrees of seriousness, provided, however, that minimum penalties, where applicable, should not prevent the court from taking account of particular circumstances in the individual case.[4]

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2 Select Committee, PC-R-SN (90) 12, at p2.
3 Ashworth, *op cit*, at p2.
4 Select Committee, *op cit*, at p3.

Examination of the replies to the Committee's questionnaire has shown that many member states have penalty scales which have not undergone systematic revision for 50 or even 100 years. Since penalty scales should give guidance on the relative seriousness of different types of offence, principled revision of maximum penalties could make a significant contribution to greater consistency in sentencing. The Committee has also formed the view that wide penalty scales for offences (e.g., a single offence of theft) may contribute to disparity in sentencing, by allowing sentences for minor offences to escalate within the high overall maximum. The Committee is aware that any revision of penalty scales may have consequences for various procedural provisions which are linked to maximum penalties (e.g., powers of arrest).

The second part of the recommendation deals, in general language, with the two problems of (i) wide penalty scales for individual offences; and, (ii) a wide range of non-custodial sentences - the paradox that attempts to find alternatives to imprisonment have often produced a proliferation of new measures and a concomitant reduction in consistency.[5]

C. ***Aggravating and Mitigating Factors***

1. The factors taken into account in aggravation or in mitigation of sentence should be compatible with the declared aim or aims of sentencing.

2. The major aggravating and mitigating factors should be clarified in law or legal practice. Wherever possible, the law or practice should also attempt to define those factors which should not be considered relevant in respect of certain offences.[6]

This recommendation aims to reduce inconsistency in sentencing by drawing attention to, and excluding, certain possible sources of disparity which the Committee has noted. It affirms the general connection between the aims of sentencing and the aggravating and mitigating factors.[7]

D. ***Recidivists***

1. Recidivism should not, at any stage in the criminal justice system, be used mechanically as a factor working against the defendant.

2. Although it may be justifiable to take account of the offender's previous criminal record within the declared aim(s) of sentencing, the sentence should be kept in proportion to the seriousness of the current offence(s).

3. The effect of recidivism should depend on the particular characteristics

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5 Ashworth, *op cit*, at p3.
6 Select Committee, *op cit*, at p3.
7 Ashworth, *op cit*, at p4.

of the offender's prior record. Thus, any effect of previous criminality should be reduced or nullified where:

(i) there has been a significant period free of criminality prior to the present offence; or

(ii) the present offence is minor, or the previous offences were minor; or

(iii) the offender's criminal history manifests social deprivation so that aggravation on these grounds would amount to discrimination; or

(iv) the offender is still young.

4. There should be a coherent policy with regard to the relevance of discontinued proceedings, foreign judgments, amnesty, pardon or time-barred offences.[8]

This recommendation aims to promote consistency by ensuring that the principle of proportionality of sentence to the seriousness of the offence prevails over any aggravating effect of previous convictions. The imposition of substantial sentences on recidivists convicted of minor crimes goes against the policy of restraint in the use of imprisonment, as well as fostering inconsistency. The recommendation also states what is now the best practice among judges, which is to carry out a qualitative assessment of the criminal record of each offender before sentencing.[9]

E. *Giving Reasons for Sentences*

1. Courts should in general state concrete reasons for imposing sentences. In particular, specific reasons should be given when a custodial sentence is imposed.

2. What counts as a "reason" is a concrete motivation which relates the particular sentence either to the declared aim(s) of sentencing or to the normal range of sentences for the type of crime.[10]

This recommendation stems from the Committee's conclusion that the obligation to give reasons for sentences may make a significant contribution to greater consistency in sentencing, particularly when combined with greater certainty about the aims of sentencing and with appellate review of sentences. The Committee also regards the giving of reasons for sentence as important in explaining sentences to the public and the offender, and thereby increasing public

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8 Select Committee, *op cit*, at p3.
9 Ashworth, *op cit*, at p4.
10 Select Committee, *op cit*, at p4.

understanding of and confidence in sentencing. The Committee does not recommend reason-giving as mandatory for all sentences, since it recognises that the need for speed and efficiency in criminal justice may outweigh the value of reason-giving in some types of case, especially the most minor. It attempts to emphasise the importance of reason-giving to legal values and to consistency in sentencing, whilst recognising the extra burdens it might place upon judges.[11]

F. *Reformatio in Peius*

1. The principle of prohibition of *reformatio in peius* should be observed so that, where only the defendant appeals against sentence, the court must not increase the sentence on such appeal.

2. The powers of prosecutors to use their right to appeal should not undermine the principle of *reformatio in peius*, thereby deterring offenders from appealing.[12]

This recommendation is designed to eliminate the unfairness which the Committee finds to be inherent in the power to increase sentence on an appeal by a defendant, which may operate to deter the pursuit of justified appeals by offenders. It remains to be discussed whether we should go further in recommending the abolition of "accessory appeals" by the prosecutor, since they too might place offenders under pressure not to pursue justified appeals. It is to be noted that this recommendation goes against consistency in sentencing (insofar as it prevents an appeal court from rectifying an unduly lenient sentence in this type of case). It does so in order to preserve the higher value of individual fairness, but it may be questioned whether the recommendation lies within our terms of reference.[13]

G. *Time Spent in Custody*

In principle, time spent in custody before trial or before appeal should count towards the sentence. There should be a coherent policy with regard to time spent in custody abroad.

H. *Sentencing Studies and Information*

Arrangements should be made to ensure that judges are regularly provided with information about the operation of the criminal justice system, and that they have the opportunity to attend seminars and conferences on sentencing, on a regular basis.

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11 Ashworth, *op cit*, at p5.

12 Select Committee, *op cit*, at p4.

13 Ashworth, *op cit*, at p6. It will be noted from the discussion in the text that we do not entirely share the views of Professor Ashworth and the Select Committee on this point. See Ch 14, *supra* (Prosecution Appeal against Sentence).

