

Throw Away the Key: Public and Judicial Approaches to Sentencing – Towards Reconciliation

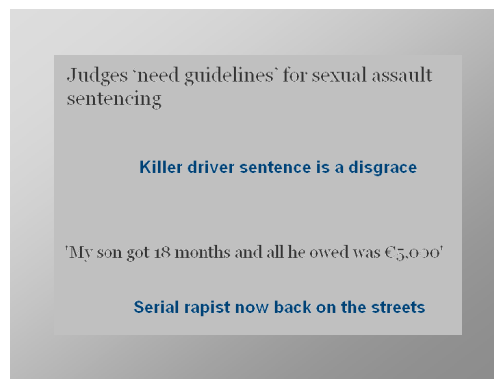
The Martin Tansey Memorial Lecture

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Compared to politics, the courts are a quiet backwater; one where a lot happens and much of it makes the news but very little of that achieves the level of teeth-grinding engagement with the public where everyone is affected and so everyone has an opinion. Except, you might say, when it comes to sentencing.



From what is reported, it might be thought that judges get sentencing consistently wrong. Of course, it is the headline grabbing cases that get reported. But, even still, as Dr. Niamh Maguire has pointed out, in an article published in 2010, since the 1990s the “issue of inconsistency in Irish sentencing practices has been highlighted in the media on a regular basis”.² The media habitually runs with the ball that judges are out of touch and inconsistent in how they deal with serious offenders. From a lifetime of observing the process of sentencing from the inside and from the outside, one might come to suspect that what we are expected to believe is the public want is a kind of revenge system of locking up offenders and throwing away the key; that for every vicious crime there should be a savage response. Martin Tansey devoted his professional life, from 1965 to 2002, much of that as head of the

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² ‘Consistency in Sentencing’, [2010] 2 *Judicial Studies Institute Journal* 14.

Probation Service, to disabusing the public of that attitude. Offenders, despite their crimes, are capable of being reformed. Supervision in the public sphere and alternatives to sentencing such as community service were developed under him. Through the Whitaker Report on the penal system, it has come to be commonplace that before a prisoner is sentenced, a probation report must be presented. Through its detailed background on the convicted person, a balanced judicial response is informed. For those who have to be sent to jail, the probation service under Martin Tansey developed the idea of half-way house accommodation, and from the point of view of the judiciary, suspending part of a sentence under supervision so that there would be a real chance of moving an offender away from recidivism. I am certain that Martin Tansey would have had strong views on currently commonplace extremist arguments: that the judiciary should have less power; that sentences should be made in Dáil Éireann and merely administered by the judges; and that legislation must determine what sentence a convict gets once he is found guilty of a crime. He would also have had a view on the mischievous proposition that judges are not to be trusted because the Irish judiciary lack a sentencing policy, lack clear guidance as to the appropriate principles and are left at large in remote courts to make up sentencing policy as they go along.

An occasion such as this challenges us all to move away from tossing around opinion ungrounded in fact and to address on a reasoned basis what is going on in judicial circles on the issue of sentencing in serious cases. As with any real view of human affairs, one might also ask where the problems are and how they might be addressed.

Problems in sentencing

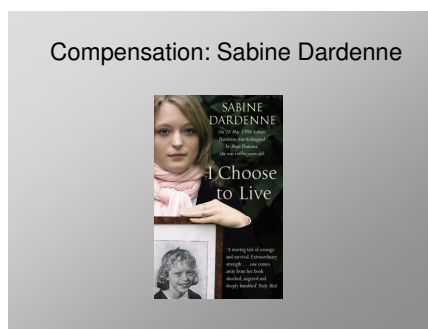
Sentencing is not at all easy. A judge, first of all, is caught between two families, that of the victim and that from which the offender comes. If the facts are allowed to dominate in determining the appropriate response, the result will tend towards what is objectively correct. Victims will have a chance to see their side of what has been done to them as a necessary counterbalance to the special pleading in mitigation allowed to the defence. People call for consistency in sentencing but it must be remembered, secondly, that while a judge in Dublin may be one of three or more dealing with that kind of crime and stationed in the Criminal Courts of Justice and so may consult with colleagues as to the 'going rate', all around the country there are judges who see no one from month to month and who are expected to make multiple decisions on any one day on a huge divergence of criminal offences. Up to 2012, there was no way of linking them together or supplying information on trends and on relevant factors. It might be an exaggeration to say that they might be like the first time defence-lawyer in Hitchcock's film *The Wrong Man*, but still it is not a bad illustration of the way the system works. A third problem is that certainly there has been guidance from cases decided at Court of Criminal Appeal level but the relevant cases are not necessarily cited by either side. In fact, the trend has been for no precedents to be cited in sentencing hearings and, with the exception of rape, for counsel for the prosecution not even to indicate a level of seriousness as to how the facts of the case compares with others. Hence, one may see that serious guidance on the proper approach to child pornography sentencing in the case of *The People (D.P.P.) v. Carl Loving* [2006] 3 I.R. 355 [sentence of 5 years' imprisonment (with 2 years suspended) in Circuit Court reduced to 1 year by Court of Criminal Appeal] has in the past not been routinely transmitted to every Circuit Court and District Court judge. There is no doubt as to how useful the guidance provided by Fennelly J. actually is.

1. Look to the two basic mitigating factors:
 - Whether "the accused accepts responsibility for the offence, including his plea of guilty";

- However, acceptance of responsibility is lessened as there is generally “little scope for plausible denial”. Regardless, the accused had facilitated garda inquiries and “relieved them of the necessity to prove their case”.
 - His/ her “previous character... with particular reference to the offence in question”. The applicant had previous convictions but they did not relate to the offence and dated back a number of years.
2. Consider the individual offence:
 - How serious and numerous are the images? At 175: the images were much fewer than in other cases where a shorter sentence has been imposed.
 3. The Circumstances & Duration of the Activity:
 - Images were downloaded during a “comparatively short period” of 2 months
 - Accessed a maximum of 15 times
 - Not subscribed to and the applicant ceased using them after tackling his dependence on alcohol
 4. Whether the images were shared/ distributed/ circulated:
 - The applicant had never shared/commissioned the material/ had improper relations with children.

There can be no doubt that these principles would introduce consistency into sentencing in this area. However, a decision such as this can only work if it is consistently cited to judges and if counsel for the prosecution, while abiding by their responsible position that they should not call for any particular sentence, offer guidance as to where the facts of the case of which the accused has been found guilty, or pleaded guilty, fit within that scheme.

A further difficulty, the fourth one I will touch on, is the issue of money. Those of you who have read *I Choose to Live*, the marvellous biography of Sabine Dardenne, the girl kidnapped and held for years by a paedophile in Belgium, will know that when Marc Dutroux came to be sentenced, with the judge sat two assessors whose task it was to assess the civil damages to which she was entitled in Belgium in addition to whatever sentence the criminal judge imposed.



