

## CONSISTENCY IN SENTENCING

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### INTRODUCTION

Ireland has an individualised system of sentencing in which judges exercise a relatively broad sentencing discretion. Since the foundation of the State in 1922 few attempts have been made to change or challenge the nature of the Irish sentencing system. This lack of reform, however, does not necessarily reflect widespread satisfaction with the system as a whole. Indeed, a recurrent criticism of the Irish sentencing system is that judicial sentencing practices are widely inconsistent. In the 1990s the Law Reform Commission carried out a detailed study and evaluation of the sentencing system in Ireland<sup>1</sup>. In particular, the Commission considered the fact that like cases could be treated differently, and justifiably so, as the worst type of inconsistency in sentencing and it concluded that “intuitively” the existence of inconsistency in Irish sentencing practices was a certainty.<sup>2</sup> Since then, the issue of inconsistency in Irish sentencing practices has also been highlighted in the media on a regular basis. Perhaps the most notable example is the *Prime Time* documentary broadcast

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<sup>1</sup> Law Reform Commission, *Consultation Paper on Sentencing* (March 1993); Law Reform Commission, *Report on Sentencing* (LRC 53 – 1996).

<sup>2</sup> Law Reform Commission, *Consultation Paper on Sentencing* (March 1993) p. 69. In the absence of empirical evidence of inconsistency in Irish sentencing practices, the Law Reform Commission specifically referred to a study carried out by Palys and Divorski in Canada, in which different judges were asked to pass sentence in the same cases and to comment on the reasons for their conclusions. Noting that Palys and Divorski found considerable differences in the approach of individual judges when sentencing the same case, the Law Reform Commission concluded that: “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”.

in 2004 that described sentencing in the District Court as a “lottery”.<sup>3</sup> Academic research on sentencing in Ireland has also highlighted the issue of inconsistency in Irish sentencing practices.<sup>4</sup>

Despite these criticisms, the wave of sentencing reform that occurred in the 1980s and 1990s in many jurisdictions worldwide largely by-passed Ireland. Whilst countries such as Sweden,<sup>5</sup> Finland,<sup>6</sup> England and Wales,<sup>7</sup> USA,<sup>8</sup> Canada<sup>9</sup> and Australia<sup>10</sup>

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<sup>3</sup> Prime Time, *Prime Time Investigates The District Court*, RTÉ 1, 13 December 2004.

<sup>4</sup> See Walsh and Sexton, *An Empirical Study of Community Service Orders in Ireland* (Dublin, Stationery Office, 1999). Their study on the community service order in Ireland found considerable variations between judges both in relation to the length of community service orders and the length of the alternative prison sentences imposed. See also Hamilton, “Sentencing in the District Court: ‘Here be dragons’” (2005) 15 *Irish Criminal Law Journal* 9. Hamilton’s study on sentencing in the Dublin District Courts combined observation of 365 cases over an eight-week period and qualitative interviews with court staff and criminal solicitors. The researchers observed inconsistencies in the sentencing of public order offences and noted that judges do not appear to share a common rationale in relation to the purposes of imprisonment. Further, many criminal solicitors admitted that they often engage in “judge shopping” on behalf of their clients.

<sup>5</sup> Jareborg, “The Swedish Sentencing Reform” in Clarkson and Morgan, (eds.), *The Politics of Sentencing Reform* (Oxford University Press, 2001) p. 95; von Hirsch, “Sentencing Reform in Sweden”, in Tonry and Hatlestad (eds.), *Sentencing Reform in Overcrowded Times: A Comparative Perspective* (Oxford University Press, 1997) p. 211.

<sup>6</sup> Lappi-Seppälä, “Sentencing and Punishment in Finland: The Decline of the Repressive Ideal”, in Tonry and Frase (eds.), *Sentencing and Sanctions in Western Countries* (Oxford University Press, 2001) p. 92; Tornudd, “Sentencing and Punishment in Finland”, in Tonry and Hatlestad (eds.), *Sentencing Reform in Overcrowded Times* (previous note), p. 189.

<sup>7</sup> Ashworth, “The Decline of English Sentencing and Other Stories”, in Tonry and Frase (eds.), *Sentencing and Sanctions in Western Countries*, p. 62; Ashworth, “New Sentencing Laws Take Effect in England”, in Tonry and Hatlestad (eds.), *Sentencing Reform in Overcrowded Times: A Comparative Perspective* (previous note), p. 133; Ashworth, “English Sentencing since the Criminal Justice Act 1991”, in Tonry and Hatlestad (eds.), *Sentencing Reform in Overcrowded Times: A Comparative Perspective* (previous note), p. 146.

<sup>8</sup> For example see Frase, “Sentencing Guidelines are ‘Alive and Well’ in the United States”, in Tonry and Hatlestad, *Sentencing Reform in Overcrowded Times: A Comparative Perspective* (above, note 5), p. 12; Reitz, “The Disassembly and Reassembly of U.S. Sentencing Practices” in Tonry and Frase

saw the establishment of sentencing commissions, councils and panels, charged with enhancing consistency in sentencing by, *inter alia*, the introduction of various forms of sentencing guidelines, most of the recommendations for reform made by the Law Reform Commission in 1996 in its *Report on Sentencing* aimed at addressing inconsistency in Irish sentencing practices were largely ignored. Over a decade later, it is likely that the concerns and criticism expressed about inconsistency in Irish sentencing practices are equally prescient. However, it may be the case that the failure to implement reform in Ireland represents an opportunity rather than a loss. We are now in a position to learn from the mistakes and benefit from the successes of other jurisdictions that have attempted to reform sentencing in order to increase consistency and equity in sentencing outcomes. However, before we can even attempt to learn from these experiences, we firstly need to fully understand how and why inconsistency in sentencing occurs in the Irish sentencing system.

In order to come to a better understanding of why inconsistency in sentencing occurs in Ireland, this paper presents new findings from a qualitative research study specifically designed to examine judicial views on consistency in sentencing, as well as, the extent of and the reasons for inconsistency in Irish sentencing practices.<sup>11</sup> By way of context, this paper begins with

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(eds.), *Sentencing and Sanctions in Western Countries* (above, note 6), p. 222. See generally Tonry, *Sentencing Matters* (1<sup>st</sup> ed., Oxford University Press, 1996).

<sup>9</sup> Daubney and Parry, "An Overview of Bill C-41 (The Sentencing Reform Act)", in Roberts and Cole (eds.), *Making Sense of Sentencing* (University of Toronto Press, 1999) p. 31.

<sup>10</sup> Freiberg, "Three Strikes and You're Out – It's Not Cricket: Colonization and Resistance in Australian Sentencing", in Tonry and Frase (eds.), *Sentencing and Sanctions in Western Countries* (above, note 6), p. 29; Gorta, "Truth in Sentencing in New South Wales" in Tonry and Hatlestad (eds.), *Sentencing and Reform in Overcrowded Times* (above, note 5), p. 152.

<sup>11</sup> The findings presented in this paper are based on a piece of exploratory research on sentencing in Ireland entitled *Sentencing in Ireland: An Exploration of the Views, Rationales, and Sentencing Practices of District and Circuit Court Judges*. This research was carried out under the supervision of Dr. Eoin O'Sullivan, at the School of Social Work and Social Policy, and was submitted to Trinity College Dublin for the degree of Doctor of Philosophy in

a brief examination of the sources of inconsistency in the Irish sentencing system and of relevant findings from previous research on consistency in sentencing. The main findings of the new study are then presented in three parts beginning with judicial views on sentencing and consistency in sentencing, followed by an examination of the levels of consistency and inconsistency in sentencing decisions, and then by an examination of reasons for inconsistency in sentencing. Although District and Circuit Court judges participated in the study this article specifically focuses on the findings from the District Court. Having presented the main findings, this paper then briefly discusses some of their implications for enhancing consistency in Irish sentencing practices.

## **I. CONTEXT: INCONSISTENCY AND THE IRISH SENTENCING SYSTEM**

### *A. Defining Inconsistency in sentencing*

The principle of parity in sentencing requires that like cases are treated alike and that different cases are treated differently.<sup>12</sup> If similarly situated offenders, convicted of similar crimes, receive different sentences, then this can be said to illustrate a lack of parity in sentencing practice. Consistency can then be defined as treating like cases alike. However, the term “inconsistency” in the context of sentencing is often used interchangeably with, and assumed to mean the same thing as, disparity in sentencing, even though there is an important distinction between the two. Inconsistency in sentencing occurs when like cases are treated differently but justifiably so, whereas disparity occurs when like cases are treated differently but without justification.<sup>13</sup> Sometimes this difference is also indicated

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May 2008. I am grateful to the judges of the District and Circuit Courts who agreed to participate in this research.

<sup>12</sup> Ashworth, “Disentangling Disparity”, in Pennington and Lloyd-Bostock (eds.), *The Psychology of Sentencing* (Centre for Socio-Legal Studies, 1987); O’Malley, *Sentencing Law and Practice* (1<sup>st</sup> ed., Round Hall Sweet & Maxwell, 2000).

<sup>13</sup> Ashworth, “Disentangling Disparity” (previous note).

by the use of other terms, such as “warranted variation” and “unwarranted variation”. In this article and for the purposes of the findings presented herein, inconsistency in sentencing is defined as occurring when like cases are treated differently with justification.