I. *Use of Statistics*

1. Sentencing statistics should be compiled and presented in a way which is informative to judges, particularly in respect of sentencing levels for relatively quantifiable offences (for example, drunk driving, thefts from supermarkets).

2. Statistics should be compiled so as to ensure that they give sufficient details to measure and to counter inconsistency in sentencing, for example by linking the use of particular penalties to types of offences.

3. Research into sentencing should be encouraged in order to provide more detailed data, both for the information of judges and in order to identify disparity.[14]

This recommendation is designed to ensure that the aims and principles of sentencing adopted in a member state are put into effect by a well-informed judiciary. The Committee believes that some of the sentencing statistics which are now available in some member states are not presented in a form which maximises their usefulness to the courts. Collection and compilation of the necessary statistics may require a review of existing arrangements for producing sentencing statistics and may require further empirical research to be carried out, but the Committee believes that these are important steps towards the achievement of greater consistency.[15]

14 Select Committee, *op cit*, at p4.

15 Ashworth, *op cit* at pp6-7. See also para 9.268 *et seq*, *supra* (Conclusions and Provisional Recommendations).

APPENDIX B: CANADIAN SENTENCING COMMISSION GUIDELINE PROTOTYPES

GUIDELINE PROTOTYPE

I. Offence:	Manslaughter s219, *Criminal Code*
II. Maximum:	12 Years
III. Presumptive Disposition:	Presumption of Custody (IN)
IV. Guidelines:	Range: 4-6 Years

ADVISORY INFORMATION

V. Current Practice

(These data reflect sentencing under the current system which includes full release on parole as early as one-third and remission based release after an inmate has served two-thirds of sentence. To get an idea of time actually served by inmates, these sentences must be discounted to a greater degree than would the ranges proposed by the Commission).

Criminal Code sections 215, 217, 219.

Percentiles (m = months, y = years)

Source	*25th*	*50th (Median)**	*75th*	*90th***
Correctional Sentences Projects	3.5y	5y	10y	10y
Sentencing Commission		5y	12y	

* The median sentence can be regarded as the sentence in the middle of the distribution: of all cases resulting in custody, half are above (ie. higher) and half are below it.

** The 90th percentile is that sentence below which 90% of cases can be found. To illustrate, the 90th percentile for manslaughter during this period was 12 years (Sentencing Commission). This means that of all offenders who were convicted of manslaughter *and* who were sent to prison, 90% received terms of imprisonment that were 12 years or below.

VI. Case Law:

1. Description:

."manslaughter is of course a crime which varies very greatly in its seriousness. It may sometimes come very close to inadvertence. That is one end of the scale. At the other end of the scale, it may sometimes come very close to murder". *R v Cascoe* (1970), 54 Cr App R 401 (CA) [British case].

."There are certain cases of manslaugher where the line between crime and accident is narrow" ... *The Queen v Gregor* (1953), 31 MPR 99 (NSSC).

2. Aggravating and Mitigating Factors:

(a) *Aggravating*

(i) Premeditation: .callousness of the preparation. *R v Warner, Urqhart, Martin and Mullen,* [1946] OR 808 (Ont CA).

(ii) Victim Stranger: .where the offender is a danger to the public as seen by the fact that the victim was a total

stranger. *R v Johnson* (1971), 4 CCC (2d) 226 (Ont CA).

(iii) Age of Victim: .where the victim is a child. *R v Bezeau* (1958), 28 CR 301 (Ont CA).

(iv) Alcohol involved: .where alcohol was involved. *R v Sadowski* (1968), 3 CRNS 269 (Ont CA).

.where offender is an incurable alcoholic and presents a continuing danger. *R v Empey* (1978), 4 CR (3d) S-59 (Ont CA).

(v) Criminal record: .where the record is lengthy and involves violence. *R v MacDonald* (1974), 27 CRNS 212 (Ont CA).

(b) *Mitigating*

(i) Domestic context: .where the death occurs as a result of a domestic quarrel involving relatives or friends. *R v Muttart* (1971), Nfld. & PEIR 404 (PEICA).

.where the accused is a mother and where incarceration would adversely affect her children, alternatives should be used. *R v Henry* (1977), 20 Crim LQ 139 (Que CA).

.where the victim is a child, the "domestic context" no longer operates as a mitigating factor *R v Bezeau* (1958), 28 CR 301 (Ont CA) *R v Bompass* (1959), 123 CCC 39 (Alta SC) unless parents have personality defect (ie. suffer from mental retardation) *R v Antone and Antone* (1977), 20 Crim LQ 143 (Ont CA).

.where the offender repeatedly assaulted the victim (usually

		his wife) in the past, this will also negate the mitigating effect of the "domestic context". *R v MacDonald* (1974), 27 CRNS 212 (Ont CA).
(ii)	Intoxication:	.where the accused was drunk and only intended to frighten the victim. *R v Baldhead,* [1966] 4 CCC 183 (Sask CA).
(iii)	Native offender:	.where the offender is native and for whom a penitentiary sentence would involve being sent away from the remote area in which he lived without contact with the outside world. *R v Fireman* (1971), 4 CCC (2d) 82 (Ont CA).
(iv)	Inadvertance:	.where death was the result of inadvertance on the part of the offender. *R v O'Neill* (1966), 51 Cr App R 241 (CA).
(v)	Provocation:	.where the offender was provoked or acting in self-defence. *R v Muttart* (1971), 1 Nfld. and PEIR 404 (PEICA).
(vi)	Offender's Suffering:	.where the offence itself carries with it an inherent punishment (ie. killing a member of one's own family or being seriously disfigured or maimed as a result of the incident. *R v Beckner* (1984), 15 CCC (3d) 244 (Ont CA) *AG of Quebec v Rubio* (1984), 39 CR (3d) (Que SC).
(vii)	Other factors:	.include previous good character of the accused, the unlikely repetition of the crime and the age of the accused. *The Queen v Gregor* (1953), 31 MPR 99 (NSSC).