Other countries have had this approach to sentencing over many years. Here, the issue of compensation being paid in mitigation of a sentence has caused considerable disquiet; I think, principally because the system, unlike in Belgium, was never set up for it. Further, it was not set up once the idea of compensation for crime became part of the judicial responsibility of a judge in sentencing. Nothing was done to integrate these two factors that in our system had been regarded as totally separate, so much so that if in the past a jury heard in a rape case that a complainant had also issued proceedings seeking compensation, her absolute entitlement as a victim of violence, the chances of a conviction were markedly lessened.

Under s. 6 of the Criminal Justice Act 1993 a court may instead of or in addition to, any other penalty, unless it sees any reason to the contrary, make a compensation order requiring the guilty party to pay compensation in respect of any personal injury or loss resulting from the offence of which he has been convicted.

Section 6, Criminal Justice Act 1993:

- (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 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 who has suffered such injury or loss.
- (2) The compensation payable under a compensation order shall be of such amountas the court considers appropriate, having regard to any evidence and to any representations that are made by or on behalf of the convicted person, the injured party or the prosecutor, and shall not exceed the amount of the damages that, in the opinion of the court, the injured party would be entitled to recover in a civil action against the convicted person in respect of the injury or loss concerned.

...

The order shall be of such amount 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, the injured party or the prosecutor. The order shall not exceed the amount of the damages that, in the opinion of the court, the injured party would be entitled to recover in a civil action against the convicted person in respect of the injury or loss. Why, I wonder, was the wording “instead of or in addition to” [any other sentencing penalty] chosen? If the award of damages had been automatic, there would be no difficulty. It would be part of the responsibility of a judge to also assess civil compensation. By making the approach one of mitigation if money is paid, it is arguable that the legislature made a mistake. A victim of violence is entitled to civil compensation; every assault is a civil wrong, a tort, in law compensated for by damages just like a traffic or work accident. But the fact that the accused can pay, and sometimes offers to pay, on the basis suggested by this legislation, namely a reduction in sentence, adds a complicating factor because it is not standard, as in Belgium, but a matter of mitigation that can divert a judge from a proper approach to sentencing. Sometimes people go so far as to question whether by measuring a reduction in sentence by virtue of the payment of compensation the victim is being degraded. Is there any sense to this? Well, there is some guidance from the Court of Criminal Appeal on this issue. In *D.P.P. v. Mc Laughlin* [2005] 3 I.R. 198 the Court stated that no victim:

...should ... be drawn into any form of proactive role in determining or negotiating the amount of any compensation which an accused person may offer with a view to mitigating his sentence. The extent of the involvement should be either to indicate a willingness to accept or refuse any sum of compensation that may be offered. Thereafter it is entirely a matter for the court to determine the appropriate sentence having regard to all the multiple considerations which must be borne in mind in this context, including any payment of compensation offered or made.

One might question whether this legislative structure has introduced an unnecessary and often inappropriate mitigating factor. The Oireachtas might consider the matter again.

Fifthly, the entitlement to suspend a sentence may be sometimes misplaced. Knowing that the general run of sentence for a particular offence of a particular

gravity is a long period of imprisonment, a judge may be tempted to suspend the bulk of a sentence to reflect mitigating factors. In reality, truly difficult cases tend to be those in which this approach of suspending the large part of a long sentence in a serious case arises out of the terrible dilemmas in which judges sometimes find themselves. Manslaughter carries no mandatory minimum sentence, unlike the life imprisonment that is automatic for murder. In murder cases, decisions over years of criminal trials that operate as precedents have established that excessive self-defence, subjective provocation and a requirement to prove intention and not just recklessness mean that only the very worst homicides can ever be called murder. But in manslaughter, the range of culpability can be from an attack akin to murder to accidental death. A fairground operator who does not check the rust on his ride may face a judge who must sentence on the basis of culpability; a friend may kill another with a punch outside a pub while both are inebriated; or a discarded lover may mount an arson attack meaning to scare but not to harm. No one envies a judge the decisions in those cases. These are not extreme examples. Almost as challenging are cases where an object is thrown with no purpose of causing serious harm but the victim ends up with brain damage. Robbery and drug dealing, just two examples of several offences carrying a maximum sentence of life imprisonment, all demand that so many factors as to participation, degrees of harm, planning and scale of seriousness be taken into account that no-one can reasonably say that sentencing is an easy issue.

Finally, I might mention that what seems the appropriate sentence in 1993 may not be what is right in 2013: in other words, there is a current sentencing approach and the experience of a judge from practice does not always remain a sure guide. Let me give an example. For the decade during which I practiced before Neylon P., that wonderful man whom we called Tommy Neylon, but not to his face, the standard sentence for incest was three years imprisonment. In 1986 a particularly ghastly case of incest came before the Dublin Circuit Court. A girl had been abused by her father well into her 20s, the abuse having started when she was barely over ten years of age. The key point in this case was the willingness of the victim to give evidence. This was tested to the limit by the father who abused her by threatening her with savage violence after she had gone to the Gardai. An application was made to revoke bail and this young lady had to get up in front of a crowded courtroom on a Friday in court 14, now court 24, and describe the threats that she had been subjected to by her father. She did it in front of everyone and everyone knew what had happened to her because *in camera* protection did not extend to bail hearings. After that, knowing that she would swear up, the father pleaded guilty. The sentence was three years imprisonment. That was the going rate for such a case at that time. Were that sentence to be imposed today it might be questioned. In fact, uproar happened only a few years later in 1993 in the Kilkenny incest case; there the sentence was seven years and the accused was released in 1998. The judiciary were at that time constrained by a maximum penalty of seven years for incest under the Punishment of Incest Act, 1908. The legislature has since changed it.³ Times do change and with it attitudes.

³ The maximum sentence was increased to 20 years imprisonment under section 12 of the Criminal Justice Act 1993. Under section 5 of the Criminal law (Incest Proceedings) Act, 1995, the maximum penalty for incest is now life imprisonment.



Supreme Court

It is only a personal view, but given the burdens involved in formulating a correct sentence, some kind of practical guidance is needed. Guidance in principle, legal guidance, is already there. The Supreme Court in *The People (D.P.P.) v. M.* [1994] 3 I.R. 306 through Denham J. , pointed out that the “nature of the crime, and the personal circumstances of the appellant, are the kernel issues to be considered and applied in accordance with the principles of sentencing...”. This approach she described as “the essence of the discretionary nature of sentencing”. Thereafter, these are these principles to be taken into account:

- the fundamental principle of proportionality; the sentence should be proportionate to the crime committed but also to the personal circumstances of the accused;
- the general impact on victims is a factor to be considered by the court in sentencing;
- a grave offence should attract a severe sentence but attention must also be paid to individual factors such as remorse, which may in principle reduce the sentence;
- in considering the sentence it is appropriate to consider the offence and the circumstances of the accused but not in order to determine whether the accused should be incarcerated to prevent future offending.

Some may think that anyone can take these principles and come up with a fair sentence. Some may also think that they would do a better job. I wonder.

Public perception

I might briefly mention that a number of criminology studies have analysed the gap between the public perception of a sentence and the reality of the task that a judge faces. In a way, the volunteers were asked to become a sentencing jury. As Groucho Marx said “I was married by a judge. I should have asked for a jury”. These studies fulfilled his wish.

