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FROM PRACTICAL WISDOM TO GUIDELINES: THE FUTURE OF SENTENCING AND REGULATION

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I have chosen this topic partly because it is probably the area of law with which I am most familiar, but also because of its public importance. Sentencing has undergone significant change during the past decade, and it is set to change even further in the coming years, as formal guidelines begin to be issued by the Judicial Council (a matter to which I shall return). The main purpose of guidelines, though it certainly need not be the only one, is to promote consistency in judicial sentencing practice. Consistency is undoubtedly an important value. But what I want to argue in this paper is that sentencing reform, whether through guidelines or any other strategy, is of little value unless it produces a sentencing system that is moderate, proportionate and constructive, as well as consistent. I shall begin by asking if consistency matters at all or whether there is more to be said for the traditional discretionary approach – that explains the reference to "practical wisdom" in the title. Consistency, I argue, is important, but a moderate and effective sentencing system cannot be produced through formal guidelines alone. The maximum sentences specified by statute and the availability of an effective parole system are also of prime importance.

Secondly, we must recognise that, today, criminal sentencing is only one means, and in some respects a decreasingly important one, of punishing certain kinds of crime and misconduct, notably in the white-collar and corporate areas. Regulatory bodies such as the Central Bank and the Data Protection Commission are now empowered to impose very severe financial penalties for various kinds of corporate and white-collar misconduct. We can no longer think of state punishment solely in terms of criminal sentencing. We must also take account of the extensive punishment powers being conferred on regulatory agencies. That explains the "Regulation" element in the title.

The idea of practical wisdom

In modern English translations of Aristotle's *Ethics,* which dates from the 4th century BC, the Sixth Book usually carries a title such as "The Intellectual Virtues."[1] However, what he is saying in this book is reasonably straightforward and still resonates today. It is essentially that there are several ways of thinking and of discovering the truth, and that different people have these qualities to different degrees. He lists a number of them including science, technical skill, intuition, theoretical wisdom and what he calls in the original Greek "Phronesis" which is usually translated as "practical wisdom", sometimes as "prudence" or "sagacity", but we will stick with "practical wisdom."

Aristotle saw this as an essential quality for the political leader. So, what exactly is it? As always with Aristotle, we are faced with the problem that many of his surviving works, including the *Ethics*, consist of his lecture notes rather than texts prepared for publication. However, at the risk of over-simplifying, and extrapolating what we can from the text as it stands, we can say that the person who has this quality of phronesis is someone who isn't necessarily a theorist or an original thinker (and at one point Aristotle seems to say that it would be better if they were not a theorist) but who can understand theories and principles, and then apply them in a pragmatic, objective and rational manner in policy-making and decision-making. This, in turn, requires close attention to the particular circumstances of each case as well as to the governing precepts and principles. As he writes:

> "Again, [practical wisdom] is not concerned with universals only; it must also take cognizance of particulars, because it is concerned with conduct, and conduct has its sphere in particular circumstances. That is why some people who do not possess theoretical knowledge are more effective in action (especially if they are experienced) than others who do possess it."[2]

Attention to particular circumstances was a key element of Aristotle's conception of justice. Earlier in the *Ethics*, he deals with the impossibility of creating general rules that will produce just outcomes in all the situations to which they apply. Because of the legislator's inability to foresee all those

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[1] The English version being used here is Aristotle, *Ethics,* translated by J.A.K. Thomson, revised ed. (London: Penguin Books, 1976). The Greek text used is Aristotle, *Nicomachean Ethics,* with translation by H. Rackham (Harvard University Press, 1968).

[2] Aristotle, *Ethics* (above), 213. See also David Wiggins, "Deliberation and practical reason" (1975-1976) 76 *Proceedings of the Aristotelian Society* 29.

situations, there must be some strategy for either interpreting a rule creatively or departing from it altogether where justice so demands. The strategy Aristotle recommends is equity. That, at least, is the word used in most modern English translations. The word used by Aristotle in the original Greek, *epieikeia*, can also mean fairness, decency or clemency. But the idea is essentially the same. It reflects the need for some kind of principled flexibility to mitigate the rigors of general rules, and especially rules that are expressed in mandatory terms. He explains the relationship between law and equity in this way:

> "Thus, justice and equity coincide, and although both are good, equity is superior. What causes the difficulty is the fact that equity is just, but not what is legally just; it is a rectification of legal justice. The explanation of this is that all law is universal, and there are some things about which it is not possible to pronounce rightly in general terms…"[3]

Although written two and half millennia ago, this could be read as one of the strongest condemnations yet of mandatory and mandatory minimum sentences.