GUIDELINE PROTOTYPE

I. Offence: Break and Enter\ Dwelling-House* s306(1)(d)

II. Maximum: 6 Years

III. Presumptive Disposition: Qualified Presumption of Custody (**QI**) (ie. unless it is not a serious instance of the offence *and* the offender has no relevant record).

IV. Guidelines:

Offence	*Description*	*Range**
Break and Enter	Breaking and entering a private dwelling and committing (or intending to commit) an indictable offence therein or breaking out of a private dwelling after having committed or intending to commit an indictable offence therein	3-18 months

*For those receiving custody

ADVISORY INFORMATION

V. Current Practice

(These data reflect sentencing under the current system which includes full release or parole as early as one-third and remission based release after an inmate has served two-thirds of sentence. To get an idea of time actually served by inmates, these sentences must be discounted to a greater degree than would the ranges proposed by the Commission).

Criminal Code sections 306, 306(1), 306(1)(a), 306(1)(b), 306(1)(c), 306(1)(c)(i), 306(1)(c)(ii) (Includes break and enter of dwelling and non-dwelling):

Percentiles (m = months, y = years)

Source	*25th*	*50th(Median)**	*75th*	*90th***
Correctional Sentences Project (both dwelling and business premises)	3m	6m	1y	2y
Sentencing Commission (both dwelling and business premises)		6m		2y

* The median sentence can be regarded as the sentence in the middle of the distribution: of all cases resulting in custody, half are above (i.e. higher) and half are below it.

** The 90th percentile is that sentence below which which 90% of cases can be found. To illustrate, the 90th percentile for break and enter during this period was 2 years (Sentencing Commission). This means that of all offenders who were convicted of break and enter *and* who were sent to prison, 90% received terms of imprisonment that were 2 years or below.

VI. Case Law:

1. Description — .no particular sub-categorization; variation as *per* aggravating and mitigating factors.

2. Aggravating and Mitigating Factors

   (a) *General*

   (i) Amount Stolen: .the value of the goods stolen during the break and enter will aggravate or mitigate depending: *R v Prieduls* (Unreported) June 6, 1975 (Ont CA) *R v Lemire* (Unreported) June 8, 1977 (BCCA).

(b) *Aggravating*

(i)	Series of offences:	.where there is a string of offences. *R v Garcia and Silva*, [1970] 3 CCC 124 (Ont CA) NB where the number of offences is low and the accused is youthful, custody is to be avoided. *R v Dengo* (1972), 15 Crim LQ 259 (Ont CA).
(ii)	Premeditation:	.where the offence is premeditated. *R v Murray* (1960), 32 WWR 312 (Sask CA).
(iii)	Criminal record:	.where the offender has a criminal record - if the accused is a "professional burglar" this will justify a very serious penalty. *R v Brooks*, [1970] 4 CCC 377 (Ont CA).

(c) *Mitigating*

(i)	Background of offender:	.where the offender has no criminal record and has a good employment history and/or a supportive family. *R v Davenport* (Unreported) February 17, 1977 (Ont CA). .where the offender has an unfortunate background or family history. *R v Alderton* (1985), 44 CR (3d) 254 (Ont CA).
(ii)	Offender's alcoholism:	.where the offender suffers from alcoholism and is trying to rehabilitate himself. *R v Alderton* (1985), 44 CR (3d) 254 (Ont CA).
(iii)	Age:	.where the offender is a youth. *R v Alderton* (1985), 44 CR (3d) (Ont CA).

(iv)	Desire for rehabilitation:	.where the offender has a desire to be rehabilitated (and there are facilities available to assist in this). *R v Murray* (1960), 32 WWR 312 (Sask CA).
(v)	Mental Capacity:	.where the offender is of borderline intelligence. *R v Lewis* (1985), 67 NSR (2d) 198 (NSSC).
(vi)	Spontaneous offence:	.where there was only one offence and it was committed on impulse. *R v Murray* (1960), 32 WWR 312 (Sask CA).
(vii)	Intoxicated:	.where the offender was intoxicated when the offence was committed. *R v Ward* (1976), 14 NSR (2d) 96 (NSSC).

APPENDIX C: PROPOSED CANADIAN PROVISIONS ON EVIDENCE AND PROCEDURE FOR SENTENCING

The Sentencing Hearing

S6 *General*

(1) *In determining the sentence to be imposed on an offender, the court*

(a) shall, as soon as practicable after a determination of guilt, hold a hearing to determine the appropriate sentence to be imposed;

(b) shall, where the offender was determined to be guilty of two or more offences, consider at the same time all such offences and determine the sentence to be imposed for each such offence;

(c) shall consider where there are outstanding charges against the offender, with the consent of the offender and the Attorney General, all charges to which the offender signifies his consent to plead guilty and determine the sentence to be imposed for each such charge;

(d) may consider any facts of the offence for which sentence is to be imposed that could constitute the basis for a separate offence, if that court would otherwise have had jurisdiction to try such offences or charges;

(e) shall give reasons and state the terms of the sentence imposed. The reasons and the terms of the sentence shall be entered into the record of the proceedings, or where the proceedings are not recorded, shall be in writings.