In one such study conducted in the United States, a number of participants were chosen and given a basic outline of the facts of a case. These facts included mitigating factors and details as to the previous character of the accused. The participants were then asked to suggest a sentence. While previous researchers had found open-ended questions on the appropriate sentence for convicted offenders to result in sanctions that were overly punitive, this study found responses to be largely in line with the sentencing practice of the courts at that time. The public surveyed largely concurred with sentencing decisions about incarceration and sentence length, with the exception of certain crimes particularly drug offences,

which those surveyed believed were dealt with too harshly, and certain white collar crimes, which those surveyed believed were not dealt with harshly enough.⁴

Similarly, the Sentencing Council of England and Wales has sought to gauge public attitude to sentencing for various crimes. In a recent study on public attitudes to the sentencing of drug offences, a number of participants were chosen and given a basic outline of the facts of a case.⁵ Each focus group discussion opened with a few questions about the purposes of sentencing, and how the ‘seriousness’ of drug offences should be defined. The remainder of the discussion was devoted to consideration of six sentencing scenarios. These specified the details of six different offences, ranging from cannabis possession to large scale importation of heroin. Participants were then asked to suggest an appropriate penalty and to indicate the reasons behind their selection. They were then asked to consider whether, how and why the penalty should change if the offence differed in some way, for example, if a different type of drug was involved, or if the offender’s role or circumstances differed. The study found that the sentences suggested by the sample group for certain low level drug offences, having been informed of the sentencing process followed by judges, was largely in line with the sentencing practice of the courts, while the group adopted a more punitive attitude to large scale importation and associated offences. One scenario was consistently sentenced more leniently by participants than it would be by the courts. That case involved the importation of cocaine by a single mother from Nigeria who had been recruited in her home country to bring a moderate amount of cocaine to the UK in order to pay off outstanding debts. Having been informed of these factors, very few participants in the study opted to sentence the Nigerian mother to the kind of eight to ten-year custodial sentence that she would be likely to receive in the courts at the time of the study.

This is not just about newspapers, since some reporting is responsible and the regular court reporters are highly respected. All I suggest is that sentencing is not at all easy, that judges are pulled in many directions, and picking out and demonstrating for public consumption the factors that justify a sentence is far from easy.

So, if sentencing is difficult, how can it be made easier? In particular, is there rhyme or reason to the sentencing approach of the Irish courts and would they be suited to improvement? Let’s look at the United States of America, England and Wales, Scotland and finally I want to tell you what we have been about in Ireland.

Plea bargaining and the United States of America

The United States of America is the place to which to look if you want a structured model whereby whatever offence you plead guilty to determines the sentence precisely. Here we are grateful for the assistance of Professor Mike W Martin of Fordham University but any errors which follow and any opinions are those of the authors. As with any large jurisdiction, there is much to admire and there are perhaps some aspects of their approach that might not be suitable elsewhere.

The USA has decided on a federal level that there should be certain crimes should have mandatory minimum sentences—*i.e.*, a court must give at least a certain

⁴ Cohen *et al.*, *Measuring Public Perceptions of Appropriate Prison Sentences, Final Report*, October 2002. Available at <https://www.ncjrs.gov/pdffiles1/nij/grants/199364.pdf> (last accessed 8th April, 2013).

⁵ Jacobson *et al.*, *Public Attitudes to the Sentencing of Drugs offences*, March 2011, Sentencing Council Research Series 01/11. Available at http://sentencingcouncil.judiciary.gov.uk/docs/Drugs_research_report.pdf (last accessed 8th April, 2013).

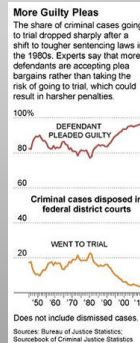
number of years in certain cases. The category of cases for mandatory minimum sentencing includes drug distribution, firearms, and terrorism.

- For drug cases, 21 U.S.C. § 841(b)(1)(A)-(B)) requires sentences of at least 10 years (21 U.S.C. § 841(b)(1)(A)) or 5 years (21 U.S.C. § 841(b)(1)(B)), depending on the drug quantity and substance. In addition, if the perpetrator has a previous conviction for drugs or violence, the mandatory minimum is doubled upon the prosecutor's filing of a "prior felony information" with the Court.
- For firearms cases, 18 USC § 924(c): requires 5, 7 or 10-year *consecutive* sentences for possessing, brandishing or discharging, respectively, a firearm during a drug crime or crime of violence, and 30-year *consecutive* if it was a submachine gun or used a "silencer." If the defendant has a previous firearm conviction under 18 USC § 924(c), then every subsequent conviction is an additional 25-years *added to the sentence*. An example:
 - If a defendant is picked up for robbing drug dealers of their drugs and drug proceeds while brandishing a weapon, and the Government can prove during his trial 5 separate instances where the defendant committed this crime, as well as one instance where the defendant then re-sold a kilogram of heroin that had been stolen, then the defendant would be facing the following mandatory minimum sentence:
 - 10 years for the selling of the heroin, plus
 - 7 years for the brandishing of the gun during robbery 1, plus
 - 25 years for the brandishing of the gun during robbery 2, plus
 - 25 years for the brandishing of the gun during robbery 3, plus
 - 25 years for the brandishing of the gun during robbery 4, plus
 - 25 years for the brandishing of the gun during robbery 5,
 - For a total of 117 years. Remember: the Court must sentence him to no less than this amount.
- Courts are allowed to go under the mandatory minimums in two instances:
 - Safety valve:
 - Drug case
 - No violence
 - Minimal participant
 - No prior criminal history
 - Truthful and forthcoming about role in crime.
 - Cooperation:
- Defendant and Government enter into a cooperation agreement.

These mandatory minimum sentences certainly bring clarity but they can lead to the type of scenarios such as this one: a 27-year-old gang member who robbed a few drug dealers and then sought to sell the drugs he robbed; if he loses at trial, he will face a mandatory sentence of 40 years; 10 years for the drugs, plus 5 years for

possessing a firearm during the first robbery, plus 25 years for possessing a firearm for the second robbery. The Government has offered him a plea deal to just the first firearm charge—thus, if he takes the plea, he will have a mandatory minimum sentence of 5 years, while facing a Guideline range of 10-12 years.

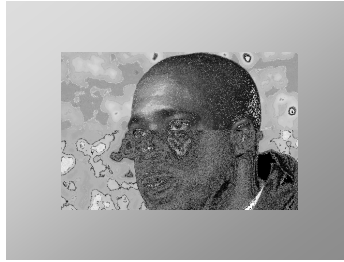
Plea Bargaining in the United States



Then there is plea bargaining as to the formulation of the charge the defendant will plead to. This varies on a state to state level. Let us take an instance from the state of California. In 2008 Hans Reiser, a well known software developer, was found guilty of the first-degree murder of his estranged wife, a crime which carries a sentence of 25 years to life imprisonment. Her body had not been found. Prior to sentencing, the Office of the State Attorney, having consulted the family of the victim, agreed to a deal whereby Reiser would reveal the location of his wife's body in exchange for pleading guilty to second-degree murder. The deal was made subject to the approval of the trial judge. Having revealed where he had hidden the victim's remains, Reiser received a fifteen year sentence, the maximum sentence for a second-degree murder.