Returning, then, to the Aristotelian notion of practical wisdom, it has enjoyed a long afterlife and has, indeed, has been of growing interest in recent times, especially as it applies to professional practice,[4] and to modern philosophers such as Martha Nussbaum. The leading British political theorist, Isaiah Berlin, often invoked it in his writings throughout the latter half of the 20th century. For instance, in an article published shortly before his death, he wrote:

> "What makes statesmen, like drivers of cars, successful is that they do not think in general terms—that is, they do not primarily ask themselves in what respect a given situation is like or unlike other situations in the long course of human history…. Their merit is that they grasp the unique combination of characteristics that constitute this particular situation—this and no other. What they are said to be able to do is to understand the character of a particular movement, of a particular individual, of a unique state of affairs, of a unique atmosphere, of some particular combination of economic, political, personal factors; and we do not readily suppose that this capacity can literally be taught."[5]

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[3] Aristotle, *Ethics* (above), 199. Explaining this and the passage that follows, Martha Nussbaum writes: "The law is authoritative insofar as it is a summary of wise decisions. It is therefore appropriate to supplement it with new wise decisions made on the spot; and it is also appropriate to correct it where it diverges from what a good judge would do in this case. Here again, we find that particular judgment is superior in both correctness and flexibility": Nussbaum, *Love's Knowledge: Essays on Philosophy and Literature* (Harvard University Press, 2013), 69.

[4] See, for example, Elizabeth Kinsella and Allan Pitman (eds), *Phronesis as Professional Knowledge: Practical Wisdom in the Professions* (Rotterdam; Sense Publishers, 2012).

[5] Isaiah Berlin, "On political judgment", *New York Review of Books,* 3 October 1996.

Berlin, like Aristotle, was primarily concerned here with identifying the ideal qualities of the "statesman" in the language of the time, or the political leader as we say today. But, of course, the same can be applied to anyone charged with making important decisions with a public dimension, including judges.

In a political or legal system where practical wisdom is considered the most desirable intellectual virtue or personal quality, the all-important challenge is to choose very carefully those appointed, by whatever means, to key decision making roles. The emphasis must be on appointing persons who are most gifted with this quality of practical wisdom. Then once they are appointed, the argument runs, they should just be let get on with the job, and they will probably get it right or about right most of the time. Nobody gets it right, whatever that may mean, all of the time. Getting it right or about right most of the time is the best that can be expected. I am not saying I endorse this policy, I'm just describing how it might operate.

Of course, there are problems with this notion of practical wisdom, including how exactly it can be identified. If I were to ask each member of this audience to identify who present is best endowed with practical wisdom, everyone would probably be polite enough to point to someone else. But secretly, many of us might be saying to ourselves, "well, actually it's me" (unless you went to a good school in which case you would say "it is I"). We are all inclined to believe that we are uniquely gifted with it, and we can all think of at least a half dozen of our acquaintances who are decidedly not so gifted. But don't feel guilty about that, because there are many others who think the same about you. And who can say who's right?

Secondly, we must always be attentive to the complex relationship between knowledge and power, most notably developed by Michel Foucault. Power often provides the opportunity to select and shape the knowledge transmitted to others. It should never therefore be assumed that practical wisdom is possessed by everyone who happens to hold an office in which they might be expected to exercise it. We must always interrogate carefully how and why they came to occupy the position they hold. It is the quality itself rather than the office held that matters, however elevated that office may be.

Having said all this, I would not knock the idea of practical wisdom or deny that some people, by virtue of disposition and experience, are more endowed with it than others. When it is genuinely present and conscientiously applied, it can doubtless produce good decisions, but not necessarily consistent decisions. This, in turn, raises the question: does consistency matter?

Does consistency matter?