S7 *Procedure*

(1) *Before determining the sentence to be imposed, the court shall give the offender, if present, an opportunity to make representations with respect to sentence;*

(2) *In determining the sentence to be imposed the court shall*

(a) consider any relevant information placed before the court including any representations or submissions made by or on behalf of the prosecutor or the offender;

(b) before making an order to pay a sum of money, and for the purpose of determining the amount to be paid, the time for payment and the method of payment, unless the offender acknowledges the ability to pay, conduct or cause to be conducted an inquiry concerning the ability of the offender to pay the amount;

(3) *The court shall ask for submissions by the prosecutor and the offender on the facts relevant to the sentence to be imposed on the offender, and if the facts are disputed, hear evidence presented by the prosecutor and the offender;*

(4) *Any witness called pursuant to subsection 7(2) may be cross-examined by the prosecutor or the offender as the case may be.*

(5) [*Current* Criminal Code *Subsection 735(1)*] Where an accused, other than a corporation, pleads guilty to or is found guilty of an offence, a probation officer shall, if required to do so by a court, prepare and file with the court a report in writing relating to the accused for the purpose of assisting the court in imposing sentence or in determining whether the accused should be discharged pursuant to section 736.

(6) [*Current* Criminal Code *Subsection 735(1)*] Where a report or statement is filed with the court under subsection (1) or (1.2), the clerk of the court shall forthwith cause a copy of the report or statement to be provided to the offender or counsel for the offender and to the prosecutor.

S8 *Evidence*

In determining the sentence to be imposed upon an offender,

(1) *Where facts are disputed, the court shall hear evidence presented by the party in support of such facts and the party adducing such facts must prove their existence beyond a reasonable doubt;*

(2) *A court may accept as proved all facts essential to the findings of*

guilt, and any facts agreed upon by the prosecutor and the offender;

(3) *The court shall give effect to all evidentiary privileges and rules relating to competency and compellability of witnesses recognised by the rules of evidence that apply to criminal matters.*

S9 [*Current* Criminal Code *Section 665*]

(1) Subject to subsections 9(3) and 9(4), where an accused or a defendant is convicted of an offence for which a greater punishment may be imposed by reason of previous convictions, no greater punishment shall be imposed on him by reason thereof unless the prosecutor satisfies the court that the accused or defendant, before making his plea, was notified that a greater punishment would be sought by reason thereof.

(2) Where an accused or a defendant is convicted of an offence for which a greater punishment may be imposed by reason of previous convictions, the court shall, on application by the prosecutor and on being satisfied that the accused or defendant was notified in accordance with subsection (1), ask the accused or defendant whether he was previously convicted and, if he does not admit that he was previously convicted, evidence of previous convictions may be adduced.

(3) Where a summary conviction court holds a trial pursuant to subsection 803(2) and convicts the defendant, the court may, whether or not the defendant was notified that a greater punishment would be sought by reason of a previous conviction, make inquiries and hear evidence with respect to previous convictions of the defendant and if any such conviction is proved may impose a greater punishment by reason thereof.

(4) Where, pursuant to section 623, the court proceeds with the trial of a corporation, that has not appeared and pleaded and convicts the corporation, the court may, whether or not the corporation was notified that a greater punishment would be sought by reason of a previous conviction, make inquiries and hear evidence with respect to previous convictions of the corporation and if any such conviction is proved may impose a greater punishment by reason thereof.

(5) This section does not apply to a person referred to in paragraph 742(a.1).

S10 [*Current* Criminal Code *Section 669*]
Where one sentence is passed on a verdict of guilty on two or more counts of an indictment, the sentence is good if any of the counts would have justified the sentence.

S11 [*Current* Criminal Code *Subsections 735(1.1) to (1.4)*]

(1) For the purpose of determining the sentence to be imposed on an offender or whether the offender should be discharged pursuant to section 736 in respect of any offence, the court may consider a statement, prepared in accordance with subsection (1.2), of a victim of the offence describing the harm done to, or loss suffered by, the victim arising from the commission of the offence.[1]

(2) A statement referred to in subsection 11(1) shall be

(a) prepared in writing in the form and in accordance with the procedures established by a program designated for the purpose by the Lieutenant Governor in Council of the province in which the court is exercising its jurisdiction; and
(b) filed with the court.

(3) A statement of a victim of an offence prepared and filed in accordance with subsection 11(2)(a) does not prevent the court from considering any other evidence concerning any victim of the offence for the purpose of determining the sentence to be imposed on the offender or whether the offender should be discharged pursuant to section 736.

(4) For the purposes of this section, "victim", in relation to an offence, means

(a) the person to whom harm is done or who suffers physical or emotional loss as a result of the commission of the offence, and
(b) where the person described in paragraph (a) is dead, ill or otherwise incapable of making a statement referred to in subsection 11(1), includes the spouse or any relative of that person, anyone who has in law or in fact the custody of that person or is responsible for the care or support of that person or any dependant of that person.

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1 Such a provision is not recommended for this jurisdiction. See para 11.33 *et seq*, *supra* (Role of the Victim).

APPENDIX D: PLEA DISCUSSIONS AND AGREEMENTS (DOCUMENTS)

(i) Recommendations of the Canadian Law Reform Commission in its Working Paper "Plea Discussions and Agreements" (No 60, 1989)

1. The term "plea agreement" should be defined as meaning any agreement by the accused to plead guilty in return for the prosecutor's agreeing to take or refrain from taking a particular course of action.

2. The term "plea discussion" should be defined as meaning a discussion directed toward the conclusion of a plea agreement.

3. (1) The term "improper inducement" should be defined as meaning any inducement that necessarily renders suspect the genuineness or factual accuracy of the accused's plea, and as including the following conduct when it is engaged in for the purpose of encouraging the accused to plead guilty:

   (a) the laying of any charge not believed to be supported by provable facts;
   (b) the laying of any charge that is not usually laid with respect to an act or omission of the type attributed to the accused;
   (c) a threat to lay any charge of the type described in paragraphs (a) and (b) above;
   (d) a threat that any not guilty plea entered by the accused will result, upon the accused's conviction, in the prosecutor's asking for a sentence more severe than the sentence that is usually imposed upon a similar accused person who has been convicted, following a not guilty

plea, of the offence with which the accused is charged;[1]

(e) any offer, threat or promise the fulfilment of which is not a function of the maker's office;

(f) any material misrepresentation; and

(g) any attempt to persuade the accused to plead guilty notwithstanding his or her continued denial of guilt.