### *B. Sources of Inconsistency in the Irish Sentencing System*

Inconsistency in sentencing outcomes is highly likely in Ireland for at least three reasons.

#### *1. Individualised Sentencing System*

Firstly, individualised sentencing systems by their very nature always give rise to a certain degree of inconsistency. Differences in case factors means that no two cases are ever precisely the same and this results in small but often noticeable differences in sentencing outcomes between two seemingly similar cases. Ireland inherited its individualised system of sentencing on independence. Rather than reject this system and replace it with a new one, the Irish courts have incrementally embraced it, and may even have made it a constitutional necessity.

In recent years, Irish courts have on a number of occasions reaffirmed the discretionary nature of sentencing that exists in Ireland by highlighting the necessity for sentencers to exercise their discretion to meet both the circumstances of the crime and the circumstances of the criminal.<sup>14</sup> The individualisation of sentences has been interpreted by Irish courts as a key requirement of the principle of proportionality in Irish sentencing law. For example, Denham J. in the Supreme Court in *The People (Director of Public Prosecutions) v. M.* referred to the constitutional nature of the principle of proportionality and elaborated on its meaning in the context of sentencing:

Sentences should be proportionate. Firstly, they should be proportionate to the crime. Thus, a grave offence is

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<sup>14</sup> See, for example, *The People (Director of Public Prosecutions) v. W.C.* [1994] 1 I.L.R.M. 321; *The People (Director of Public Prosecutions) v. M.* [1994] 3 I.R. 306; *The People (Director of Public Prosecutions) v. Tiernan* [1988] I.R. 250.

reflected by a severe sentence ... However, sentences must also be proportionate to the personal circumstances of the appellant. The essence of the discretionary nature of sentencing is that the personal situation of the appellant must be taken into consideration by the court ...<sup>15</sup>

Thus, by its very definition, the Irish version of proportionality in sentencing requires that sentences be individualised. Since the principle of proportionality has been referred to on a number of occasions as a constitutional principle,<sup>16</sup> there is a possibility that the individualisation of sentences in Ireland may now be a constitutional requirement, at least in circumstances where the judiciary are called upon to use their discretion to decide the sentence.<sup>17</sup> If this is the case, it represents an enormous coup on the part of the judiciary: by making the individualisation of sentences a constitutional necessity, they have preserved the discretionary nature of the Irish sentencing system along with their relatively broad discretionary powers. The legislature may of course still extend the range of offences to which mandatory sentencing laws apply. However, reform aimed at changing the essentially discretionary nature of the Irish sentencing system may require a constitutional amendment.

## 2. Multiple Sentencing Aims

Secondly, the breath of discretion conferred on judges under Irish sentencing law means that different judges can legitimately adopt different sentencing approaches when sentencing the same case. In other words, they can treat like cases differently and can justify their decisions according to Irish sentencing law. One reason for this is that in Ireland there is no single unifying sentencing aim that judges must give priority to when passing sentence. Instead, Irish judges may choose one of three different sentencing aims including deterrence,

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<sup>15</sup> [1994] 3 I.R. 306 at 316.

<sup>16</sup> *The People (Director of Public Prosecutions) v. W.C.* [1994] 1 I.L.R.M. 321, at 324; *The People (Director of Public Prosecutions) v. M* [1994] 3 I.R. 306, at 316.

<sup>17</sup> *Lynch v. The Minister for Justice Equality and Law Reform & Whelan v. Minister for Justice Equality and Law Reform* [2010] I.E.S.C. 34.

rehabilitation and retribution.<sup>18</sup> The Law Reform Commission in its *Consultation Paper on Sentencing* in 1993 was highly critical of the failure to prioritise sentencing aims in Ireland:

Since one consideration may lead to a sentence dramatically different to that which another may lead 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 sentencing 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.<sup>19</sup>

Furthermore, once judges have chosen a particular sentencing aim to apply to a particular case, for instance rehabilitation, no principles exist that might guide them in applying this general aim to specific cases.<sup>20</sup> Theoretically at least, this means that even if two judges choose the same aim to apply to the same case, they could quite easily and justifiably impose two quite different sentences.

### 3. Judicial Variability

Thirdly, inconsistency in sentencing is likely to happen in Ireland because of judicial variability. Judicial variability refers to the individual differences between judges in terms of their approach to sentencing that occur naturally by virtue of their own individuality. Again, a certain amount of judicial variability will always exist in every sentencing system. Nonetheless, for a number of reasons judicial variability is a highly significant factor in understanding inconsistency in sentencing outcomes in Ireland. This is because practically no attempts have ever been made to reduce or to combat the effects of judicial variability on sentencing practices in Ireland. Three examples are illustrative:

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<sup>18</sup> See, for example, *The State (Stanbridge) v. Mahon* [1979] I.R. 214, at 216, and *The People (Attorney General) v. O'Driscoll* [1972] 1 Frewen 35 at 359.

<sup>19</sup> Law Reform Commission, *Consultation Paper on Sentencing* (March 1993) at 61.

<sup>20</sup> Law Reform Commission, *Consultation Paper on Sentencing* (previous note).

the appointment and training of judges; the limited nature of sentencing guidance from the legislature and from the courts; and inherent weaknesses in the Irish system of appellate review in sentencing.

### 3.1 *The Appointment and Training of Judges*

The process of judicial appointment and the training of judges in Ireland have changed little since the foundation of the state.<sup>21</sup> Judges in Ireland are chosen from the ranks of qualified and usually long practicing solicitors and barristers. Traditionally solicitors were usually appointed as District Court judges and barristers usually made up the majority of Circuit, High and Supreme Court judges. However, recent amendments to the Courts and Courts Officers Acts now provide that long-standing practising solicitors and barristers can be directly appointed to all courts.<sup>22</sup> Therefore, Irish judges will always have a professional legal background coupled with a considerable period of time practicing law.

The power to appoint judges is vested in the President under Article 35.1 of the Constitution, although under Article 13.9 this power can only be exercised on the advice of the Government. In practice, this means that the Government recommends judges for appointment to the President.<sup>23</sup> Before 1995, judicial nominations were usually made through political

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<sup>21</sup> See Ward, *Justice Matters: Independence, Accountability and the Irish Judiciary* (Irish Council for Civil Liberties, 2007); Feenan, "Judicial Appointments in Ireland in Comparative Perspective" (2008) 8 J.S.I.J. 37.

<sup>22</sup> Section 29(2) of the Courts (Supplemental Provisions) Act, 1961, provides that solicitors and barristers of not less than ten years' standing can apply for appointment to the District Court. Section 17(2) of the Courts and Courts Officers Act, 1961, allows barristers of not less than ten years' standing to apply to be a judge of the Circuit Court, and an amendment to this section by s. 30 of the Courts and Courts Officers Act, 1995, provides for solicitors of the same standing to apply to be a judge of the Circuit Court. Section 4 of the Courts and Courts Officers Act, 2002, amended s. 5 of the 1961 Act, and that section now provides that practising barristers and solicitors of not less than 12 years standing shall be qualified to be appointed as a judge of the Supreme Court or the High Court, provided they have been practising for a continuous period of not less than 2 years immediately prior to appointment.

<sup>23</sup> Ward, *Justice Matters: Independence, Accountability and the Irish Judiciary* (above, note 21).

representations to the Government from members of the Oireachtas (with or without the knowledge of the candidate in question), however the Government ultimately made the decision. More recently, in 1995 the Judicial Advisory Appointments Board (JAAB) was established to provide advice to the Government, by identifying and informing the Government of suitably qualified candidates for appointment to judicial office.<sup>24</sup> Despite this, the Government continues to receive political representations regarding judicial nominations, and commentators argue that the Irish system of judicial appointments remains open to criticism on a number of grounds. These include the continuing role of political patronage and the lack of transparency,<sup>25</sup> and the lack of diversity in the judiciary,<sup>26</sup> as well as the failure of the appointments system to comply with international human rights standards.<sup>27</sup>

The criteria for judicial appointment<sup>28</sup> have been severely criticised as being “ill-defined and overly-subjective”<sup>29</sup> and for not being “transparently meritocratic”.<sup>30</sup> Another criticism of the criteria for judicial appointment is they do not include any reference to the practical requirements of the type of work that judges actually engage in. For example, the criteria do not include skills such as the ability to handle heavy workloads or to work under pressure unsupervised, nor is there any requirement for

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<sup>24</sup> Courts and Courts Officers Act, 1995, s. 13(1).

<sup>25</sup> Feenan, “Judicial Appointments in Ireland” (above, note 21), p. 49.

<sup>26</sup> Feenan, “Judicial Appointments in Ireland” (above, note 21), p. 43.

<sup>27</sup> Ward, *Justice Matters: Independence, Accountability and the Irish Judiciary* (above, note 21).

<sup>28</sup> Section 16(7) of the Courts and Courts Officers Acts, 1995. provides that judges JAAB shall not recommend the name of a person to the Minister unless that person has in his or her practice as a barrister or solicitor displayed “a degree of competence and a degree of probity appropriate to and consistent with the appointment concerned”, “is suitable on ground of character and temperament” and is “otherwise suitable”.

<sup>29</sup> Bacik, Costello and Drew, *Gender Injustice: Feminising the Legal Professions?* (Trinity Law School, 2003); Ward, *Justice Matters: Independence, Accountability and the Irish Judiciary* (above, note 21).