A few weeks ago, Baroness Onora O'Neill, a leading modern philosopher, delivered the John Kelly Lecture at UCD on the topic "Philosophical Views on Judgment." She took as her starting point a recently published book called *Noise: A Flaw in Human Judgment*[6] by Daniel Kahneman, Olivier Sibony and Cass Sunstein, three authors who need no introduction. This book has received great attention and great praise. By "noise", they are referring to what they describe as "an undesirable variation in judgments of the same problem." They acknowledge that judgments can suffer from bias, but that is something we all regard as unacceptable, so they don't dwell on that. What they are concerned about instead is how different people, even when acting with complete integrity and with the same level of expertise and professionalism, can still reach different decisions when confronted with the same set of facts, even though they are applying the same principles and standards. They illustrate this with examples ranging from sentencing (to which they devote two short chapters), the setting of insurance premiums, medical diagnoses by doctors, decisions in child custody disputes and asylum applications. For instance, they describe an experiment, which they call a "noise audit" which they conducted in a large insurance company. The purpose was to see how much, if at all, underwriters and loss adjusters vary when setting a premium or estimating the amount of a claim. Insurance executives involved in this work accepted that variation occurred depending on who was assigned, for example, to set a premium, but they estimated that the variation would be, at most, 10 per cent. When the researchers asked more than 800 CEOs and senior executives from different industries how much variation they would expect in similar expert judgments, the most frequent answer was again 10%. However, the controlled research experiment within the insurance company found that the median difference in underwriting was 55%. This meant that if one executive quoted a premium of $9,500, another, equally experienced, executive would quote $16,700 for the same risk.

The authors of *Noise* regard this kind of variation as a "flaw" in human judgment, thus explaining the book's sub-title. They argue that steps should be taken to reduce, if not eliminate, this kind of variation, and they make various proposals for how this can be done.

Baroness O'Neill agreed with the authors of *Noise* that judgment can vary, but she disagreed with them that this is necessarily a flaw. She was concerned with human judgment generally rather than professional judgment, and she argued

6 London: William Collins, 2021.

many matters are, in the time-honoured phrase, a matter of judgment. If I read the book correctly, the authors would not necessarily have disagreed with much of what she said. They accept, as we all do, that literary and artistic judgment, for example, varies but that is not necessarily a bad thing. In fact, it is probably beneficial.

But turning to professional judgment, is variation there something about which we should be concerned? It depends on what is at stake. Suppose, for example, you had three candidates for a job, all them more than well qualified and suitable for the position, and suppose it was arranged to have all of them assessed by two different interview panels. And, again, we will assume that all the interviewers were highly expert and experienced in the relevant field. There is a good chance that the two panels would rank the candidates differently. Should be we concerned about that variation in judgment? I would say "no". It may not be an ideal situation, but it is a price worth paying for allowing professional judgment to be exercised. Suppose, on the other hand, a person who is feeling unwell consults two different medical specialists. One tells her that she may be suffering from a serious illness and needs further tests. The other tells her that she is just suffering from stress and all she needs is a good holiday. Clearly, we should be worried about variation in that kind professional judgment.

What then about sentencing? Should we be concerned about variation in sentencing judgments? We should. After all, most criminal penalties involve the deprivation or restriction of liberty, or the deprivation of property, both of which are highly valued and strongly protected rights. Additionally, in a constitutional democracy, the criminal justice system should be informed by certain fundamental values such as legality, fairness, non-discrimination, rationality and proportionality. These rights and values are scarcely protected or honoured in system where sentencing is, in the words of the authors of *Noise,* a lottery. The penalty imposed on an offender should not vary to any significant degree depending on who the sentencing judge happens to be on the day. I emphasise the words "to any significant degree" because there will inevitably be some variation. One could try to eliminate all variation in sentencing judgment by having a system of fixed penalties, but that is a cure that would be decidedly worse than the disease.

Therefore, to answer the question asked at the outset – does consistency matter? – yes, but it is not all that matters. Consistency, after all, tells us nothing about the nature or severity of the penalties that should be imposed. A uniformly harsh sentencing system would be just as consistent as a uniformly lenient or

moderate one. Consistency is observed once unwarranted disparities are eliminated from the system, however harsh or otherwise the system may be. Lyndon Harris puts it very well in his recent book, *Achieving Consistency in Sentencing*[7] when he says that consistency is agnostic as to the merits of what it aims at.

This is not to say, however, that consistency in itself is without value. It is important for promoting distributive justice by ensuring that similar cases are treated in a similar fashion. Further, a sentencing system that is seen to be consistent is more likely to attract public confidence than one that is not.

However, what we should be striving to achieve is a system that is not only consistent, but moderate and proportionate as well. This raises the question of whether guidelines can help to promote these values within the sentencing system, and I believe they possibly can. First, however, a short historical excursus is necessary, just to explain the evolution of sentencing guidelines in recent times.