(2) The term "improper inducement" should be defined so as to make it clear that encouraging the accused to enter into a plea agreement, as defined in Recommendation 1, is not in itself an improper inducement.

4. (1) The prosecutor and the accused, or counsel for the accused on his or her behalf, should be permitted to have plea discussions.

(2) No judicial officer before whom proceedings in respect of the accused are or will be held should take part in plea discussions.

(3) Notwithstanding part (2), it should be permissible for the Chief Justice, or a judge whom he or she has designated, to initiate and preside over plea discussions between the prosecutor and the defence, provided it is emphasized that the accused will not be appearing before the judge and is not obliged to conclude any plea agreement.[2]

[(4) A judge may, in general terms, inform the prosecution and defence as to the potential benefit of plea discussions, and may provide them with an opportunity to have such discussions.][3]

5. A prosecutor, police officer or defence counsel should not offer any improper inducement to an accused.

6. No judicial officer before whom proceedings in respect of the accused are or will be held should offer any inducement for the purpose of encouraging an accused to plead guilty to an offence.[4]

7. (1) A prosecutor should not, when the accused has retained counsel, have plea discussions directly with the accused in the

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1 These four provisions are derived from the ALI Model Code of Pre-Arraignment Procedure (1975), s350.3(3); see *infra*.

2 This subsection recognises that the dangers of judicial participation are considerably lessened when the judge involved is not one before whom the fate of the accused will ultimately be decided. The experience and objectivity of a senior trial judge could be useful, in the Canadian Commission's view, in keeping plea discussions on a realistic plane, and in bringing about plea agreements that are potentially acceptable.

3 This was a minority view. The majority were concerned that this might be interpreted as putting pressure on the accused to reach an agreement and to enter a guilty plea. We share their concern, and would be cautious about allowing a departure from judicial supervision to judicial involvement even at this level.

4 The purpose of recommendations 5 and 6 is to try to ensure the factual accuracy of pleas.

absence of the accused's counsel.

(2) A prosecutor with whom the unrepresented accused wishes to have plea discussions should inform the accused that:

(a) representation by counsel may be advantageous to the accused; and

(b) if the accused cannot afford to retain counsel, he or she should ascertain from the provincial legal aid plan whether her or she is eligible for assistance,

and should not thereafter have plea discussions directly with the accused unless the accused has informed the prosecutor unequivocally that he or she will not be retaining counsel.[5]

8. (1) Prosecutors should afford accused persons in similar circumstances the same opportunities for engaging in plea discussions.

(2) A prosecutor should endeavour to ensure, in the course of plea discussions, that accused persons in similar circumstances receive equal treatment.[6]

9. Counsel for an accused person should not conclude on the accused's behalf any plea agreement that requires the accused to plead guilty to an offence of which the accused maintains he or she is innocent.[7]

10. A prosecutor should not suggest, conclude or participate in any plea agreement that:

(a) requires the accused to plead guilty to an offence that is not disclosed by the evidence;

(b) requires the accused to plead guilty to charges that inadequately reflect the gravity of the accused's provable conduct, unless, in exceptional circumstances, they are justifiable in terms of the benefits that will accrue to the administration of justice, the protection of society, or the protection of the accused;

(c) requires the prosecutor to withhold or distort evidence; or

(d) contemplates a disposition that departs significantly from that which, in the absence of a plea agreement,

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5 This recommendation recognises that counsel's superior ability to evaluate the strength of evidence, the appropriateness of charges, the likely sentence, etc. can provide valuable protection for the accused and make plea discussions meaningful.

6 This recommendation is predicated on the principles of fairness and equality, and of prevention of disparity.

7 The accused's rights, professional ethics, and the factual accuracy of pleas, are all sought to be maintained by this recommendation.

would have resulted upon the accused's pleading guilty to the same offence, unless, in exceptional circumstances, it is justifiable in terms of the benefits that will accrue to the administration of justice, the protection of society, or the protection of the accused.

11. (1) A prosecutor should, unless the circumstances make it impracticable to do so, solicit and weigh carefully the views of any victims before concluding a plea agreement.

(2) A prosecutor who concludes a plea agreement should endeavour to ensure that victims are told the substance of, and reasons for, that agreement, unless compelling reasons, such as a likelihood of serious harm to the accused or to another person, require otherwise.

12. (1) A prosecutor and an accused who have concluded a plea agreement should, before the accused's plea is entered, disclose to the court:

(a) the substance of, and reasons for, that agreement; and
(b) whether any previous plea agreement has been disclosed to another judge in connection with the same matter and, if so, the substance of that agreement.

(2) The disclosure and justification contemplated by part (1) of this recommendation should be made in open court unless compelling reasons, such a likelihood of serious harm to the accused or to another person, require otherwise.

13. Upon being informed that the prosecutor and the accused have concluded a plea agreement, the judge should be able, where he or she considers it necessary to do so, to ascertain by questioning whether the accused understands the substance and consequences of that plea agreement.[8]

14. No plea agreement or submission should be binding on a judge.

15. In any case in which the judge, having been informed of the existence and substance of a plea agreement and of the reasons for that agreement, determines that an accused should not be judicially disposed of in the manner contemplated by the plea agreement, the judge should

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8 This recommendation is designed to ensure that the concurrence of the accused with a plea agreement is informed and voluntary.

inform the accused of this fact.[9]

16. Before any guilty plea is accepted from an accused, the judge should be able, where he or she considers it necessary to do so, to ascertain by questioning whether any inducement to plead guilty, other than an inducement disclosed as part of a plea agreement, has been offered to the accused.