<sup>30</sup> Ward, *Justice Matters: Independence, Accountability and the Irish Judiciary* (above, note 21).

specific or specialised expertise in particular areas.<sup>31</sup> In 2008 approximately 64 District Court judges disposed of 482,203 summary offences and 68,491 indictable offences, as well as sending 12,965 cases forward for trial to the Circuit Court.<sup>32</sup> This was just their criminal workload. Perhaps of greater concern is the fact that there is no requirement for newly appointed District Court judges to have ever practiced in the District Court or to have any specialised experience or skill in criminal matters. Thus it would not be unheard of for a highly competent and long practising barrister to be appointed to the District Court despite the fact that he or she had a commercial law practice in the High Court. This situation is compounded by the fact that after appointment, judges receive little or no training. An exception to this is that in the District Court new judges are provided with an opportunity to sit with another more experienced judge for approximately one week. After this a new judge begins to pass sentence in his or her own court almost immediately. The Director of Public Prosecution's *Guidelines for Prosecutors*<sup>33</sup> envisages an important role for the public prosecutor in the sentencing process. It suggests that although the prosecutor should not advocate a sentence of a particular magnitude, counsel for the prosecution should supply judges with, *inter alia*, information on relevant sentencing laws that should be considered, the relevant circumstances of the accused and on similar previous sentencing decisions. Apart from this, judges meet up at least twice a year at judicial conferences, organised by the Judicial Studies Institute, during which they have an opportunity to discuss their approaches to sentencing.

Unlike other jurisdictions, it is noteworthy that no specialised training is necessary to be considered for the bench in Ireland. Similarly, little if any training or induction is provided for judges once appointed. These facts, coupled with the limited

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<sup>31</sup> These skills are common requirements for judicial appointments within other jurisdictions for example in Canada and in New Zealand (cited in Ward, *Justice Matters: Independence, Accountability and the Irish Judiciary* (above, note 21) pp. 50-51).

<sup>32</sup> Court Service, *Annual Report 2008*, p. 65.

<sup>33</sup> Director of Public Prosecutions, *Guidelines for Prosecutors*, available at <http://www.dpp.ie/publications/category/14/guidelines-for-prosecutors/>.

sentencing guidance that is made available to Irish judges means that judges, by definition, have no choice but to develop their own approaches to sentencing once appointed, a situation that does little to enhance consistency in sentencing practices.

### 3.2 Lack of Guidance

Secondly, Irish judges receive little sentencing guidance from the legislature or from the superior courts (Court of Criminal Appeal and Supreme Court). There is no statutory framework for Irish sentencing law, and currently the role of legislation is largely confined to laying down maximum sentences. In relation to most offences, legislation prescribes the maximum fine and term of imprisonment, but omits any reference to the broad range of other sanctions that a judge may impose for that offence.<sup>34</sup> No attempt has ever been made by the legislature to prioritise conflicting sentencing aims, to devise a coherent sentencing framework or to provide any type of guidance to judges regarding the choice of penalties for particular offence types.<sup>35</sup> As a consequence, it is fair to say that Irish judges exercise a relatively broad sentencing discretion in the context of a virtual legislative vacuum. This, needless to say, does not encourage consistency in sentencing. Furthermore, sentencing guidance from the superior courts in Ireland is relatively limited. The Irish Supreme Court decided in *The People (Director of Public Prosecutions) v. Tiernan*<sup>36</sup> that the issuing of guideline-type judgments would be inappropriate, having regard to the “fundamental necessity” for Irish judges to exercise their discretion to tailor sentences to the individual circumstances of the offence and of the offender in each case. As a result, the role that the Court of Criminal Appeal might have played in providing detailed guideline-type judgments has been significantly curtailed.

In spite of this, the Irish courts have attempted to provide some level of guidance to sentencers by developing the

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<sup>34</sup> O'Malley, *Sentencing Law and Practice* (1<sup>st</sup> ed., Round Hall, 2000); Bacik, “The Practice of Sentencing in the Irish Courts” in O'Mahony (ed.), *Criminal Justice in Ireland* (Institute of Public Administration, 2002).

<sup>35</sup> Law Reform Commission, *Consultation Paper on Sentencing* (March 1993).

<sup>36</sup> [1988] I.R. 250.

jurisprudence of the principle of proportionality, without doubt the most important sentencing principle in Irish law. The Central Criminal Court in *The People (Director of Public Prosecutions) v. W.C.*<sup>37</sup> and the Supreme Court in *The People (Director of Public Prosecutions) v. M.*<sup>38</sup> referred to the constitutional nature of the principle of proportionality, and provided an authoritative statement of the meaning of proportionality within Irish sentencing law (the sentence must be proportionate to the circumstances of the crime *and* to the personal circumstances of the offender).<sup>39</sup> Further clarification on the requirements of the proportionality principle came from the Court of Criminal Appeal in *The People (Director of Public Prosecutions) v. Kelly*,<sup>40</sup> when it indicated a preference for a two-tiered structured approach to sentencing rather than one based on instinctual synthesis.<sup>41</sup> According to Hardiman J., the proper approach involves two steps: "... one looks first at the range of penalties and locates where on the range the particular case should lie and one then applies the mitigating factors after having performed that exercise".<sup>42</sup>

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<sup>37</sup> [1994] 1 I.L.R.M. 321.

<sup>38</sup> [1994] 3 I.R. 306.

<sup>39</sup> Murray C.J. delivering the judgment of the Supreme Court in *Lynch v. Minister for Justice, Equality and Law Reform & Whelan v. Minister for Justice, Equality and Law Reform* [2010] I.E.S.C. 34 recently confirmed the importance of the principle of proportionality in Irish sentencing law, at least in circumstances where a judge is exercising a judicial discretion as to the sentence to be imposed. However, the judgment also specifically distinguishes the principle of proportionality in sentencing from the doctrine of proportionality, which has its origins in the judgments of Costello J. in *Heaney v. Ireland* [1994] 3 I.R. 593. According to Murray C. J. the latter doctrine "is a public law doctrine with specified criteria, according to which decisions or acts of the State, and in particular legislation, which encroach on the exercise of constitutional rights which citizens are otherwise entitled freely to enjoy, are scrutinised with regard to their compatibility with the Constitution or the law". Later on in the judgment Murray C.J. concludes that the doctrine outlined in *Heaney* does not apply to the sentencing process.

<sup>40</sup> [2005] 1 I.L.R.M. 19.

<sup>41</sup> O'Malley, *Sentencing Law and Practice*, (2<sup>nd</sup> ed., Round Hall Sweet and Maxwell, 2006).

<sup>42</sup> *The People (Director of Public Prosecutions) v. Kelly* [2005] I.L.R.M. 19 at 22.

Despite these developments, applying proportionality in practice still presents inherent difficulties and its ability to promote consistency in sentencing is curtailed. This is because in the absence of specific guidelines regarding the relative seriousness of different offences, the appropriate sentence ranges for particular offences and the weight that should be given to the various aggravating and mitigating factors recognised in Irish sentencing law, it is virtually impossible to tell whether a particular sentence is proportionate or not.<sup>43</sup>

### 3.3 *Inherent Weaknesses in the Irish System of Appellate Review*

Thirdly, the system of appellate review in Irish sentencing law does little to promote consistency in Irish sentencing practices. In the first place, the standard of appellate review in Irish sentencing law is relatively high. The Court of Criminal Appeal will only intervene to quash the sentence if it can be shown that the trial judge has erred in principle by departing from the principle of proportionality.<sup>44</sup> The need to prove an error in principle, in circumstances where Irish trial judges are not required to give reasons for their sentences, especially considering the inherent uncertainty surrounding the principle of proportionality, may discourage appeals and reduce opportunities for clarification of sentencing law.

A second point is that, in the absence of *specific* and *detailed* guidelines (and therefore some level of agreement) on how to apply the principle of proportionality in practice, there is a chance that the system of review may fall prey to the perils of subjectivity: the trial judge (applying the principle of proportionality) believes that a 10-year sentence is proportionate whereas the Court of Appeal (also applying the proportionality principle) believes that a six-year sentence is proportionate. The point is not that this happens all the time in practice, but that there is no mechanism (specific guidelines) through which it is apparent that this is not happening.

A third and a related problem is that the generality of the guidance provided by the Court of Criminal Appeal on how the

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<sup>43</sup> O'Malley, *Sentencing Law and Practice* (1<sup>st</sup> ed., Round Hall, 2000).

<sup>44</sup> *The People (Director of Public Prosecutions) v. Drinkwater* [2007] I.E.C.C.A. 84.

principle of proportionality should be applied to specific cases is not always of great assistance in structuring judicial sentencing discretion. For example, in *Director of Public Prosecutions v. Dwyer*<sup>45</sup> the Court of Criminal Appeal found that the trial judge had erred in principle by failing to take into account previous convictions and their nature. However, no guidance was given as to how previous convictions should be dealt with by sentencing judges, the relevance of previous convictions to proportionality in sentencing, or the weight that should be attached to previous convictions in terms of increasing sentence severity.