Exactly 35 years ago almost to the day, on 13 May 1988, the Supreme Court delivered two important sentencing judgments in *Conroy*[8] and *Tiernan*.[9] The court had previously addressed some constitutional and procedural aspects of sentencing in cases such as *Deaton*[10] but this was the first time it was asked squarely to decide on the appropriate sentences for particular offences – manslaughter in *Conroy* and rape in *Tiernan.* I want to dwell here on *Tiernan* which arose from a particularly egregious case of gang rape for which the appellant, Tiernan, was sentenced to 21 years' imprisonment and that sentence was upheld by the Court of Criminal Appeal. His further appeal to the Supreme Court was enabled, rather unusually, by a certificate granted by the Attorney General who asked the court to consider indicating guidelines for rape sentencing. Problematically for the court, this question did not feature in the appellant's grounds of appeal and so, strictly speaking, it could not be addressed. However, the court made clear that in any event it did not consider it appropriate to lay down any such guidelines. Delivering the majority judgment, Finlay C.J. noted, first, that there were no reliable data about existing sentencing practice on which any such guidelines might be based. More significantly, for present purposes, he went on to say:

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7 Lyndon Harris, *Achieving Consistency in Sentencing* (Oxford University Press, 2022), 4.
8 [1989] I.R. 160
9 [1988] I.R. 250.
10 [1963] I.R. 170.

> "Furthermore, having regard to the fundamental necessity for judges in sentencing in any form of criminal case to impose a sentence which in their discretion appropriately meets all the particular circumstances of the case (and very few criminal cases are particularly similar), and the particular circumstances of the accused, I would doubt that it is appropriate for an appellate court to appear to be laying down any standardisation or tariff of penalty for cases."[11]

The majority ultimately decided to reduce the sentence from 21 years to 17 years. The fifth member of the court, McCarthy J., delivered a separate judgment which was dissenting to the extent that he would have upheld the original 21-year sentence. However, he seemed equally opposed to anything resembling sentencing guidelines. He said:

> "The trial judge, subject to due consideration of the matters specified by the Chief Justice, and taking into account what further matters may properly appear to be relevant in the particular case, should have a true judicial discretion as to the sentence appropriate in any case."[12]

These statements, in effect, represented an Aristotelian approach. The court was saying that sentencing decisions are best left to the practical wisdom of trial judges, with the implied qualification that a sentence that seriously diverged from the norm could be corrected on appeal. You might say that they were just talking about discretion, as indeed they were. But I would follow H.L.A. Hart who argued that discretion, properly understood, is not merely about choice. Rather it is about the exercise of practical wisdom which calls for rationality and objectivity in decision-making, even where a number of outcomes are legitimately available. He saw discretion as a power of discernment. [13] However, for present purposes, the most notable aspect of *Tiernan* is its rejection of the notion of sentencing guidelines.

But *Tiernan* is not the only anniversary we are marking. Fifty years ago, in 1973, a short book, running to about 120 pages, was published in New York. It was entitled *Criminal Sentences: Law without Order* and the author, Marvin Frankel, was a federal district court judge. It attracted a fair bit of attention when published but is now regarded as one of the most influential works of the past century in the field of criminal law. This assessment is probably justified because it led to a profound, indeed revolutionary, change in American

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11 [1988] I.R. 250, 254.

12 [1988] I.R. 250. 257.

13 H.L.A. Hart, "Discretion" (2013) 127 Harvard L.R. 652 (paper delivered in 1956).

sentencing, a change that would later reverberate in many other parts of the world, most recently here in Ireland.

Frankel excoriated the American sentencing system for its inconsistency and arbitrariness. He certainly had a point, although some later claimed that he exaggerated the problem. It must however be recalled that, at that time, appeals against sentence were effectively unknown in the United States. Merit-based appeals against sentence were introduced in all jurisdictions in these islands in the early 20th century (in 1924 in this country) but that had not happened in America. Secondly, American sentencing at that time was truly indeterminate. In some jurisdictions a judge would impose a prison sentence of, say, one to 10 years, leaving it to the parole authority to decide when the prisoner would be released. The theory was that the parole authority would decide when the prisoner was sufficiently rehabilitated to be release. But this soon became the theory. The practice was that prisoners were released on serving one third of whatever sentence or maximum sentence that had been nominated by the judge. Frankel concluded by recommending the creation of a commission on sentencing, the functions of which would include, in his words, "the enactment of rules" (governing sentencing), though he did not elaborate very much on what he meant by this.