17. In any case in which the prosecutor and the accused have concluded a plea agreement, the judge should be able, before any guilty plea is accepted from the accused, to make such inquiry as he or she considers necessary in order to be satisfied that a factual basis for the accused's guilty plea exists.

18. In determining whether to accept an accused's plea of guilty to any offence other than the offence charged, the judge should consider the substance of, and reasons for, any plea agreement concluded between the accused and the prosecutor.

19. The judge should reject an accused's guilty plea if, *inter alia*, he or she has reasonable grounds to believe:

    (a) that the plea was entered as a result of an improper inducement;
    (b) that the plea was entered as a result of a judicial officer's having offered an inducement for the accused to plead guilty;
    (c) where the accused, pursuant to what is currently section 606(4) of the *Criminal Code*, is pleading "not guilty of the offence charged but guilty of [another] offence arising out of the same transaction ...," that the offence to which the accused is pleading guilty inadequately reflects the gravity of the accused's provable conduct; or
    (d) that no factual basis for the accused's guilty plea exists.

20. An accused who has entered a guilty plea should be entitled to withdraw that plea before sentence, or to appeal against a conviction based thereon:

    (a) if it was entered as a result of an improper inducement;
    (b) if it was entered as a result of the judge's having

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9 The Canadian LRC rejected the alternative option (embodied in s350.5(4) of the ALI Model Code) of requiring the court to explain why a plea agreement has not been accepted and to give the prosecution and defence the opportunity to present the court with a modified agreement. It was thought that this would have the effect of making the judge a negotiating party. (*Plea Discussions and Agreements*, at p55). It may seem unduly rigid, however, that any judicial rejection of a plea agreement must be final.

offered an inducement for the accused to plead guilty;

(c) if it was entered as a result of a significant misapprehension as to the substance or consequences of a plea agreement concluded between the accused and the prosecutor; or

(d) if the prosecutor has breached a plea agreement concluded with the accused.

21. Where an accused has pleaded guilty to an offence and, upon his or her conviction, has received a sentence that is permitted under the *Criminal Code* in the circumstances and that accords with, or is within the range anticipated by, a plea agreement, the prosecutor should not be permitted to appeal against the sentence received by the accused unless it is shown:

(a) that the prosecutor, in the course of plea discussions, was wilfully misled by the accused in some material respect; or

(b) that the court, in passing sentence, was wilfully misled in some material respect.

22. In any case in which the accused has pleaded guilty to an offence in accordance with a plea agreement concluded between the accused and the prosecutor, any proceedings taken subsequently against the accused in contravention of that agreement should be prohibited unless the prosecutor

(a) was, in the course of plea discussions, wilfully misled by the accused in some material respect, or

(b) was induced to conclude the plea agreement by conduct amounting to an obstruction of justice.

23. Evidence of a guilty plea, later withdrawn, or of an offer to plead guilty to an offence, or of statements made in connection with any such plea or offer, should be inadmissible on the issue of guilt or credibility in any proceedings.

(ii) American Law Institute, A *Model Code of Pre-Arraignment Procedure (1975).*

Section 350.3 Procedure for Plea Discussions

(1) *Plea Conference.* At the request of either party, the parties shall meet to discuss the possibility that upon the defendant's entry of a plea of guilty or nolo contendere to one or more offences, the prosecutor will not charge, will dismiss or will move for the dismissal of other charges, or will recommend or not oppose a particular sentence. The defendant must be represented by counsel in such discussions and the defendant

need not be present. The court shall not participate in such discussions.

(2) *Prosecutor's Regulations.* Each prosecution office in the state shall issue regulations pursuant to Section 10.3 setting forth guidelines and procedures with respect to plea discussions and plea agreements designed to afford similarly situated defendants equal opportunities for plea discussions and plea agreements.

(3) *Improper Pressure.* The prosecutor shall not seek to induce a plea of guilty or nolo contendere by exerting such undue pressures as:

(a) charging or threatening to charge the defendant with a crime not supported by facts believed by the prosecutor to be provable;
(b) charging or threatening to charge the defendant with a crime not ordinarily charged in the jurisdiction for the conduct allegedly engaged in by him; or
(c) threatening the defendant that if he pleads not guilty, his sentence may be more severe than that which is ordinarily imposed in the jurisdiction in similar cases on defendants who plead not guilty.

(4) *Preliminary Consideration of Plea Agreement.* If the parties have reached a proposed plea agreement they may, with the permission of the court, advise the court of the terms of the agreement and the reasons therefor in advance of the time for tender of the plea. The court may indicate to the parties whether it will concur in the proposed disposition. Any such concurrence is subject to the information in the presentence report being consistent with representation made to the court.

Section 350.4

(2) *Plea to Reflect Informed Choice by Defendant.* By inquiring of the prosecutor and defence counsel and the defendant personally, the court shall ascertain whether there were any prior plea discussions, whether the parties have entered into any agreement with respect to the plea and the terms thereof and whether any inducements were offered in violation of Subsection 350.3(3). The court shall not accept a plea of guilty or nolo contendere from a defendant without first determining that such plea is a product of informed choice and that the defendant understands the effect, if any, of the plea on other charges that have been or may be brought against him.

Section 350.5. Additional Action to be Taken by the Court Where There is A Plea Agreement

(1) *Disclosure of Agreement at Time of Plea.* If the parties have entered a plea agreement pursuant to Section 350.3, they shall disclose it to the court at the time the defendant is called upon to plead.

(2) *Court's Consideration of Appropriateness of Disposition.* In considering whether to approve a plea pursuant to a plea agreement, the court shall consider whether:

(a) the parties have considered adequately the facts relevant to an appropriate disposition with respect to the defendant;

(b) the terms of the agreement and any psychiatric or other special rehabilitation program agreed upon appear generally suited to the defendant's needs, and

(c) the agreement is in the public interest in that it takes into account not only the benefit to the public in securing a prompt disposition of the case, but also the importance of a disposition that furnishes the public adequate protection and does not depreciate the seriousness of the offence or promote disrespect for the law.