Another case, from the state of Utah, demonstrates the way in which the State Attorney's office can use the threat of the death penalty to secure a particular resolution to a murder charge. By pleading guilty to two counts of first-degree felony aggravated murder, Donald Bret Richardson avoided the death penalty. As part of a plea deal, prosecutors agreed to recommend that Richardson serve life in prison without the possibility of parole. According to Richardson's defence counsel, prior to the plea agreement the prosecutor was planning to recommend the death penalty if Richardson was found guilty at trial.

One of the criticisms of a system that has a large disparity depending on whether a plea offer is accepted or the accused takes a trial and is found guilty is that some people will later argue that they felt compelled to plead guilty to crimes they didn't commit; so opponents argue. Cases become controversial after disposal. Here is an example. Brian Banks, an aspiring sportsman who was convicted at the age of 17 of kidnapping and raping a school friend in the state of California, is probably the most prominent recent example. He spent five years in prison having pleaded "no contest" to the charges following a plea agreement that yielded a sentence of five years imprisonment followed by five years probation. Following his release, the alleged victim of the rape admitted she had fabricated the story and Banks was subsequently exonerated in 2012. His attorneys had advised him that if he did not accept the plea bargain and the case went to trial, he could be sentenced to life imprisonment on the prosecutor's recommendation, a possible 41 years.



What happens if an accused person decides not to accept a plea bargain? Consider what recently happened in the state of Florida; we have these details from the *New York Times*. Shane Guthrie was accused of beating his girlfriend and threatening her with a knife. He was initially charged with aggravated battery on a pregnant woman and false imprisonment. The prosecutor offered him a deal of two years in prison plus probation. Guthrie rejected that, and also rejected a later offer of five years, because he believed that he was not guilty, according to his lawyer. The prosecutor's response was severe. He filed a more serious charge of first-degree felony kidnapping, based on the girlfriend's accusation that he pulled her by the arm inside her home and then grabbed her hair and pulled her the distance of several parking spaces. Because of a state law that increased punishments for people who had recently been in prison, like Mr. Guthrie, this charge could mean mandatory life imprisonment if Guthrie is convicted. This case is ongoing and obviously we have no view as to the innocence or otherwise of Mr. Guthrie. It is the principle which counts.

On a federal level sentencing is sophisticated and structured. Curiously, they have moved away from sentencing guidelines being mandatory. Instead these are merely advisory. The Court must still determine the sentencing guideline range.

- Preliminary point:
 - The Guidelines are no longer mandatory. See *United States v. Booker*, 543 U.S. 220 (2005) (6th Amendment of the US Constitution (right to trial by jury) precludes a judge from making the factual findings required under the Sentencing Guidelines that increase the sentence beyond that supported by a plea or jury verdict; must be admitted by the defendant or proved to a jury beyond a reasonable doubt).
- How to determine the Guideline range:
 - Calculate Offense Level
 - Calculate Criminal History
 - Retrieve range from the chart
- "Departures" from the Guidelines:
 - After determining the Guideline range, the Court must determine whether the Guidelines themselves allow for departures from the Guideline range.
 - When the Guidelines were mandatory (pre-*Booker*), the only way to get below the Guidelines was to be eligible for one of the departures explicitly permitted under the Guidelines. Two examples of such departures, and there are only a handful, are cooperation and diminished capacity.

According to *Booker*, after determining the Guideline range and any applicable Guideline “departures,” the Court must determine if there are any circumstances pursuant to 18 U.S.C. § 3553(a) that would justify a “non-Guideline” sentence.

- 18 U.S.C. § 3553(a) states:

The court shall impose a sentence sufficient, but not greater than necessary The court, in determining the particular sentence to be imposed, shall consider—

- **(1)** the nature and circumstances of the offense and the history and characteristics of the defendant;
- **(2)** the need for the sentence imposed—
 - **(A)** to reflect the seriousness of the offense . . . ;
 - **(B)** to afford adequate deterrence . . . ;
 - **(C)** to protect the public from further crimes . . . ; and
 - **(D)** to provide defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
- **(3)** the kinds of sentences available;
- **(4)** the kinds of sentence and the sentencing range established for—
 - **(A)** the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines— **(i)** issued by the Sentencing Commission . . . ; and **(ii)** that . . . are in effect on the date the defendant is sentenced; or
 - **(B)** in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission . . . ;
 -
- **(5)** any pertinent policy statement—
 - **(A)** issued by the Sentencing Commission . . . ; and
 - **(B)** . . . is in effect on the date the defendant is sentenced.
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- **(6)** the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
- **(7)** the need to provide restitution to any victims of the offense.

Prior to *Booker*, Courts were forbidden to look at the factors set forth in 18 U.S.C. § 3553(a), and were limited to Guidelines “departures” if they wanted to give a sentence below the Guideline range. Post-*Booker*, Guideline departures are far less significant, because a court may consider a wide variety of issues under 18 U.S.C. § 3553(a)(1) (“the nature and circumstances of the offense and the history and characteristics of the defendant”) in order to give a “non-Guideline” sentence. Indeed, in *Gall v. United States*, 552 U.S. 38 (2007), the Supreme Court held that “extraordinary” circumstances are not required for non-Guideline sentences. The appellate standard of review of district court sentences is abuse of discretion, regardless of whether that sentence is inside or outside the Guidelines range.

Thus, the Sentencing Guidelines are not mandatory, and in fact now act only as guidelines for what the sentence should be. During one recent US Supreme Court oral argument, Justice Alito noted that the judges in the Eastern District of New York (Brooklyn, Queens and Long Island) were only sentencing 30 percent of the defendants before them to Guideline sentences. So guidelines are now being departed from in the United States regularly. Mandatory minimums and plea bargaining issues remain. Some people here see guidelines as the way forward. Let’s look at the approach of two jurisdictions close to here.

England and Wales

Many of you attended the lecture given in February by Lord Justice Treacy of the Court of Appeal of England and Wales in which he outlined the approach of the Sentencing Council of England and Wales which was established in 2010. Briefly, the Sentencing Council is responsible for the promotion of “a clear, fair and consistent approach to sentencing” through the creation of sentencing guidelines. It also produces analysis and research on sentencing, and works to improve public confidence in sentencing.

This is an organisation with an annual budget approaching £2 million and 16 permanent civil servants. They are not at large as to their approach. Lord Justice Treacy explained that before a guideline is set, huge volumes of data are collated from sentencing judges, interested groups such as victims and the general public. They also conduct interviews with focus groups to determine what factors, in their view, make a crime more serious or less serious. Judges are also invited to “road test” proposed guidelines during the consultation process, prior to the completion of the definitive guideline. He made it clear that sentencing guidelines are responsive, and are not shackling judicial discretion. Speaking on sentencing guidelines at the annual lecture of the Irish Penal Reform Trust last September he said:

In all of these guidelines, the Council has returned to first principles of sentencing and opted to focus attention on the two determinates of seriousness as defined in statute by the Criminal Justice Act 2003, namely harm and culpability ... Of course we are not wedded to an exact and limiting structure-some guidelines will require slightly different structures, but the principles will remain the same which is important in encouraging a consistent approach.