Frankel's book might now have faded into obscurity had it not caught the attention of Senator Edward Kennedy who became its main champion at political level. During the next decade, he campaigned strongly for federal sentencing reform, and his efforts bore fruit, under the Reagan presidency as it happened, with the enactment of the Sentencing Reform Act in 1984. This provided for the creation of the United States Sentencing Commission which produced the federal sentencing guidelines that entered into force in 1987 and which, with some amendments, still apply. These were grid-based guidelines that governed the sentencing of all federal offences. Similar grid-based guidelines were adopted by individual states. In fact, the Minnesota guidelines, often regarded as the most successful, had been adopted in 1980.

American sentencing guidelines based, as they typically are, on a grid have found no imitators elsewhere. The main reason for their rejection is the so-called "recidivist premium", namely the increased sentences imposed on offenders with previous convictions. In many American guideline systems, the sentence imposed on an offender with say, ten previous convictions (at least for non-trivial offences) may be twice what would be imposed on a first-time offender, in some cases more than that. As part of the 1984 reform, parole was abolished within the federal system, a move that many are now regretting.

When England and Wales introduced formal sentencing guidelines about 2003/2004, it took a different approach. First, the Sentencing Guidelines Council (now the Sentencing Council) developed guidelines incrementally on an offence-by-offence basis. By now it has developed separate guidelines for virtually all commonly prosecuted offences, as well as so-called generic guidelines dealing with general matters such as the assessment of offence seriousness and discounts for guilty pleas. However, in contrast to American guidelines, the English guidelines are essentially narrative in nature. They specify sentence ranges for various categories of each offence, but they are also strongly descriptive by setting out which factors should increase or reduce culpability as well as personal factors that may mitigate the sentence to be eventually imposed.

What, then, has been happening in Ireland? As we have seen, the Supreme Court rejected the idea of sentencing guidelines in *Tiernan* in 1988 and this remained the orthodoxy for the next 25 years. The change came in March 2014 when the Court of Criminal Appeal, then in the final months of its existence, suddenly issued two guideline judgments. This was an entirely unheralded development, and the court got around the *Tiernan* problem by interpreting its language literally. Recall that in *Tiernan* the Chief Justice had said that he doubted if it would be appropriate for an appeal court to appear to be laying down any "standardisation or tariff of penalty" for offences. The Court of Criminal Appeal said that it agreed with this, but that it did preclude the indication of appropriate sentence ranges for particular offences. It then proceeded to do just that for possession of firearms in suspicious circumstances, the offence in one of the cases, *Ryan,* and causing serious harm, the offence in the other case, *Fitzgibbon.* Just to illustrate, the offence of causing serious harm carries a maximum sentence of life imprisonment. The ranges recommended by the court were:

Lower category	2 to 4 years
Middle category	4 to 7½ years
Highest category	7½ to 12½ years

(with the possibility of a higher sentence, up to life imprisonment in exceptional cases)

The present Court of Appeal issued its first guideline in 2018 in *Casey* which dealt with residential burglary, and it has issued several other formal and informal guidelines since then. Typically, the court divides the sentence scale into three ranges – low, middle and high. Therefore, where the maximum

sentence is, say, nine years, the lowest category will carry a sentence range of zero to three years, the middle category a sentence range of three to six years and a highest category of 6 to nine years. Where the offence is punishable with a maximum of life imprisonment, the court usually assumes that the effective maximum is 15 years and it sets the ranges accordingly, though with the possibility of going above 15 years in exceptional cases. The Supreme Court has also issued guideline judgments for assault manslaughter, rape and harassment. Some of these contain more than three categories, as is appropriate for offences such as manslaughter and rape.

Taking stock of where we now stand

What we have seen happen then over the past 35 years is a profound change in judicial attitudes to guided sentencing. There has been a transition from strong resistance to enthusiastic acceptance, at least at superior court level. Various reasons might be suggested for this change. One is that courts came in for increasing public criticism for what was perceived to be inconsistent sentencing, especially as the media became far less deferential to the courts that they may have been in the past. Secondly, a new generation of judges were more receptive to innovation, including the opportunities afforded by information technology, and they adopted a more open-minded approach to guided sentencing. But perhaps the more compelling explanation is the deeper commitment to procedural justice and reasoned and transparent decision-making on which legal systems in democratic countries now insist. Back in the 18th century, Lord Mansfield was contacted by a relative of his who had been appointed a colonial governor and whose duties would include resolving disputes. He was seeking advice as to how he should go about the business of judging. Mansfield replied: "consider what you think justice requires and decide accordingly. But never give your reasons; for your judgment will probably be right, but your reasons will certainly be wrong."[14] Such a policy would scarcely be countenanced today when decision-making is meant to be as transparent as possible.