(3) *Presentence Investigation.* The court may direct its probation service to conduct an investigation to assist it in ruling on the plea agreement. If the court believes it appropriate it may direct that such investigation be commenced at the time a plea agreement is presented for preliminary consideration pursuant to Subsection 350.3(5).

(4) *Ruling on the Plea.* Before accepting a plea pursuant to a plea agreement, the court shall advise the parties whether it approves the agreement and will dispose of the case in accordance therewith. If the court determines to disapprove the agreement and not to dispose of the case in accordance therewith, it shall so inform the parties, not accept the defendant's plea of guilty or nolo contendere, and advise the defendant personally that he is not bound by the agreement. The court shall advise the parties of the reasons it rejected the agreement and afford them an opportunity to modify the agreement accordingly. A decision by the court disapproving an agreement shall not be subject to appeal.

(iii) United States Federal Rules of Criminal Procedure (1988)

(e) *Plea Agreement Procedure.*

(1) *In General.* The attorney for the government and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or nolo contendere to a charged offence or to a lesser or related offence, the attorney for the government will do any of the following:

(A) move for dismissal of other charges; or

(B) make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court; or

(C) agree that a specific sentence is the appropriate disposition of the case.

The court shall not participate in any such discussions.

(2) *Notice of Such Agreement.* If a plea agreement has been reached by the parties, the court shall, on the record, require the disclosure of the agreement in open court or, on a showing of good cause, in camera, at the time the plea is offered. If the agreement is of the type specified in subdivision (e)(1)(A) or (C), the court may accept or reject the agreement, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report. If the agreement is of the type specified in subdivision (e)(1)(B), the court shall advise the defendant that if the court does not accept the recommendation or request, the defendant nevertheless has no right to withdraw the plea.

(3) *Acceptance of a Plea Agreement.* If the court accepts the plea agreement, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement.

(4) *Rejection of a Plea Agreement.* If the court rejects the plea agreement, the court shall, on the record, inform the parties of this fact, advise the defendant personally in open court or, on a showing of a good cause, in camera, that the court is not bound by the plea agreement, afford the defendant the opportunity to then withdraw the plea, and advise the defendant that if the defendant persists in a guilty plea or plea of nolo contendere the disposition of the case may be less favourable to the defendant than that contemplated by the plea agreement.

(5) *Time of Plea Agreement Procedure.* Except for good cause shown, notification of the court of the existence of a plea agreement shall be given at the arraignment or at such other time, prior to trial, as may be fixed by the court.

(6) *Inadmissibility of Pleas, Plea Discussions, and Related Statements.* Except as otherwise provided in this paragraph, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

(A) a plea of guilty which was later withdrawn;
(B) a plea of nolo contendere;
(C) any statement made in the course of any proceedings under this rule regarding either of the foregoing pleas; or
(D) any statement made in the course of plea discussions with an attorney for the government which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

However, such a statement is admissible (i) in any proceedings wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel.

(f) *Determining Accuracy of Plea.* Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.

(iv) American Bar Association, Standards for Criminal Justice (1980).

PART III. PLEA DISCUSSIONS AND PLEA AGREEMENTS

Standard 14-3.1. Propriety of plea discussions and plea agreements

(a) The prosecuting attorney may engage in plea discussions with counsel for the defendant for the purpose of reaching a plea agreement. Where the defendant has waived counsel pursuant to these standards, the prosecuting attorney may engage in plea discussions with the defendant. Ordinarily a verbatim record should be made and preserved for all such discussions.

(b) The prosecuting attorney, in reaching a plea agreement, may

agree to one or more of the following, as dictated by the circumstances of the individual case:

(i) to make or not to oppose favourable recommendations as to the sentence which should be imposed if the defendant enters a plea of guilty or nolo contendere;

(ii) to dismiss, to seek to dismiss, or not to oppose dismissal of the offence charged if the defendant enters a plea of guilty or nolo contendere to another offence reasonably related to defendant's conduct; or

(iii) to dismiss, to seek to dismiss, or not to oppose dismissal of other charges or potential charges against the defendant if the defendant enters a plea of guilty or nolo contendere.

(c) Similarly situated defendants should be afforded equal plea agreement opportunities.

(d) The prosecuting attorney should make every effort to remain advised of the attitudes and sentiments of victims and law enforcement officials before reaching a plea agreement.

Standard 14-3.2. Relationship between defence counsel and client

(a) Defence counsel should conclude a plea agreement only with the consent of the defendant, and should ensure that the decision whether to enter a plea of guilty or nolo contendere is ultimately made by the defendant.

(b) To aid the defendant in reaching a decision, defence counsel, after appropriate investigation, should advise the defendant of the alternatives available and of considerations deemed important by defence counsel or the defendant in reaching a decision.

Standard 14-3.3. Responsibilities of the judge

(a) The judge should not accept a plea of guilty or nolo contendere without first inquiring whether the parties have arrived at a plea agreement and, if there is one, requiring that its terms, conditions, and reasons be disclosed.

(b) If a plea agreement has been reached by the parties which contemplates the granting of charge or sentence concessions by the judge, the judge should:

(i) order the preparation of a preplea or presentence report, when needed for determining the appropriate

disposition;

(ii) give the agreement due consideration, but notwithstanding its existence reach an independent decision on whether to grant charge or sentence concessions; and

(iii) in every case advise the defendant whether the judge accepts or rejects the contemplated charge or sentence concessions or whether a decision on acceptance will be deferred until after the plea is entered and/or a preplea or presentence report is received.