For every sentence that a judge passes, there must be regard to the relevant sentencing guideline. This is what the burglary offences sentencing guideline looks like.

Domestic Burglary Guideline

STEP ONE
Determining the offence category

The court should determine the offence category using the table below.

Category 1	Greater harm and higher culpability
Category 2	Greater harm and lower culpability or lesser harm and higher culpability
Category 3	Lesser harm and lower culpability

The court should determine culpability and harm caused or intended, by reference only to the factors below, which comprise the principal factual elements of the offence. Where an offence does not fall squarely into a category, individual factors may require a degree of weighting before making an overall assessment and determining the appropriate offence category.

<p>Factors indicating greater harm</p> <ul style="list-style-type: none"> Theft of damage to property causing a significant degree of loss to the victim (whether economic, sentimental or personal value) Violence resulting in serious injury Occupier of home or returns home while offender present Threats to the victim, beyond the normal inevitable consequences of invasion and theft Violence used or threatened against victim Causing or potential public disorder <p>Factors indicating lesser harm</p> <ul style="list-style-type: none"> Nothing stolen or only property of very low value to the victim (whether economic, sentimental or personal) Minimal damage or disturbance to property 	<p>Factors indicating higher culpability</p> <ul style="list-style-type: none"> Victim or previous detainee targeted (for example, due to vulnerability or health issues or disability, race, sexual orientation) A significant degree of planning or organisation Kids or other weapons carried before not charged (wherever) Equipped for burglary (for example, magazines carried and/or use of vehicle) Number of groups or gangs <p>Factors indicating lower culpability</p> <ul style="list-style-type: none"> Offence committed on impulse, with limited intrusion into property Offender regulated by others Physical disorder or learning disability, where linked to the commission of the offence
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For every sentence passed in the Crown Courts, the judge must complete a form. The form identifies the principal offence for which the sentence is being passed; what category it falls into in the relevant guideline; the aggravating and mitigating factors; the number of relevant previous convictions the offender had; the stage at which a guilty plea was entered; and what percentage reduction was allowed for that plea. These forms are collected and collated on a monthly basis. These forms enable the Sentencing Council to measure departures from their guidelines. This is what one of these looks like.

I actually wonder if this is not just slightly too much of a straightjacket? I also wonder about the constitutional position. Sentencing is entrusted to the judiciary. How can it meet the requirement of justice when one of the most important functions of criminal justice is entrusted to a panel of whom exactly and chosen by which method on the basis of what criteria?

Looking back, it seemed to me that the most easily imported era for sentencing guidelines in that jurisdiction occurred when these were first being set by the Court of Criminal Appeal of England and Wales, a practice which commenced in 1975. In those days, a decision was taken that the Court of Appeal should hear several appeals against sentence together. The judges considered the various circumstances and set down very broad, but transparent, guidelines as to how they considered sentences ought to be approached. This was well before the formality of the Sentencing Council had ever been thought of. The Sentencing Guidelines Council, the predecessor to the current Sentencing Council of England and Wales, was formed in 2003. Between 2003 and 2010 the courts were required to “have regard” to relevant guidelines. Since the establishment of the Sentencing Council in 2010, the courts in that jurisdiction “must follow” guidelines of that body, unless it is in the interests of justice not to do so. Before 2003, guideline-type judgments by the Court of Appeal were intended to be guidelines only, and judges were not obliged to follow them.

Let’s look at one of the early examples now. In *R v. Billam* (1986) 8 Cr. App. R. (S) 48, the Lord Chief Justice provided quite detailed guidelines on sentencing those convicted of rape. Having considered the starting point for rape sentences in contested cases, the Court then addressed aggravating factors that should be considered in such cases:

The crime should in any event be treated as aggravated by any of the following factors: (1) violence is used over and above the force necessary to commit the rape; (2) a weapon is used to frighten or wound the victim; (3) the rape is repeated; (4) the rape has been carefully planned; (5) the defendant has previous convictions for rape or other serious offences of a violent or sexual kind; (6) the victim is subjected to further sexual indignities or perversions; (7) the victim is either very old or very young; (8) the effect upon the victim, whether physical or mental, is of special seriousness. Where any one or more of these aggravating features are present, the sentence should be substantially higher than the figure suggested as the starting point.

A later example of how well this can work is *R v. Afonso and ors* [2005] 1 Cr. App. R. 99. In that case, the Court of Appeal heard three appeals against sentence together in order to take the opportunity to give guidance in relation to the sentencing of a particular group of offenders, namely low level of suppliers of Class A drugs. The defendants were unemployed drug addicts. They had sold the drugs to undercover

police officers but did not hold a stock of drugs. The Court of Appeal felt that the level of sentence which it would usually impose in a case involving sale of Class A drugs would be disproportionate in the circumstances. After an analysis, this is the kind of guidance that was offered to sentencing judges:

There will be some such adult and young offenders for whom a drug treatment and testing order will be appropriate in the circumstances indicated in Attorney General's Reference No.64 of 2003Where such an order is not appropriate, generally speaking, adult offenders in the category we have identified, if it is their first drugs supply offence, should, following a trial, be short-term prisoners, and, following a plea of guilty at the first reasonable opportunity, should be sentenced to a term of the order of two to two-and-a-half years' imprisonment. For young offenders, the custodial term is likely to be less.

Scotland

Sheriff Tom Welsh QC has as usual been most generous with assistance on Scottish law. As with America, any errors here are our own and any opinions similarly. Sentencing guidelines were unknown in Scotland and until the year 2000 were rarely discussed. They are now brought in as a matter of law through the Criminal Justice and Licensing (Sentencing) Act 2010. As I understand the current position, the implementation of the legislation through the Scottish government is stalled. A major issue is cost, with start up expenditure estimated at £900,000 and more and an annual cost of £400,000 that is thought by many to be an unrealistic. The Act follows a familiar pattern of setting up a council of 11 people, judges in the minority, which collates information and issues guidance. The Criminal Procedure (Scotland) Act 1995, which is a code by all but name, was amended in 2003 to allow the appeal court to issue sentencing guidelines. They have done so on occasion. One case about child pornography offers general parameters but in the absence of an actual information gathering body for Scotland, it relies very heavily on the equivalent approach for England and Wales; *Her Majesty's Advocate v. Graham* [2010] HCJAC 50, May 27th, 2010.

Her Majesty's Advocate v. Graham [2010] HCJAC 50

"This appeal demonstrates how too rigid an adherence to guidelines can distort the sentencing exercise and produce an unjust result. If one looked no further than the Definitive Guideline (of the Sentencing Council of England and Wales), a sentence in the range of two to five years' imprisonment would seem appropriate. The sentence must, however, reflect the culpability of the respondent..... I consider that a cumulo sentence of seven years' imprisonment should be the starting point on the charges with which we are concerned."