A new guidelines era

However, we are now entering a different era as a result of the Judicial Council Act 2019 which creates a Sentencing Guidelines and Information Committee which is charged with a number of functions, the most important for present purposes being to prepare draft sentencing guidelines for adoption by the Board of Judicial Council. (The Judicial Council, in turn, consists of all serving judges

[14] Amartya Sen, *The Idea of Justice* (London: Penguin Books, 2010), 4.

while the Board consists of 11 judges including the Presidents of all the courts). The Act gives the Committee considerable latitude in relation to the kind of guidelines it draws up. It seems to envisage guidelines along the lines of the English model, but it certainly does not require that our guidelines should be exactly similar to the English ones. However, it provides for both offence specific guidelines and general guidelines. The factors to which the Committee must have regard when drawing up guidelines include the sentences currently imposed by the courts, the need to promote consistency, the impact of sentences on victims of crime and the need to promote public confidence in the sentencing system.

One all-important consideration when it comes to drawing up guidelines is the extent to which they are intended to be binding on the courts. Here again, the 2019 Act is phrased in fairly flexible terms. It provides that a court in imposing a sentence shall have regard to any relevant guidelines unless it is satisfied that it would be contrary to the interests of justice to do so, although it must state its reasons for deciding that it would be unjust to apply a guideline.

Should guidelines try to change the course of sentencing practice?

The first question, to borrow from the title of a leading work of literary criticism, is whether sentencing guidelines should aim to be a mirror or a lamp.[15] Should they aim to reflect to reflect existing practice (a mirror) or to chart out a different course by, for example, recommending different sentence ranges from those that are now commonly applied (and become, in that sense, a lamp). Guidelines that reflect existing practice are probably more likely to be accepted by trial judges, and it must be recalled that under the statute judges have some degree of latitude to depart from guidelines. Experience elsewhere has shown that guidelines that impose abrupt changes in sentencing levels meet with far greater resistance than those reflecting existing practice. Those guidelines that have so far been judicially developed in Ireland seem to have been largely accepted by trial courts – though I am saying this purely on the basis of impression as opposed to any kind of empirical evidence. Any offence-specific guidelines adopted by the Judicial Council that adhered closely to those guidelines that have been judicially developed over the past decade or so would probably gain general acceptance.

But there are other considerations to be borne in mind as well, and one of these is prison overcrowding which, right now, is a serious problem. On 4 May 2023, the number of prisoners in custody was 4,583, which meant that, overall, the

[15] M.H. Abrams, *The Mirror and the Lamp: Romantic Theory and the Critical Tradition* (New York: Norton Books, 1958).

prison system was operating at 104% bed capacity. The Women's Prison in Limerick was operated at 171% bed capacity and the Limerick Men's Prison was operating at 130% bed capacity. This is utterly unacceptable. On the same date last year, 2022, there were 4,000 prisoners in custody, so we have seen an increase of almost 600 in the course of a year. It is difficult to foresee this situation improving any time soon. One need only consider, for example, the number of cases pending before the Central Criminal Court alone, bearing in mind that that court deals solely with murder and rape cases. Consider also the number of large drug seizures and related arrests we are currently seeing. Then there are offences such as money laundering and human trafficking, about which we scarcely heard until recently, but which are now increasing in prevalence and which typically attract heavy sentences.

Of course, one solution is to increase prison capacity, but that brings its own share of problems, not the least of which being the logistical difficulties in building more prisons. Furthermore, warehousing large numbers of prisoners, probably in overcrowded conditions, for lengthy periods does little to promote public safety in the long term.

One problem with guidelines is that they tend to emphasise imprisonment. There is nothing inevitable about this. Often, it is merely a matter of convenience. Simply put, it is easier to think in terms of prison sentences and to specify terms of custody rather than try to develop three-dimensional guidelines that would recommend non-custodial penalties equivalent in severity to short and medium length prison terms. For instance, I mentioned earlier Marvin Frankel's book which was published 50 years ago. Very recently, there as a conference held in New York, addressed by some leading scholars and judges, to mark the 50th anniversary of its publication. However, it wasn't an occasion for unalloyed celebration. Frankel was undoubtedly the original inspiration for the federal sentencing guidelines, and they have certainly brought a fair measure of consistency to federal sentencing. But they have also brought about a very significant increase in the federal prison population. In 1987 when the guidelines were introduced there were 44,000 federal prisoners. Today, there are 153,000, more than a threefold increase.