Jurisprudence from the Court of Criminal Appeal does provide some practical guidance to some sentencing judges, especially in its precedents, in so far as they suggest broad sentencing ranges for certain serious offences such as rape, sexual assault and manslaughter.<sup>46</sup> However, its precedents have little relevance to judges in the District Court, who deal with offences much less serious than rape, sexual assault and manslaughter. Despite the fact that the vast majority of sentencing that occurs in Ireland takes place in the District Court, it is the one court for which there is no effective system of review. There is no right of appeal from the District Court to the Court of Criminal Appeal. A sentence imposed in the District Court can be appealed to the Circuit Court either under section 18(1) of the Courts of Justice Act, 1982, which is essentially an appeal of the conviction and the sentence. Alternatively, an appeal against sentence only can be taken to the Circuit Court under section 50 of the Courts (Supplemental Provisions) Act, 1961.

An appeal of a District Court conviction and sentence under section 18(1) to the Circuit Court is an appeal *de novo* and is essentially a total rehearing of the case. In many instances this means that the case as heard in the Circuit Court bears little resemblance to the original District Court case. In relation to both types of appeal, the Circuit Court can increase the severity of the sentence imposed by the District Court and this may operate as a

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<sup>45</sup> [2007] I.E.C.C.A. 3.

<sup>46</sup> See for example the recent case of *Director of Public Prosecutions v. Colclough* [2010] I.E.C.C.A. 15 where the Court of Criminal Appeal was able to refer to fifty previously decided sentences in manslaughter cases in order to gauge where on the scale of penalties the case before it should be placed.

disincentive to appeals. However, the most fundamental weakness of this system is that there is no mechanism for relaying the results of appeals back to District Court judges, and, therefore, neither type of appeal offers any type of guidance to the lower courts.

## II. PREVIOUS RESEARCH

Previous studies in other jurisdictions have invariably found considerable inconsistency in sentencing practices.<sup>47</sup> Although differences in case factors do account for differences in sentencing outcomes, studies using a variety of methodologies have identified judicial variability as the key factor in understanding sentencing and inconsistency in sentencing.<sup>48</sup> Findings from these studies suggest that formal legal factors may not be particularly important in terms of understanding either the nature of sentencing or the reasons for variation in sentencing practices.<sup>49</sup>

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<sup>47</sup> Hood, *Sentencing in Magistrates' Courts: A Study in Variations of Policy* (Tavistock, 1962); Hogarth, *Sentencing as a Human Process* (University of Toronto Press, 1971); Austin and Williams, "A Survey of Judges' Responses to Simulated Legal Cases: Research Note on Sentencing Disparity" (1977) 68 *Journal of Criminal Law and Criminology* 306; Palys and Divorski, "Explaining sentence disparity" (1986) 28 *Canadian Journal of Criminology* 347; Tarling, *Sentencing Practice in Magistrates' Courts* (Home Office Research Study 56, London: HMSO, 1979); Ashworth, Genders, Mansfeld, Peay and Player, *Sentencing in the Crown Court: Report of an Exploratory Study* (Oxford Centre for Criminological Research, 1984); Parker, Sumner and Jarvis, *Unmasking the Magistrates*, (Open University Press, 1989).

<sup>48</sup> Hogarth, *Sentencing as a Human Process* (above, note 47); Hood, *Sentencing the Motoring Offender: A Study in Variations of Policy*, (Heinemann, 1972); Austin and Williams "A Survey of Judges' Responses to Simulated Legal Cases: Research Note on Sentencing Disparity" (1977) 68(2) *Journal of Criminal Law and Criminology* 306; Palys and Divorski, "Explaining sentence disparity" (1986) 28(4) *Canadian Journal of Criminology* 347; Ashworth, Genders, Mansfeld, Peay and Player, *Sentencing in the Crown Court: Report of an Exploratory Study* (Oxford Centre for Criminological Research, 1984); Parker, Sumner and Jarvis, *Unmasking the Magistrates*.

<sup>49</sup> Hogarth, *Sentencing as a Human Process* (above, note 47); Ashworth, Genders, Mansfeld, Peay and Player, *Sentencing in the Crown Court: Report of*

The importance of judicial variability lies in the fact that regardless of the uniformity implied by formal legal rules, judges tend to select and place greater weight on information that is consistent with their own attitudes, the purposes that they wish to achieve and the sentences they have in mind and habitually use.<sup>50</sup> Parker *et al*'s<sup>51</sup> study of sentencing in the Magistrates' Court found that a judges' own common sense, moral judgements and legal experience were considerably more influential in determining the sentence than the legal factors in the case. Similarly, previous research suggests that inconsistency in sentencing is related to the fact that individual judges hold different views on the appropriateness and efficacy of various penalties and to the fact that judges interpret the "facts of the case" and the seriousness of the offences differently.<sup>52</sup>

The high degree of selectivity and the relationship between selectivity and judicial attitudes suggests that a high proportion of variation in sentencing can be explained by the "human element" involved.<sup>53</sup> However, certain features of sentencing systems can make selective interpretation a necessity, including: lack of agreement as to proper principles in sentencing; the amount of unguided discretion in information-use given by the law; inadequacies in the sentencing alternatives available; information overload; and the subjective nature of the decision process.<sup>54</sup> Many of these features are present in the Irish sentencing system. For example, information overload and high workloads may be particularly relevant in understanding sentencing in Ireland, especially in the District Court. According to Hogarth,<sup>55</sup>

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*an Exploratory Study* (above, note 48); Parker, Sumner and Jarvis, *Unmasking the Magistrates*.

<sup>50</sup> Hogarth, *Sentencing as a Human Process* (above, note 47); Palys and Divorski, "Explaining sentence disparity"; Parker, Sumner and Jarvis, *Unmasking the Magistrates*.

<sup>51</sup> Parker, Sumner and Jarvis, *Unmasking the Magistrates*.

<sup>52</sup> Hood, *Sentencing the Motoring Offender*; Ashworth, Genders, Mansfeld, Peay and Player, *Sentencing in the Crown Court: Report of an Exploratory Study* (above, note 48).

<sup>53</sup> Hogarth, *Sentencing as a Human Process* (above, note 47); Parker, Sumner and Jarvis, *Unmasking the Magistrates*.

<sup>54</sup> Hogarth, *Sentencing as a Human Process* (above, note 47).

<sup>55</sup> Hogarth, *Sentencing as a Human Process* (above, note 47).

Canadian magistrates with particularly high workloads tended to adopt “rules of thumb” which amounted to presumptions in favour of particular penalties for particular types of cases. The District Court in Ireland is known as the workhorse of the criminal justice system as it deals with the vast majority of criminal cases proceeded against. Judges in the District Court may therefore be more likely than judges in other courts to develop “rules of thumb” which amount to presumptions in favour of particular penalties for particular types of cases.

Research on sentencing in the Magistrates’ Courts in England and Wales has shown that variation in sentencing between different benches are related to the differences in sentencing cultures of different benches<sup>56</sup> and to a strong working ideology, whereby the uniqueness of the case is prioritised over the need for consistency.<sup>57</sup> This is partly explained by a type of intense professional socialisation of new magistrates by more experienced magistrates on the same bench and by the fact that magistrates must reach a group decision on the type of sentence to impose. These factors do not apply to Irish judges who sit separately. However, it is possible that judges develop their own sentencing policies on an individual basis and that these approaches differ considerably. It is also possible that due to the individualised nature of the Irish sentencing system, Irish judges might also subscribe to a working ideology that prioritises the uniqueness of each case, similar to that shared by magistrates.

Finally, Tonry<sup>58</sup> argues that most judges when interviewed are fundamentally opposed to any type of reform, which reduces their discretionary powers, and this is the reason why voluntary guidelines (like those in the Magistrates’ Courts) do not achieve

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<sup>56</sup> Hood, *Sentencing in Magistrates’ Courts: A Study in Variations of Policy*; Hood, *Sentencing the Motoring Offender*; Tarling, *Sentencing Practice in Magistrates’ Courts* (Home Office Research Study 56, London: HMSO, 1979); Parker, Sumner and Jarvis, *Unmasking the Magistrates*.

<sup>57</sup> Hood, *Sentencing in Magistrates’ Courts: A Study in Variations of Policy*; Hood, *Sentencing the Motoring Offender*; Tarling, *Sentencing Practice in Magistrates’ Courts*; Ashworth, Genders, Mansfeld, Peay and Player, *Sentencing in the Crown Court: Report of an Exploratory Study* (above, note 48).

<sup>58</sup> Tonry, *Punishment and Politics: Evidence and Emulation of English Crime Control Policy* (Willan Publishing, 2004).

more consistent sentences. Also, he argues that sentencing councils and commissions in American jurisdictions that involved only judges or in which judges dominated in membership, were ultimately unsuccessful in producing guidelines that structured discretion exactly because judges are, in principle, opposed to limiting judicial discretion. To date, research has not examined how Irish judges view sentencing and consistency in sentencing.

### III. THE CURRENT STUDY

#### *A. Aims of Study*

The assertion made by the Law Reform Commission<sup>59</sup> that inconsistency in Irish sentencing practices was, intuitively at least, a certainty, has largely gone untested. Despite its importance for understanding both the nature of sentencing and the reasons for inconsistency in sentencing practices, the extent of inconsistency in sentencing that can be explained by judicial variability alone has never been explored in Ireland. Furthermore, despite the fact that judges are the key actors in the process of sentencing and that their views of sentencing, inconsistency in sentencing and methods of reducing inconsistency are vitally important to understand, their views have never received much attention from researchers.