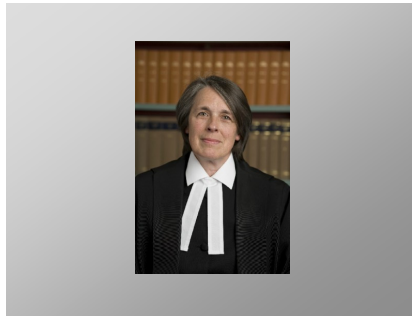
Another closely reasoned decision relates to the cultivation of cannabis plants and again bases its reasoning largely on the same source; *Her Majesty's Advocate v. Zhi Pen Lin* [2007] HCJAC 62, November 2nd, 2007. Reading these impressive decisions, it is clear what has been clear to humanity since the construction industry began:

you can't make bricks without straw. And in Scotland in the absence of expenditure on the nuts and bolts of gathering information, there has been a need to refer to the information gathered in the neighbouring jurisdiction.

Ireland

The gathering of information is crucial to any exercise in rationalising sentencing into patterns. That takes time, expertise, personnel and money. That is clear from the Scottish situation, the early efforts in England and Wales and the current approach of that jurisdiction through the work of the Sentencing Council. It is equally clear in respect of any progress in this country towards the co-ordination of sentencing. In the meanwhile, it behoves the judiciary to do they best that they can to serve the country. The work of Judge David Riordan was pioneering in this respect. As early as 2005 Judge Riordan, then a judge of the District Court, surveyed the typical penalties attached to a number of continually recurring charges in the District Court. The survey, conducted by Judge Riordan with Ms. Andrea Ryan, was not based on actual outcomes in decided cases but on a survey of likely penalties which would be imposed by his colleagues. The survey examined situations in which the Probation of Offenders Act would be applied, and when a custodial sentence might be considered appropriate. It also gauged the severity of the penalty on a first, second or third conviction for a similar offence. Judge Riordan's subsequent completion of his doctorate on the use of community service orders and the suspended sentences in 2009 was an outstanding contribution to the area of sentencing in Ireland.

In recent years it has become clear that additional research is needed in this area. Early last year the Chief Justice asked me to take on the role of supervising the Judicial Researchers' Office.

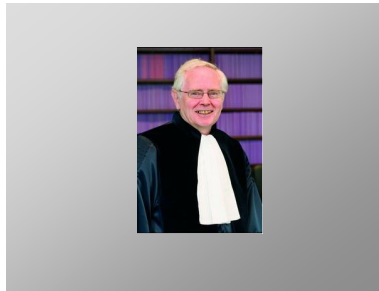


This, as the name implies, is the body that engages in research on behalf of the judiciary but it consisted of only two people at the time for 148 judges. The Chief Justice and the President of the High Court set about bringing the office up to strength. There are now six people with serious ability in legal research.

The Judicial Researchers' Office



One of the priorities of the Chief Justice was the gathering of information as to sentencing in serious cases and that task was taken up by the researchers. The Chief Justice was aware that the review of rape sentencing in the Central Criminal Court decision of *The People (D.P.P.) v. W.D.* had been a collaborative effort between me and Aoife Marie Farrelly, who then worked for the Judicial Researchers' Office. That is stated in the judgment. The draft of that judgment was also critiqued in a most positive way as to the relevant patterns of sentencing in rape by O'Higgins J., my senior colleague on the High Court and now a judge of the General Court of the European Union, who also supplied additional transcripts central to the decision.



In that decision, with the help of Ms Farrelly, dozens of rape sentences were examined and classified towards showing the circumstances that might guide a mild response, an ordinary response, an exceptional response and, finally, a sentence tending towards life imprisonment.

The Chief Justice was interested as to whether a similar exercise could be conducted to bring that decision up to date and what could be done to explore the patterns that precedent had laid down for other types of crime. Other judges, Sheehan J. in particular, had started giving written sentencing decisions. The Chief Justice was also intent that the Irish Sentencing Information System (known as ISIS) should be revived but funding was needed for that. While we had the researchers, work could begin straight away on this new project. The practice of guardedly gathering information from diverse sources had been approved by the Court of Criminal Appeal in *The People (D.P.P.) v. Adam Keane* [2008] 3 I.R. 177, with caution. This is what Murray C.J. said:

Nonetheless, with that qualification in mind, [cases in the media] did provide some useful indicators for the purpose of the broad exercise involved in that case. The judgment did not purport to set standard sentences or tariffs but is a valuable reference point in ascertaining the wide variety of factors ... which can influence sentencing in rape cases.

In this work, the President of the High Court, Kearns P., has been very supportive and encouraging as have the President of the Circuit Court and the President of the District Court.

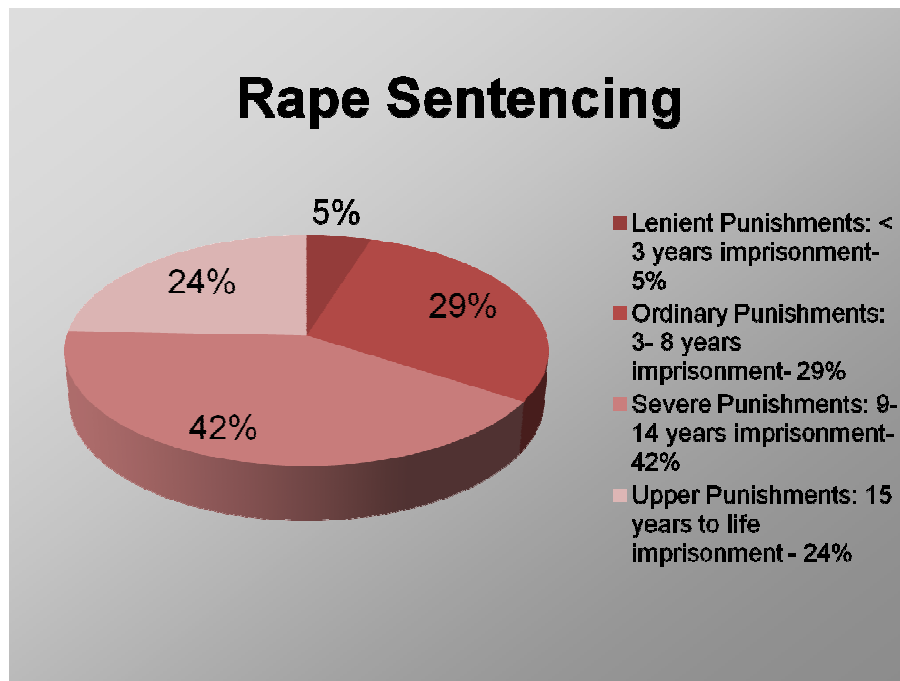


As a result of decisions taken at this level, we are in a much stronger position to gather information in 2012 and 2013. Until recently, decisions relied on the availability of court transcripts and newspaper reports, or a detailed survey in the case of the pioneering study by Judge Riordan. Some limited information was also available on ISIS. For the last two years, the majority of courts have been equipped with a digital audio recording system that allows judges and researchers to listen to sentencing hearings since its inception. This tool is now being used. It enables the researchers to hear the arguments made on each side and to listen to the reasoning of the judge in giving sentence. This is slow and painstaking work. In addition, at the National Judicial Conference in November, the Chief Justice inaugurated the judges' intranet. This is a private information service containing years of research and a section of it is specifically designed to retain sentencing analysis information. Only the judges and the senior researcher and her deputy can access it, because of data protection reasons. A number of sentencing studies have been conducted by the Judicial Researchers' Office since the launch of the intranet:

- rape
- manslaughter
- robbery and tiger kidnapping
- sexual assault
- child pornography

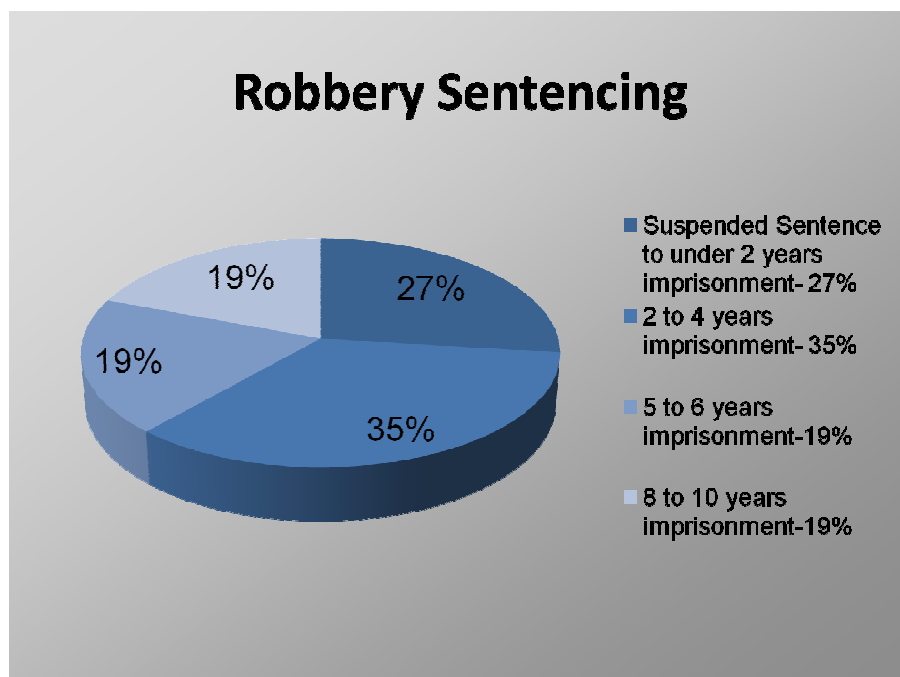
The Judicial Researchers' Office completed the first study into rape sentencing in November 2012 and made it available on the judges' intranet.

Here is a chart as to the total sample and the results:



As you can see, lenient punishments for rape are very rare indeed. There are no cases in the current analysis where the accused “walked free”. There is a norm of a sentence of around 5-6 years imprisonment for those who plead guilty at an early opportunity, thus admitting their wrong and not contesting what is a more than difficult event to speak about for a victim. Lesser sentences are accounted for by exceptional factors. More condign responses are accounted for by exceptional violence or the sadistic humiliation or by a victim being subjected to multiple assailants.

Here is the chart representing graphically the results of the robbery sentencing analysis of the Circuit Court:



Studies now being conducted are attempting an analysis of:

- section 15A Misuse of Drugs Act 1977 cases where the high value of the drugs requires a presumptive mandatory minimum sentence of 10 years
- drug sentencing generally
- dangerous driving

In an address in 2012 to the Irish Penal Reform Trust the Minister for Justice, Alan Shatter, mentioned that one of the key examples of mandatory sentencing we have in Ireland, namely sentences imposed on those convicted under s. 15A of the Misuse of Drugs Act 1977 (as amended), did not appear to be working.

Section 15A:

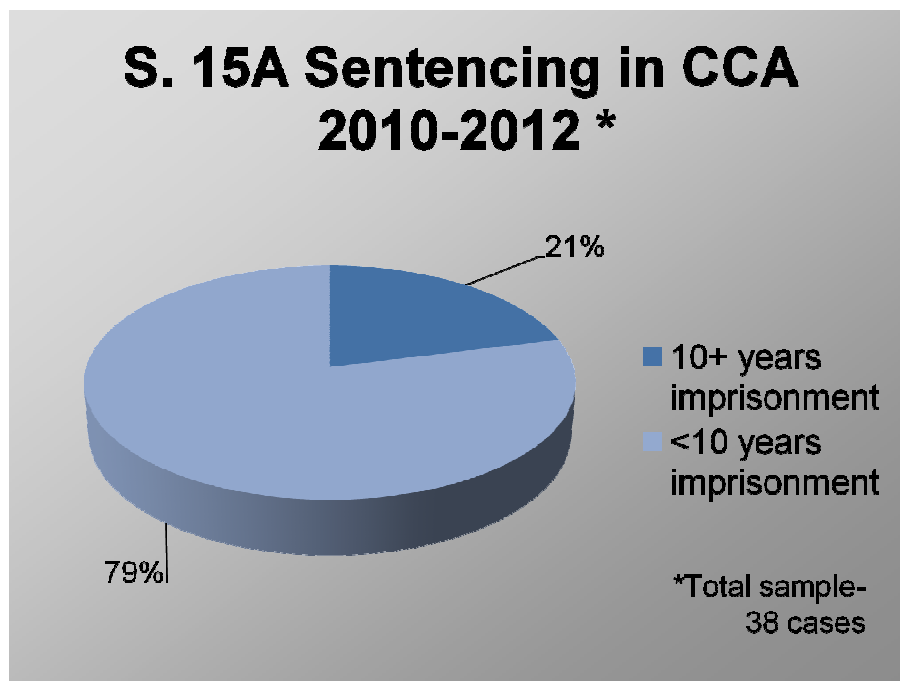
- (1) A person shall be guilty of an offence under this section where
- (a) the person has in his possession, whether lawfully or not, one or more controlled drugs for the purpose of selling or otherwise supplying the drug or drugs to another in contravention of regulations under section 5 of this Act, and
- (b) at any time while the drug or drugs are in the person's possession the market value of the controlled drug or the aggregate of the market values of the controlled drugs, as the case may be, amounts to €13,000 or more.

As you know, s. 27 of the Misuse of Drugs Act introduced a minimum sentence of ten years for those convicted under s.15A of possessing drugs for sale or supply where the value exceeds €13,000. According to s. 27, a person convicted of the offence must receive a sentence of ten years unless there are “*exceptional and specific circumstances*” which make it unjust to impose that sentence.

Section 27:

- (3C) Where a person (other than a person under the age of 18 years) is convicted of an offence under section 15A or 15B of this Act, the court shall, in imposing sentence, specify a term of not less than 10 years as the minimum term of imprisonment to be served by the person.

A draft of our drug sentencing report, currently in preparation, indicates that just under 21 per cent of those sentenced in relation to offences under s. 15A in the period 2010-2012 actually received a sentence of ten or more years imprisonment.