Any body charged with developing sentencing guidelines must therefore remain constantly and acutely aware of the impact its recommendations on the prison population and of the need to avoid imprisonment where possible. It can do this by, for example, producing a general guideline on sentencing options, including guidance on when the custody threshold should be deemed to have been passed. Likewise, in its offence specific guidelines, it can recommend non-custodial

sentences (or at least the possibility of non-custodial sentences) for the lower categories of some offences, and it can try to make recommended prison sentences for the higher categories as moderate as possible.

However, my main message in this regard is that a guideline setting body cannot, on its own, achieve parsimony in punishment and moderate prison sentences. After all, when setting guidelines, it must have regard to maximum sentences set by statute. When those maximum sentences are high, as they nowadays almost invariably are, they will probably result in high guideline sentences. The higher the statutory maximum, the higher the recommended guideline sentences are likely to be. I would illustrate this by referring to a fairly recent decision of the Court of Appeal in *Lennon* which offered guidance on sentencing for witness intimidation. This offence carries a maximum sentence of 15 years imprisonment, and so the court recommended sentence ranges of zero to 5 years, 5 to 10 years and 10 to 15 years, which was fair enough. Interestingly, however, when this offence was first created in 1999, it carried a maximum sentence of 10 years, but this was increased to 15 years in 2009 for no particularly good reason. The matter was addressed only very briefly by the Minister for Justice during the Oireachtas debates on the 2009 legislation and the only explanation he gave for increasing the maximum sentence was that the Gardai had recommended it. Of course, if the original 10 year maximum still prevailed when *Lennon* was decided, the recommended sentence ranges would have been significantly lower.

Another problem with maximum penalties, as Rory Kelly has persuasively argued, is that they are often the product of historical accident and cannot therefore be relied upon to produce true proportionality in sentencing practice.[16] It would be all very well if maximum sentences were chosen according to a rational scheme in which each was carefully ranked, having regard to the inherent gravity of the offence to which it attached compared with the gravity of other offences. But that is not the reality.

Ideally, there should be a general review of maximum penalties but at least legislators, when setting maximum penalties for new offences should be aware that these will feed into guidelines and shape those guidelines to a considerable extent. The presumptive minimum sentences for drug and firearms offences should be abolished as these no have no meaningful role in a guidelines jurisdiction.

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[16] Rory Kelly, "Reforming maximum sentences and respecting ordinal proportionality" [2018] Crim. L.R. 450.

We cannot, admittedly, be optimistic about any general review of maximum sentences being undertaken, but there is something else the Government could do and that is to revise the parole system. It may seem strange to make such a suggestion because the present parole system was introduced as late as 2019 (in the Parole Act of that year). This Act has some very good elements, especially in relation to procedural rights, but it is deeply flawed on the all-important question of eligibility for parole. It provides that a person serving a life sentence does not become eligible for parole until they have served 12 years in custody, though it is unclear how the 12-year figure was arrived at. However, when it comes to prisoners serving determinate sentences (of a set number of years or months), the Act provides that the Minister for Justice may make regulations to allow for the grant of parole to those serving prison sentences of at least 8 years (and the Minister is entitled to specify that parole will be available only to those serving prison sentences of longer than 8 years). This means that only a relatively small proportion of the prison population will ever become eligible for parole (though they can qualify for less formal kinds of temporary release). The other all-important question is what proportion of a sentence a prisoner should be required to serve before becoming eligible for parole. The 2019 Act is completely silent on this question, leaving it to be decided by the Minister by way of regulation. The very least one would expect from a parole statute is that it would specify precisely the categories of prisoner who are eligible for parole and the portion of their sentences they should be required to serve before becoming eligible for consideration for parole.

I would recommend that this law should be changed to provide that everyone serving a sentence of three years, or even two years, should be eligible for parole and that a prisoner in this category should be eligible on serving, at most, one-half of their sentences. Of course, it is also essential that the Probation Service has adequate resources to supervise those released on parole, but money would be far better spent on this than on building more prisons. Supervised conditional release is likely to be far more effective in reducing recidivism than warehousing large numbers of prisoners in overcrowded custodial institutions.