In order to address these shortcomings the aims of this study were threefold: firstly, to explore judicial views on sentencing and consistency in sentencing; secondly, to explore the degree of consistency in sentencing between individual judges; and thirdly, to explore the reasons for inconsistency, if any, in sentencing practices of individual judges. Consistency in sentencing was defined as treating like cases alike, in other words, that similarly situated offenders who commit similar crimes receive relatively similar sentences. The logical corollary of this was that inconsistency in sentencing would be identified when judges treated like cases differently.

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<sup>59</sup> See above, note 32.

*B. Methodology*

To achieve the aims of the study and to gain access to rich and detailed data on sentencing from a judicial perspective, a qualitative methodology was adopted. Two research methods traditionally used in sentencing research, semi-structured interviews and sentencing vignettes, were chosen. Semi-structured interviews with judges were used to explore their views on sentencing and consistency in sentencing and they provided an important opportunity to gain insight into how judges define the context in which they sentence. Hypothetical sentencing vignettes were used to explore the degree of consistency between individual judges and to explore the reasons for inconsistency, if any. Sentencing vignettes are recognised as the “purest” method of examining the issue of consistency in sentencing due to their ability to equalise differences in case factors, so that any variation in sentencing outcome can be attributed solely to judicial variability rather than to any other variable.<sup>60</sup> Sentencing vignettes are usually used within a quantitative context whereby judges are asked to respond to pre-structured questions and their responses are then statistically analysed. In this study, sentencing vignettes were used within a qualitative context; questions were open-ended and designed to encourage discussion in order to explore judges’ meanings, beliefs, and judgements when sentencing.

Although all District Court judges were invited to participate in the research, the actual participation rate was 28% (in other words, 15 out of a total of 54 District Court judges sitting in 2007). District Court judges were presented with four sentencing vignettes designed specifically for this study. The sentencing vignettes dealt with four different offence types including assault, theft, road traffic and burglary. Judges were asked to pass sentence on the cases presented to them and to “think out loud” while doing so. Judges were also asked to comment on a number of issues in relation to each case. For example, they were asked to state the sentencing aim they wished to pursue, which factors in their opinion were the most

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<sup>60</sup> Palys and Divorski, “Explaining sentence disparity” (1986) 28 *Canadian Journal of Criminology* 347.

important and how they rated the seriousness of the case. For the purposes of measuring and identifying inconsistency in judicial sentencing outcomes, inconsistency was defined as occurring when judges imposed different sentences in relation to the same case.

#### **IV. FINDINGS: JUDICIAL VIEWS OF SENTENCING AND CONSISTENCY IN SENTENCING**

##### *A. Descriptions of Sentencing*

When asked to describe the process of sentencing, by far the most common description given by District Court judges was that each case must be decided on the basis of its own facts. The majority of judges interviewed described the sentencing process in terms of the individuality of each case, stressing that it was not only the crime that was being punished but the criminal also. As one judge explains: “It’s very difficult to weigh the sanction that fits the crime. For example, you might have the same crime committed by ten different people but you also have ten different sets of circumstances to deal with”. According to District Court judges, every individual is unique, which means that no two cases can ever truly be the same and, therefore, every case must be decided on the basis of its own facts. As a result, many judges viewed sentencing as a complex and at times, a difficult task.

Many judges mentioned the factors that they considered important when sentencing. The most commonly mentioned factors were the circumstances of the offender, the nature of the offence and whether or not the offender had previous convictions. The following account is fairly representative of how judges explained the types of factors they consider when passing sentencing in individual cases:

Well I think the first thing to do is to look at the charge that they are before the court for. Secondly, whether they pleaded guilty or not. Thirdly, their circumstances and that is very much the defence’s case and fourthly, the previous record, previous convictions and things like that. They’re all factors and features. I can’t say they’re all done in that

logical sequence but they're in the mix there. It's not a definite science by any stretch of the imagination but they're the major factors that I would look at.

Exactly how District Court judges actually weigh up the various factors and determine the final sentence was not apparent from their descriptions of sentencing, other than in the most basic and general terms: "It's the totality, the total overview of the situation, to try and distil out. It's very hard ... And it's not fly by your pants either. You have to trust your instincts as well and as I say the overriding thing is to be fair". The same judge explained how even the slightest difference between two similar cases could result in quite different sentencing outcomes: "You might give me another case with a slight detail different in it, which might turn me a little bit towards one thing or another".

District Court judges' descriptions of sentencing appear to be consistent with the "instinctive synthesis" approach to sentencing. The essence of this approach is that judges consider all the relevant factors of the case, including the circumstances of the offence and of the offender, and then come to a decision about the appropriate sentence without indicating the precise weight being attributed to individual factors or groups of factors.<sup>61</sup> Their descriptions also show the extraordinary extent to which judges have internalised the philosophy of individualisation, especially considering that they receive minimal training and, at most, sit with a more experienced judge for one to two weeks at the beginning of their judicial career. The opportunities for socialisation into a judicial culture when compared with Magistrates' Courts in England and Wales appear minimal, and yet Irish judges share a similarly strong working ideology based on the uniqueness of the individual case.

#### *B. Tariff Sentencing?*

When asked about whether or not there was a tariff system or a "going rate" for particular offences, most judges expressed the view that there was no tariff or "going rate" in Irish sentencing law. The most common explanation judges gave for why there are no tariffs in place for particular types of offences

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<sup>61</sup> O'Malley, *Sentencing Law and Practice* (1<sup>st</sup> ed., Round Hall, 2000).

was that each case is different and each sentence must reflect these differences. Consistent with their earlier descriptions of sentencing, judges emphasised the fact that in each case it is not just the crime but also the criminal that is being sentenced:

The specific thing about sentencing is that you're sentencing people, you're not sentencing the crime, so it depends upon the individual in front of you. And that's a real person and you have to take him or her into account. His life, her life, or their realities: so you're sentencing or penalising a person. So to be dogmatic as to what any one person should receive as a sentence or as a penalty seems to me absurd and then, not just.

Each sentence must therefore reflect not only the actual crime committed but also the circumstances of the individual who committed it. To sentence solely based upon the crime committed and omit any consideration of the individual circumstances of the offender would, according to the view of sentencing espoused by a majority of District Court judges, be against public policy and by implication unjust:

No definitely not. I as a judge have no going rate and I would think that that would be contrary to public policy. I think that each sentence must reflect the event, the crime, the victim, the circumstances of the accused, and the totality of circumstances, their lifestyle, their background, their disabilities, if any, their addictions, if any, and their previous convictions. I would never sit on the bench in a particular case with a fixed going rate.

A second explanation put forward by District Court judges for the lack of a tariff system in sentencing was that judges usually develop their own views of things or their own particular approaches towards certain types of cases. Indeed, some judges explained how their approach to sentencing developed incrementally over time: eventually they built up enough experience on the bench to have developed their own approach or their own "tariff" that they apply to the cases they deal with. Although a general tariff may not exist, individual District Court

judges clearly develop their own “tariff” over a period of time. Over the course of the interviews and sentencing vignettes, most judges mentioned at least one specific policy approach that they typically adopt when dealing with particular types of offender, offence, victim, sanctions or other scenario.

The following two examples illustrate the fact that judges develop their own approaches to sentencing and that these approaches are not always consistent with one another. Firstly, a number of judges indicated that they had certain pet hates, that is, crimes they regarded so seriously that they would take a severe approach towards. One judge identified mugging and burglary as his pet hates, and explained that he deals with these offences by automatically imposing a prison sentence. In a similar vein, a second judge explained that, in his view, burglary was so serious that it had to be met with a prison sentence:

First and foremost the main objective would be to indicate in no uncertain terms that if you trespass on a private house whether the victims are present or absent, you can expect nothing less than a sentence, whether that’s going to be activated or adjourned, it’s sacrosanct and if you trespass upon the privacy of a person’s home then you can expect to face the consequences.

In contrast to the first two judges, a third judge expressed the view that he would not consider a sentence of imprisonment appropriate for an offender convicted of burglary for the second time unless there were particularly aggravating factors, such as knowledge that an elderly victim was alone in the house. Joyriding was a pet hate of a fourth judge. This judge explained that there was a certain category of offence that must be responded to by the courts in a general deterrent way and for him joyriding fell into this category. In his view, the courts must send out a message about and have a particular policy in relation to joyriding: offenders should not walk away unpunished.

Secondly, District Court judges described their own unique approach towards certain types of penalties. Some judges expressed preferences for certain type of penalties and explained that they used them regularly. One judge explained how he regularly requires offenders to make a contribution to charity,

whereas another explained how in assault cases, where there are no previous convictions, he regularly requires offenders to pay compensation in order to avoid a prison sentence. Other judges explained how they often combine and adapt certain penalties to suit the needs of the particular case. For example, rather than dismissing a case under section 1(1) of the Probation of Offenders Act, 1907, one judge explained that he would usually strike out a case instead because when asked about previous convictions, the Gardaí routinely cite convictions which have been dismissed under this section. The same judge also explained that he sometimes combines certain penalties in an unorthodox fashion in order to do justice in individual cases:

In some instances what I do is I order that the defendant complete 200 hours community service, say 4-months imprisonment in default, and what I do then is remand matters back for say 6-months to see how he has got on with community service. If he has completed the community service satisfactorily and again he has not reoffended in the meantime and he seems to be doing well generally, I'd apply, since it's a first offence, I'd apply section 1(1) of the Probation of Offenders Act.