The Judicial Researchers' Office has made a ground-breaking start in rationalising sentencing policy. This exercise is not their only work, however, and we are close to having made as much progress as we can for this legal year. By seeking out and analysing information, sentencing policy can be improved: in other words, finding out what it is or is not is the foundation of where the courts might go on this issue. Perhaps, as well, it is essential that exercise for the most important offences that come up before the courts again and again. The advantage of that kind of approach is that it lays out what other judges have done without being judgemental about it and preserves independence since it can be taken or left. It is not rigid, like a sentencing guideline is supposed to be, but is not like making it up as you go along; the accusation often thrown at the judiciary. Above all, the judges' intranet project has lessened the problems that arise from isolation and lack of information. Sentencing in the most commonly occurring and serious offences has now become precedent and information based. The work takes a lot of time. By reviving the ISIS project, the Chief Justice has ensured that this work can be taken up and can be used as a foundation for the gathering of information. In order for these projects to inform sentencing an argument can be made that they must be available to practitioners on the world wide web. Data protection issues have arisen, however. We cannot use names publicly on the internet of cases we have stored, even of reported cases, even of cases not heard *in camera*; though identification on the judges' intranet is okay. A lot of work is needed before any of these studies can be made available to the public on ISIS. So far, we have the rape and manslaughter and robbery including tiger kidnapping studies prepared and two these have been released by the ISIS committee. All of this is run by the judges, but has been helped by the Courts Service which has backed this project in a most efficient way with administrative computer assistance. Nuala McLoughlin and Ger Coughlan deserve our thanks for that.

Two questions now: do we now have guidelines and are there problems shown up by the study? Again, I'll attempt to answer the second question first.

The problem

Two of the issues that I identified earlier in this lecture are causing problems in sentencing in child pornography and in sexual assault. In child pornography, the

absence of citation by practitioners before District Court and Circuit Court judges of the decision in *The People (D.P.P.) v. Carl Loving* has not assisted the sentencing process in these most difficult cases. That should change. It is a matter for practitioners, particularly the prosecution, but judges have a role too. I note that Carney J. demanded in a recent hearing that all relevant precedents be opened. He is right to insist on that. Furthermore, Carney J. and other judges in this area now have the benefit of the sentencing studies on the judges' intranet. That is a change very much for the better, one would hope. There have been issues in the past, where judges have not had relevant decisions cited to them. Here are two extracts from child pornography analysis. Firstly, here are the facts that attracted a suspended sentence in one court:

- Downloaded 13,845 images of children
- Children aged between 1 and 6
- Over a 3 year period
- According to a garda: the worst content he had ever seen
- Judge questioned the value of a custodial sentence

Now, here are the facts of the case which attracted a one year sentence:

- Downloaded 22 child pornography files for personal use only
- Over three weeks
- Children aged between 6 and 12 and engaged in full sex with adults
- Assessed as posing a low risk of re-offending

This absence of pattern is capable of simple correction. The approach of Carney J. of requiring precedent to be cited and the availability to all judges at all times of the child pornography study on the judges' intranet will offer assistance that, as I will shortly demonstrate, is shown to move sentencing in that direction.

Having been closely involved in the analysis by the Judicial Researchers' Office of sentences handed down for sexual assault, I have been concerned by another of the factors mentioned earlier; and it is money. Compensation might reasonably be either be left out altogether from criminal cases and put into realm of a simple civil claim for which the Circuit Court would have jurisdiction, or compensation should be an automatic part of a sentence. As previously mentioned, compensation is tied in by legislation as a mitigating factor in sentencing. The sexual assault study questions very seriously how this can be wise. If money can be raised by the accused the legislation says that it can be a mitigating factor but if it cannot be raised because the accused and his family are poor, where reasonably does justice stand? Money has had a definite tendency to yield inconsistent results in sexual assault sentencing. People will have strong views on this issue, particularly those who are advocates on behalf of victims groups. While I respect those views, I am unable to do anything other than point up the problem and to indicate that encapsulating it in the legislation referred to is an issue for others. Surely there are better models?

Sentencing guidelines

The Judicial Researchers' Office has not formulated sentencing guidelines through these studies and nor will it. The ISIS project will continue this work over the next year or so and will build on what we have done. The rape sentencing study clearly demonstrates that a consistent sentencing pattern has emerged in rape sentencing and has been closely followed in the five years since the collation of information and its classification in the *W.D.* decision. It is not expecting too much to imagine that as other studies are done and become publicly available that we will have the same result. Some people argue that the Supreme Court decision in *The People (D.P.P.) v. Tiernan* [1988] I.R. 250 forbids the Court of Criminal Appeal from laying down sentencing guidelines. That is not so. The decision of the Court of Criminal Appeal in the *Adam Keane* case approves the collation and classification of sentencing

information by judicial decision. That is the very exercise that we have been engaged in through 2012-2013; and more of these studies will in due course be released publicly by the ISIS committee. Meanwhile, the completed studies are a current guide to Irish sentencing practice through the judges' intranet. There may be further developments by way of judicial decision on sentencing. Now that much information has been gathered the first steps have been taken that will enable guidance at Court of Criminal Appeal level.

I feel compelled to make the point that such information as is released publicly deserves to be treated with the deference that is due to hard work. Neither the Judicial Researchers' Office nor the ISIS committee are looking for empty respect. The ISIS website has the task designated by the Chief Justice of informing the public and will not be diverted from that aim. Over time the ISIS website will enable a structured approach by practitioners in referencing relevant precedents. The addition of a regular sentencing bulletin by Tom O'Malley to the website will alert practitioners to recent developments in sentencing. On the release of the rape sentencing analysis on ISIS, it was notable that some newspapers, such as the *Sunday Times*, gave a concise summary of what has been demonstrated over the years since the *W.D.* decision, which is that rape sentencing is both tough and consistent. It was also notable that on the release of another sentencing analysis, the response of others did not appear to meet the standard of informing the public on a matter of public importance; which sentencing undoubtedly is. Here, might one be tempted towards perhaps unreasonable thoughts? In the 1946 play by Terence Rattigan *The Winslow Boy*, the boy of the title is wrongly thrown out of naval cadet school for stealing.



It is based on an actual case brought by fellow Dubliner Edward Carson QC prior to the First World War. The boy is defended publicly by his father Arthur Winslow who, when he gets nowhere with the Royal Navy authorities, then takes the extreme step of bringing judicial review proceedings. Naturally there is public interest and newspaper interest, in particular, with which Arthur Winslow cannot cope. When the press descend, the boy's father asks his barrister what he ought to say to them. The reply of the barrister is a coolly dismissive: "I hardly think it matters. Whatever you say will have little bearing on what they write".

We as a nation are entitled to demand the best from our judges. From our perspective, self-analysis carries a higher chance of improvement than being informed by mere opinion. That self-analysis is substantially underway. From the perspective of an ordinary judge, the right attitude is to do one's best to gather the materials and do the studies that will make sentencing in serious crime more predictable and more consistent.