(c) When the parties are unable to reach a plea agreement, if the defendant's counsel and prosecutor agree, they may request to meet with the judge in order to discuss a plea agreement. If the judge agrees to meet with the parties, the judge shall serve as a moderator in listening to their respective presentations concerning appropriate charge or sentence concessions. Following the presentation of the parties, the judge may indicate what charge or sentence concessions would be acceptable or whether the judge wishes to have a preplea report before rendering a decision. The parties may thereupon decide among themselves, outside of the presence of the court, whether to accept or reject the plea agreement tendered by the court.[10]

(d) Whenever the judge is presented with a plea agreement or consents to a conference in order to listen to the parties concerning charge or sentence concessions, the court may require or allow any person, including the defendant, the alleged victim, and others, to appear or to testify.

(e) Where the parties have neither advised the judge of a plea agreement nor requested to meet for plea discussion purposes, the judge may inquire of the parties whether disposition without trial has been explored and may allow an adjournment to enable plea discussions to occur.[11]

(f) All discussions at which the judge is present relating to plea agreements should be recorded verbatim and preserved, except that for good cause the judge may order the transcript of proceedings to be sealed. Such discussions should be held in open court unless good cause is present for the proceedings to be held in chambers. Except as otherwise provided in this standard, the judge should never through word or demeanour,

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10 This degree of judicial involvement in plea negotiations is not recommended for this jurisdiction, see Ch 12, *supra* (Plea Discussions and Agreements).

11 Judicial prompting of this sort is not favoured in this paper, see Ch 12, *supra* (Plea Discussions and Agreements).

either directly or indirectly, communicate to the defendant or defence counsel that a plea agreement should be accepted or that a guilty plea should be entered.

(g) In cases where a defendant offers to plead guilty and the judge decides that the final disposition should not include the charge or sentence concessions contemplated by the plea agreement, the judge shall so advise the defendant and permit withdrawal of the tender of the plea. In cases where a defendant pleads guilty pursuant to a plea agreement and the court, following entry of the plea, decides that the final disposition should not include the contemplated charge or sentence concessions, withdrawal of the plea shall be allowed if:

(i) prior to the entry of the plea the judge concurs, whether tentatively or fully, in the proposed charge or sentence concessions; or

(ii) the guilty plea is entered upon the express condition, approved by the judge, that the plea can be withdrawn if the charge or sentence concessions are subsequently rejected by the court.

In all other cases where a defendant pleads guilty pursuant to a plea agreement and the judge decides that the final disposition should not include the contemplated charge or sentence concessions, withdrawal of the plea may be permitted at the discretion of the judge.

Standard 14-3.4. Discussion and agreement not admissible
Unless the defendant subsequently enters a plea of guilty or nolo contendere which is not withdrawn, the fact that the defendant or defence counsel and the prosecuting attorney engaged in plea discussions or made a plea agreement, or statements made by the defendant in connection with and relevant to such plea discussions, should not be received in evidence against or in favour of the defendant in any criminal or civil action or administrative proceedings.

(v) Sentencing Reform: A Canadian Approach - Report of the Canadian Sentencing Commission (1987)

13.1 The Commission recommends that the interests of the victim in plea negotiations continue to be represented by Crown counsel. To encourage uniformity of practice across Canada, the responsible federal and provincial prosecutorial authorities should develop guidelines which direct Crown counsel to keep victims fully informed of plea negotiations and sentencing proceedings and to represent their views.

13.2 The Commission recommends that, where possible, prior to the acceptance of a plea negotiation, Crown counsel be required to receive and consider a statement of the facts of the offence and its impact upon the victim.

13.3 The Commission recommends that the sentencing judge inquire of the defendant whether he or she understands the plea agreement and its implications and, if he or she does not, the judge should have the discretion to strike the plea or sentence.

13.4 The Commission recommends that federal and provincial prosecutorial authorities collaborate in the formulation of standards or guidelines for police respecting over-charging and/or inappropriate multiple charging.

13.5 The Commission recommends that the relevant federal and provincial authorities give serious consideration to the institution of formalized screening mechanisms to permit, to the greatest extent practicable, the review of charges by Crown counsel prior to their being laid by police.

13.6 The Commission recommends that police forces develop and/or augment internal review mechanisms to enhance the quality of charging decisions and, specifically, to discourage the practice of laying inappropriate charges for the purpose of maximizing a plea bargaining position.

13.7 The Commission recommends that the relevant federal and provincial prosecutorial authorities establish a policy (guidelines) restricting and governing the power of the Crown to reduce charges in cases where it has the means to prove a more serious offence.

13.8 The Commission recommends that the appropriate federal and provincial authorities formulate and attempt to enforce guidelines respecting the ethics of plea bargaining.

13.9 The Commission recommends a mechanism whereby the Crown prosecutor would be required to justify in open court a plea bargain agreement reached by the parties either in private or in chambers unless, in the public interest, such justification should be done in chambers.

13.10 The Commission recommends that the trial or sentencing judge never be a participant in the plea negotiations process. This recommendation is not intended to preclude the judge from having the discretion to indicate, in chambers, the general nature of the disposition or sentence which is likely to be

imposed upon the offender in the event of a plea of guilty.

13.11 The Commission recommends that the *Criminal Code* be amended to *expressly* provide that the court is not bound to accept a joint submission or other position presented by the parties respecting a particular charge or sentence.

13.12 The Commission recommends the development of a mechanism to require full disclosure in open court of the facts and considerations which formed the basis of an agreement, disposition or order arising out of a pre-hearing conference.

13.13 The Commission recommends that an in-depth analysis of the nature and extent of plea bargaining in Canada be conducted by the federal and provincial governments or by a permanent sentencing commission.

THE LAW REFORM COMMISSION
Ardilaun Centre
111 St Stephen's Green
Dublin 2

Telephone: 715699
Fax No.: 715316

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