The evidence presented above shows that judges develop their own individual policy approaches, and that they see this as a natural part of their job rather than something extraordinary. Notwithstanding this, according to the judges interviewed, the need to respond to the uniqueness of the individual case was of utmost importance. In their view, anything less than responding to the uniqueness of the case would be contrary to public policy, and by implication, contrary to justice. However, the judges interviewed appeared not to recognise a fundamental contradiction in their reasoning: while they explicitly recognised that a general tariff would be inconsistent with the need to respond to the uniqueness of each case they did not seem to recognise that the adoption by them of their individual approaches (developed incrementally over a period of time) might also be inconsistent with the need to respond to the uniqueness of each case.

### *C. Consistency in Sentencing*

Judicial views on consistency in sentencing were quite mixed. Several judges expressed the view that greater consistency in sentencing is important and desirable. However, one judge qualified this view with the proviso that greater consistency was only possible in cases with similar circumstances:

It should be as consistent as it can be but it can't lose sight of consistency versus complexity of circumstances. There must be a balance between the two. No tax, no insurance, no licence, for these offences there should be a straightforward fine. If circumstances are the same there should be greater consistency.

This represents an implicit recognition of the fact that a certain amount of inconsistency in sentencing outcomes is part and parcel of an individualised system of sentencing. It also represents an explicit recognition of the fact that when the circumstances of the offence and of the offender are sufficiently similar, the actual sentences imposed in both cases should be similar. However, it is notable that only one District Court judge made this distinction. Several judges when asked about their views on consistency stressed their disapproval of mandatory sentencing. They explained that in their view, mandatory sentencing conflicts with the Irish system of individualised sentencing. In their view, judicial discretion to take individual circumstances into account was necessary in order to achieve justice and fairness in sentencing because each case is unique. Mandatory sentencing severely limits a judge's discretion and therefore their ability to tailor sentences to the individual circumstances of each person. This, according to some judges, leads to injustice and unfairness in sentencing:

It's the person you're sentencing and not the crime and because there are so many variables in people's lives I think it is essential for the courts, if they are to do justice, to have a fairly wide discretion in imposing penalties.

In essence, judges who disapproved of mandatory sentencing were in fact expressing support for an individualised system of sentencing that prioritises substantive justice over formal justice. This approach prioritises judicial discretion and independence as a means of producing justice and fairness in sentencing. However, the emphasis is clearly on the uniqueness of each individual case with almost no mention of the need for consistency when cases are reasonably similar.

As noted above, some judges implicitly rejected the idea that consistency in sentencing was possible in an individualised system. However, others were more explicit in their rejection of the possibility of consistency. For example, one judge rejected consistency because it was not possible given that no two cases are ever the same. Another judge explained that consistency in sentencing, although perhaps helpful to practitioners and the public, is not necessarily valuable or desirable because it may lead to injustice in individual cases, thereby undermining respect for the whole system of law.

#### *D. Factors Related to Inconsistency in Sentencing*

District Court judges identified a number of factors that they thought caused inconsistency in sentencing, including: the individualised system of sentencing; judicial independence; human factors and the lack of training for judges. Several judges explained inconsistency in sentencing in terms of it being a natural by-product of the individualised system whereby each case is decided on its own facts. Several judges explained that inconsistency in sentencing was to a certain degree caused by judicial independence. Judges develop incrementally their own tariff or approach towards certain types of cases and this naturally gives rise to inconsistency in sentencing. According to the judges interviewed, sentencing in the District Court therefore appears to happen not only on a case-by-case basis but also on judge-by-judge basis.

Some judges identified what they called the “human factor” as giving rise to inconsistency in sentencing. Judges, in common with all human beings, are unique and the fact that no two judges are the same is bound to give rise to a degree of inconsistency in sentencing. As one judge explains:

I mean you take the District Court, there are approximately 54 judges and they are 54 individuals each coming with their own pluses and minuses, their own inclinations, their own likes and dislikes, their hang-ups and baggage, and a whole baggage of maybe say political, social, economic backgrounds.

Some judges attributed inconsistency in sentencing to the lack of training for new judges. They explained that the lack of appropriate training for new judges inevitably gives rise to inconsistency as it forces judges to develop their own approach, usually in isolation from other judges. A number of judges pointed out that it was not uncommon for new judges to have little or no experience of the District Court before being appointed and that some new judges lacked even the most basic experience of dealing with criminal matters. While some newly appointed judges lack experience of a practical nature in relation to how matters are run in the District Court, almost all new judges lack experience in sentencing. As one judge explains:

For a newly appointed judge, you're always wondering am I doing the right thing? You don't become a wonderful judge on the day you get your seal, because you've spent 21 or maybe 15 or 37 years practicing as a lawyer and it's not like the Holy Spirit descends upon you and you get enlightenment or wisdom or probity or all those talents. So there is a distillation process as you begin to evolve what you consider. That's part of the ... but most judges I suppose over a period of year or two on the bench will come to a tariff as to what they think is right.

Another judge explained that training took the form of sitting with other judges for one week and taking notes. He expressed the view that while it was better than nothing, it certainly was not adequate.

#### *E. Factors Related to Consistency in Sentencing*

Judges suggested a number of ways in which consistency in sentencing might be increased. Some believed that increased

discussion about sentencing amongst judges might lead to greater consistency in sentencing and mentioned that increased opportunity is provided for this by the annual conference for District Court judges. Others pointed out that new judges sometimes develop their sentencing practice by watching more experienced judges sentence and that this can lead to greater consistency between judges:

I found it ... very useful to get together with colleagues, particularly older wiser colleagues, and hear how they deal with things. You don't have to follow their lead, you can, as I was saying earlier, borrow from one and borrow from another, and discard what you hear from another and you may find that Dan Joe is too extreme and someone else is way off the wall in terms of leniency, and you then have to try and distil by a process of gathering and selection and rejection. Distil what you think is about right. That's how I have come to where I am.

It is notable that while these suggestions point towards greater judicial collaboration and cooperation in the realm of sentencing, ultimately they still envisage each judge forming his or her own individual approach, albeit with slightly more guidance than before. Lastly, several judges suggested that some form of sentencing guidelines would be helpful in achieving greater consistency in sentencing. Judges did not indicate a particular type of guideline system. However, they did point out that some judges would view guidelines as an interference with judicial discretion and judicial independence and would therefore view them unfavourably.

## **V. FINDINGS: CONSISTENCY IN SENTENCING DECISIONS**

District Court judges were given four hypothetical vignettes and asked to pass sentence in each case. Importantly, judges were asked to "think out loud" and explain their reasons for sentencing. Judicial sentencing outcomes imposed in the vignettes were then compared in order to identify the degree of consistency and

inconsistency in their sentencing practices. The following section describes these findings.

*A. Evidence of Inconsistency*

Firstly, when the sentencing outcomes of different District Court judges were compared, high levels of inconsistency were found. For example, in the Assault case there were 13 different sentencing outcomes (although in some instances the differences were slight), and in total judges indicated that they would consider using seven different types of penalty including: a probation order; a compensation order; the poor box or contribution to charity; a fine; a community service order; a suspended sentence and a prison sentence. In terms of overall severity, sentences imposed in the Assault case ranged from a probation order to a four-month prison sentence.

Similar patterns emerged in the other three cases. In the Theft case there were 11 different sentencing outcomes, judges indicated they would use six different types of penalties and these ranged in severity from a probation order to a six-month prison sentence. There were 12 different sentencing outcomes imposed in the Burglary case, these represented six different penalties and ranged in severity from a probation order to a 12-month sentence. Lastly, in the Road Traffic case there were five different sentencing outcomes and these represented five different types of penalties ranging in severity from a probation order to a 10-month prison sentence.

Secondly, the degree of inconsistency in judicial sentencing outcomes varied between the four different vignettes. Inconsistency in sentencing outcomes was highest in relation to the Assault case, and this was also the case that judges viewed as being the least serious and imposed the least severe penalties. In contrast, sentencing outcomes were most consistent in relation to the Road Traffic case, and this was the case that judges viewed as being the most serious of the four and imposed the most severe penalties. Therefore, it could be concluded that sentencing outcomes varied according to the seriousness of the offence: sentencing outcomes in the most serious case were most consistent whereas in the least serious case they were the least consistent.

In the Theft and Burglary cases the degree of consistency in sentencing outcomes was more complicated. The majority of judges indicated that if the offenders were willing to undergo treatment for their drug addictions then they would impose non-custodial sanctions. However, there was considerable variation in the types of non-custodial sanctions that judges would impose. On the other hand, a majority of judges indicated that if the offenders in these cases were unwilling to undergo treatment they would impose custodial sentences. Therefore, in these cases there was a high degree of inconsistency in the best-case scenarios and a high degree of consistency in the worst-case scenarios indicated by judges.

Thirdly, inconsistency was most pronounced in relation to the type of penalty judges would impose, and was particularly apparent in relation to the choice between different non-custodial sanctions. For example, in the Assault case, most judges indicated that they would impose a non-custodial sanction, but there was considerable variation between them regarding which type of non-custodial sanction to impose. In contrast, in the Road Traffic case, most judges viewed prison as the appropriate penalty and so the only opportunity for inconsistency was in the length of sentence. The fact that the choice between various non-custodial penalties gave rise to the most disagreement in penalty choice was also evident in the Theft and Burglary cases: in the best-case scenarios judges agreed that if the offenders were willing to engage in drug treatment they would impose a non-custodial sanction but tended to disagree regarding which type of non-custodial sanction was the most appropriate.

Again, the degree of inconsistency in the imposition of penalty varied between cases: the less serious the case in the eyes of the judges the more likely they were to agree that it warranted a non-custodial sanction, and in turn, the more likely they were to disagree about which non-custodial sanction to impose. The opposite was also the case: the more serious the case the more likely judges were to impose a custodial sanction and the least likely they were to disagree about the penalty.

Even when judges agreed about the type of penalty to impose in a particular case, they disagreed, in some cases quite significantly, about the quantum of penalty to impose. This was

evident in relation to all penalties. For example, the size of fines that judges indicated they would impose in the Assault case ranged from €200 to €700, and in the Road Traffic case from €100 to €2,000. The number of hours of community service work that judges indicated they would impose in the same case also varied considerably: from 60 to 200 in the Assault case and from 120 to 240 in the Burglary case. There was also considerable variation in the length of prison sentence that judges would impose in all four cases. Lengths ranged from 14-days to five-months in the Assault case, from 30-days to nine-months in the Theft case, from two to 10-months in the Road Traffic case and from two to 12-months in Burglary case.

### *B. Evidence of Consistency*

Despite the level of inconsistency described above, and perhaps somewhat counter-intuitively, further analysis of judicial sentencing outcomes and judicial sentencing rationales showed that there was also a considerable degree of consistency in the sentencing approaches of judges in the District Court.

#### *1. General Patterns in Overall Approaches to Sentencing*

Although the sentencing outcomes that judges would impose in the four case scenarios presented to them varied considerably, it was possible to discern a number of general patterns in the sentencing approaches adopted by judges in each case. For example, although there were 13 different sentencing outcomes in the Assault case, most judges fell into one of three groups based upon the severity of the sentence they would impose. The first group consisted of those that would impose some form of financial penalty, the second included those that would either impose a financial penalty or a more severe penalty such as community service, prison or suspended sentence, and the third group was made up of those that would impose either a community service order, prison sentence or suspended sentence. One judge fell outside this categorisation and imposed a probation order. Similar general patterns were observed in all four case scenarios presented to judges.

## *2. Uniformity of Approach towards Heroin-Addicted Offenders*

General patterns in overall approaches were particularly obvious in the Theft and Burglary cases. Both offenders in these cases were described as regular heroin users, and the majority of judges indicated that their preferred method of dealing with the offender would be to adopt Drug Treatment Court-like mechanisms. For most judges this approach involved offering the offender an opportunity to get treatment for their drug addiction in order to avoid a prison sentence. In general, if offenders were successful and complied with all requirements the court imposed then they would face a non-custodial penalty. However, if the offender were unwilling to engage in drug treatment, the majority of judges would impose a prison sentence.

At the time of the research there was only one dedicated Drug Treatment Court in Dublin's North Inner City, and so in reality very few of the judges who participated in the research would have been able to refer offenders to this court. Furthermore, although judges also have the power under section 28(1)(a) of the Misuse of Drugs Act, 1977, to impose an order for the offender to participate, under supervision, in treatment, therapy or education in lieu of other penalties, the limited statistics available on sentencing in the District Court do not suggest any large-scale use of this provision. In light of these factors, the extent to which judges would in practice adopt Drug Treatment Court-like mechanisms is questionable. However, the degree of uniformity of approach of the judges interviewed, at least in terms of how they would like to deal with the Burglary and Theft offenders, was considerable.

## *3. Uniform Rationale for Imprisonment of Persistent Offenders*

A number of other common themes emerged over the course of the research. When judges were asked to pass sentence in the four case scenarios the appropriateness of the use of imprisonment for persistent offenders emerged as an important theme. This was particularly evident in relation to the sentencing of the offender in the Road Traffic case, in which the offender was described as having a number of previous convictions,

including one recent conviction very similar to the case in hand. In this case, many judges indicated that they would impose an immediate prison sentence principally because the offender had had previous chances and had refused to change: in their view, a prison sentence was appropriate for persistent offenders who are unwilling to change, even those who commit relatively minor offences. This shows that District Court judges share a uniform rationale in relation to the use of imprisonment for persistent offenders. However, evidence gathered during the interviews and sentencing vignettes suggests that this is the exception rather than the rule. In other words, judges tended to disagree more than agree on the circumstances in which custodial and non-custodial sentences should be used. Indeed, in the next section, this disagreement is revealed as a key reason for judicial variation in sentencing outcomes, especially in relation to non-custodial penalties.

## **VI. FINDINGS: REASONS FOR INCONSISTENCY IN SENTENCING DECISIONS**

The third objective of the research study was to explore the reasons for inconsistency, if any, in judicial sentencing outcomes. As discussed earlier, Irish judges exercise a very broad sentencing discretion and receive very little guidance from the legislature or from the courts. One consequence of this is that they can legitimately adopt a number of different approaches when sentencing the same case. However, the findings of previous research regarding the reasons associated with inconsistency suggest that even if judges do adopt the same general approach, for example rehabilitation, they may place different emphasis on certain factors, interpret the “facts of the case” differently, and disagree regarding the appropriateness of certain penalties for certain offenders.<sup>62</sup>

The sentencing vignettes were therefore designed to capture how different judges justified their sentences in each case and therefore provide some insight into the reasons for inconsistency

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<sup>62</sup> Hogarth, *Sentencing as a Human Process* (above, note 47); Ashworth, Genders, Mansfeld, Peay and Player, *Sentencing in the Crown Court: Report of an Exploratory Study* (above, note 48).

in sentencing, if any. As discussed previously, although the sentencing outcomes judges would impose in the four case scenarios presented to them varied considerably, it was possible to discern a number of patterns in the sentencing approaches. A descriptive analysis was carried out of how judges within the various groupings justified their sentencing approach and sentencing outcomes. This descriptive analysis showed that inconsistencies in judicial sentencing outcomes were related to the following factors: differences in how judges interpreted the facts of the case, especially the seriousness of the offence; differences in the weight they attached to certain factors, in particular aggravating and mitigating factors; differences in judicial views regarding the appropriateness of different penalties for certain offenders and offences and finally differences in the sentencing objectives prioritised.

*A. Differences in How Judges Viewed the Seriousness of the Case and in the Weight they Attached to Aggravating and Mitigating Factors*

The descriptive analysis showed that differences in how judges viewed the seriousness of the case were quite clearly related to differences in the severity of the penalty they imposed. Judges who imposed the most severe sentences tended to view the offence very seriously whereas those that imposed the least severe sentences tended not to mention the seriousness of the case or tended not to regard the offence as particularly serious. Similarly, judges who imposed the most severe sentences tended to place great emphasis on aggravating factors and were either sceptical towards the mitigating factors or did not mention them at all. In contrast, judges who imposed the most lenient sentences tended to place greater emphasis on the mitigating factors, although most also noted the aggravating factors. Finally, judges that imposed the most severe penalties were more likely to prioritise public protection, retribution and deterrence and less likely to request probation reports. However, those that imposed the most lenient sentences were more likely to prioritise rehabilitation and to request a probation report. It appears that judges who interpret the case most seriously, tend to place greater emphasis on the aggravating rather than mitigating factors, are more likely to

focus on the offence rather than on the offender, are more likely to prioritise retribution and deterrence rather than rehabilitation, are less likely to request a probation report and finally, are more likely to impose a more severe rather than a lenient sentence.

*B. Differences in Judicial Views Regarding the Appropriateness of Different Penalties for Certain Offenders*

When passing sentence in each case District Court judges were asked to comment on the suitability of the various sentencing options available to them. In general, there was considerable disagreement amongst judges regarding the suitability of different sanctions in each case, although the level of disagreement ranged from sanction to sanction and from case to case. District Court judges tended to agree most about the appropriate use of prison and disagreed most about the appropriate use of non-custodial sanctions. This is illustrated by the fact that in all four cases, there was a striking contrast between the high level of agreement judges exhibited about the use of imprisonment in the worst-case scenarios and the considerable disagreement they exhibited regarding non-custodial penalties in the best-case scenarios. In relation to the use of prison, the overwhelming consensus amongst District Court judges was that a prison sentence was most appropriate for serious offences and for persistent offenders who were unwilling to change. Indeed, a majority indicated that if the offenders in the theft and burglary cases were unable or unwilling to address their addiction, they would be imprisoned.

In relation to non-custodial penalties, differences in views were most pronounced in relation to certain penalties for drug-addicted and unemployed offenders. District Court judges disagreed about the suitability of the community service orders for offenders with drug addictions and were divided on the issue of the appropriateness of fines in relation to unemployed offenders. Most District Court judges agreed that the community service was not always suitable for offenders with addictions. Instead, the suspended sentence was the sanction of choice for many judges when dealing with addicted offenders, although some preferred fines and community service orders. In relation to the use of fines, some judges would not impose a fine on

unemployed offenders because of the difficulty these offenders experience in paying fines, whereas others indicated that in relation to unemployed offenders they would impose lower fines and allow longer time to pay.

The fact that District Court judges disagreed about the suitability of various penalties when sentencing the same case, suggests that inconsistency in sentencing is related to different views regarding the suitability of various sanctions for particular offences and particular offenders.

### *C. Differences in the Sentencing Objectives Prioritised*

Although, as mentioned earlier, the descriptive analysis of judicial reasoning showed that certain sentencing objectives were associated with differences in sentencing severity, further analysis showed that, with the exception of the suspended sentence and the prison sentence, there appeared to be no agreement between judges regarding the sentencing objectives that individual penalties achieved. For example, while most judges viewed the compensation order as a means of compensating the victims for the harm caused by the offence, different judges associated it with different objectives including retribution, deterrence, restitution, restoration and reparation. Similarly, judges expressed the view that a community service order could achieve a number of sentencing objectives including rehabilitation, reparation and punishment. In contrast, most judges believed the suspended sentence achieved deterrence and that a prison sentence achieved public protection, deterrence and retribution. This suggests that there may not be a relationship between particular sentencing objectives and particular penalties, other than in the case of imprisonment and suspended sentences. The fact that judges view certain sanctions as capable of achieving a number of different sentencing objectives goes some way towards explaining why judges who choose the same sentencing objective when sentencing the same case may ultimately impose different sentences in relation to that case.

## VIII. DISCUSSION OF FINDINGS

### *A. Judicial Views on Sentencing and Consistency in Sentencing*

Findings from the descriptions of sentencing illustrate that District Court judges currently engage in “instinctual synthesis” rather than a structured approach to the sentencing decision as outlined by Hardiman J in *The People (Director of Public Prosecutions) v. Kelly*.<sup>63</sup> It is also significant that in their descriptions of sentencing and when asked to pass sentence, District Court judges rarely mentioned the principle of proportionality or any type of sentencing guidance. The findings on judicial views of sentencing also illustrate the extraordinary extent to which judges have internalised the philosophy of individualised sentencing. It may not be that judges do not value consistency *per se*, but that in their view the individualised sentence is the “just” sentence and that achieving the “just” sentence is prioritised over achieving consistency in sentencing. This certainly reflects the view of the Supreme Court expressed in *The People (Director of Public Prosecutions) v. Tiernan*<sup>64</sup> regarding the discretionary nature of the Irish sentencing system and the “fundamental necessity” that judges must be free to tailor sentences to the unique circumstances of each case.

This emphasis on judicial discretion and the fact that judges view developing their own approaches to sentencing as a natural part of their job, suggests that while District Court judges have internalised the philosophy of the uniqueness of the case, they have not internalised the idea that some structure can and should be placed on sentencing, despite attempts by the Court of Appeal to convey this idea through its jurisprudence on the principle of proportionality. Perhaps this state of affairs is not surprising considering that currently there is no effective system of appellate review of the sentencing decisions of the District Court. In one sense then, the heavy reliance on judicial independence can be perceived as both a rational and understandable response on the part of District Court judges. They receive minimum training,

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<sup>63</sup> [2005] I.L.R.M. 19.

<sup>64</sup> [1988] I.R. 250.

there is no effective system of review of their sentencing practices and it can be argued that the guidance that is available from the Court of Criminal Appeal has little practical relevance to the types of cases dealt with in the District Court.

Nevertheless, there appears to be a fundamental contradiction in the sentencing rationales of District Court judges. Whilst they place a high priority on the uniqueness of each case, viewing the discretion to decide each case on its own facts as a necessary pre-requisite for achieving justice in sentencing, the fact that they adopt their own individual approaches and policies conflicts with the idea of the uniqueness of each case and may amount to a failure to exercise discretion. Judges developing individual sentencing approaches also undermines the fact that there is, in reality, only one District Court. Furthermore, the high value that District Court judges appear to place on judicial independence along with the small number of judges that suggested sentencing guidelines as a possible answer to inconsistency, suggests that District Court judges may not welcome any development, including sentencing guidelines, which might encroach upon their discretion.

#### *B. Evidence of Inconsistency and Consistency in Sentencing*

Previous claims in the Irish literature on sentencing suggested that inconsistency in sentencing was likely to be widespread. The findings of this research suggest a more nuanced understanding of inconsistency in Irish sentencing practices. Firstly, high levels of consistency as well as inconsistency were found in this study. Although the sentencing outcomes that judges would impose in the four case scenarios presented to them varied considerably, it was possible to discern a number of overall patterns in the sentencing approaches adopted by different judges in each case. Secondly, District Court judges showed remarkable similarities in their views regarding the uniqueness of the case, the appropriate approach to drug-addicted offenders and to persistent offenders. This consistency of approach and convergence of views seems even more remarkable considering that District Court judges receive limited training and guidance, sit alone on the bench and have fairly limited opportunities to interact with each other. Nevertheless, this study also found

considerable differences in the views, rationales and sentencing practices of District Court judges. On the one hand, these findings suggest some hope for improving consistency in the sentencing practices of District Court judges. However, on the other hand, they also illustrate a gap in our knowledge and understanding of how judicial sentencing cultures work. They raise difficult and as yet, unanswered questions about how some values, approaches and rationales become deeply embedded in judicial culture, whilst others fail to penetrate the surface.

### *C. Reasons for Inconsistency*

Previous claims in the Irish literature on sentencing suggested that inconsistency in sentencing was likely due to the failure to adopt a coherent sentencing policy and due to the existence of multiple sentencing aims. Findings as to the reasons associated with inconsistency in sentencing suggest that it is not simply the incoherency of sentencing policy that leads to inconsistency but also the phenomenon of judicial variability. Even if two judges agree on the same sentencing objective in relation to the same case, they may differ about how to achieve that objective, or they may disagree about which penalties might best achieve their chosen objective. Judicial variability was most pronounced in relation to three key aspects of the sentencing decision: the seriousness of the offence; the weight to be giving to various mitigating and aggravating factors and the efficacy of and circumstances in which the various penalties should be used. Reducing inconsistency in Ireland therefore, will have to involve addressing the incoherency of current sentencing policy and law, as well as trying to mitigate the worst effects of judicial variability. Judicial differences regarding the efficacy of, and circumstances in which, individual sanctions should be used can be addressed by introducing clear statutory guidance on the purposes and objectives to be served by the various sanctions available to judges under Irish law. In some respects, the Fines Act, 2010, achieves this in relation to fines. Similarly, recent efforts by the Probation Service to revamp the community service order may succeed in providing a more coherent overall message and rationale about what it is and when it should be used.

### VIII. CONCLUSION

The main purpose of this article was to present the findings of an exploratory study that examined the issue of consistency in sentencing in the District Court. As such, an in-depth consideration of the full implications of these findings in terms of how greater consistency can be encouraged and achieved in the District Court is beyond its remit. However, by way of concluding, the following section highlights three key considerations that should inform such an exercise.

Firstly, it is important to recognise that consistency in sentencing is only one, albeit very important, value in sentencing. There is a need to consider carefully the balance between consistency in sentencing on the one hand and achieving justice in sentencing on the other hand. Another way of describing this conflict between values is to refer to the need, both to sentence like cases alike and to treat different cases differently. Introducing reforms to achieve the former usually reduces the possibility of achieving the latter, or as Tonry writes “the cure may be worse than the ailment”.<sup>65</sup> Where the balance lies differs in each jurisdiction and so efforts to reduce inconsistency must be tailored to meet the individual needs, circumstances and values of each jurisdiction. Secondly, reforms to increase consistency in sentencing should be specifically designed to respond to the problem of inconsistency as it exists in the Irish sentencing system and not elsewhere. That is not to say that we have nothing to learn from experiences elsewhere. On the contrary, there is a sizeable literature on the various types of reform introduced in other jurisdictions that we have much to learn from.<sup>66</sup> However, an effort to translate these lessons into an approach that will work in the Irish sentencing system must be made.

While inconsistency in sentencing is not simply an Irish phenomenon, there are many features of our sentencing system that are unique to Ireland. For example, the number of District Court judges in Ireland is relatively small leading some to say that Ireland is relatively “under-judged”. This has its advantages, one

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<sup>65</sup> Tonry, M. *Sentencing Matters* (above, note 8), p. 187.

<sup>66</sup> Examples include Tonry, *Sentencing Matters* (above, note 8) and Roberts and Cole, *Making Sense of Sentencing* (above, note 9).

of which might be that achieving greater consistency amongst 64 District Court judges might be somewhat easier than amongst approximately 10,000 magistrates.

Thirdly, before embarking on any type of reform to reduce inconsistency in sentencing, there needs to be a careful and thorough consideration given to the nature of the reform, how it is to be implemented, and to the expected as well as the unintended consequences that it may have. Summing up the evaluative literature on the impact of reforms introduced to reduce inconsistency in sentencing across a number of English-speaking jurisdictions, Tonry observes that “among ambitious innovations, more fail than succeed, and the explanations often can be found in the carefulness and thoroughness of planning and implementation”.<sup>67</sup> The findings presented here suggest that judicial culture is deeply wedded to the discretionary nature of sentencing, and in particular to the uniqueness of the individual case. The discretionary and thus individualised nature of the Irish sentencing system has been reinforced on many occasions by the Irish Supreme Court and Court of Criminal Appeal. Whilst reform is desirable, introducing reforms that involve an outright overhaul of the entire system may create more problems than it would solve, especially if the new system envisaged is underpinned by values which are fundamentally different to existing ones.

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<sup>67</sup> Tonry, *Sentencing Matters* (above, note 8) p. 182.