Finally, in this regard, we need to have an honest discussion about the connection between sentencing and victims' interests. In the time available, I can only mention this topic here. However, there is a common assumption that, for offences at least, the heavier the sentence, the greater the relief for the victim. One comes across cases where a victim will feel undervalued if the offender got, say, five years' imprisonment but vindicated if he got seven years.

Yet, it will usually be far from clear what was wrong about one sentence and right about the other. As the Court of Appeal said in *Crowley*:[17]

> "However, in so far as victims have an entitlement to see justice done, that entitlement inures to them not as individuals but rather as members of society. The court's obligation to do justice at sentencing is owed, firstly, to the public at large, including the victims in the case; and secondly, to the accused who has an individual constitutional right to expect and receive a sentence that is proportionate (in the distributive sense) to the gravity of the crime as committed by him in his personal circumstances."

I agree fully with that.

Summing up

To sum up, therefore, what I have to say about the future of sentencing guidelines. Yes, they can generate consistency and that is an important value in itself. However, there are other equally important values, one of which I am emphasising here, namely, moderation in punishment. A guideline setting body, such as the SGIC now established under the aegis of the Judicial Council, can go some distance to achieving this. But it cannot do so alone. Its work must be supplemented by a legislative review of maximum sentences and the introduction of a more effective and inclusive parole system. Also, as I have just said, we need to have a conversation about the relationship between sentence severity and victim satisfaction.

REGULATION

I have included "Regulation" in the title of this lecture because we have now reached a point where the punishment of wrongdoing can no longer be equated with sentencing by criminal courts. What I am about to say here has little relevance to core crimes such as offences against the person and the traditional offences against property. But it is highly relevant to white-collar and corporate offending and misconduct. Sentencing is sometimes described as state punishment to distinguish it from punishment inflicted in private settings such as parental chastisement of children or sanctions imposed on members of private associations. However, state punishment extends beyond criminal sentencing. It can include punitive damages awarded against defendants in tort

[17] [2021] IECA 178

actions, non-conviction-based confiscation of criminal assets, penalties imposed as part of deferred prosecution agreements, and, importantly, financial penalties imposed by regulators. Viewed in this light, criminal sentencing is now merely part of a broader sanctioning network. In fact, as far as white-collar and corporate crime is concerned, it is becoming an increasingly insignificant part of that network.

It has been suggested by Professor Carol Steiker of Harvard Law School that this turn to civil sanctioning is attributable to the Law and Economics movement with its emphasis on law as a means of promoting efficiency, including transactional efficiency. Granted, it is more economically efficient to have a heavy sanction imposed by a salaried official or group of officials in, say, the Central Bank (or any other regulator) than to have a criminal trial lasting several weeks or months that may well result in an acquittal. However, I don't think the impact of Law and Economics theory provides the full explanation. After all the co-existence of criminal and civil sanctions in the United States was being written about by Sanford Kadish as far back as the early 1960s, long before the Law and Economics movement began to make its presence felt. However, that movement may have had an accelerating impact.

Yet, these other sanctioning systems remain largely unexplored, in this country at least.

Punitive damages

In 1775, Lord Mansfield declared that "there is no distinction better known, than the distinction between civil and criminal law, or between criminal prosecutions and civil actions."[18] This may have been largely true at the time, but a decade earlier the distinction had already become blurred with the award of punitive damages in two well-known cases, *Wilkes v Wood*[19] and *Huckle v Money*.[20] In *Wilkes,* Pratt C.J. instructed the jury that damages could be awarded, not only to compensate, "but likewise as a punishment to the guilty, to deter from such proceeding for the future, and as a proof of the detestation of the jury to the action itself." This encapsulates the essential purposes of punitive damages today – retribution, deterrence and condemnation. Yet there is something inherently incongruous about punitive damages. There are, to be sure, several different theories of tort law, but one that has been in the ascendant in recent years is the corrective justice theory, associated most closely with scholars such as Ernest Weinrib in Canada and Jules Coleman in the United

18 *Atcheson v Everitt* (1775) 1 Cowp. 382; 98 Eng. Rep. 1142, 1147.
19 (1763) Lofft. 1; 98 Eng. Rep. 489.
20 (1763) 2 Wils. K.B. 205; 96 Eng. Rep. 768.

States. The very notion of corrective justice suggests that the purpose of any remedy granted in its name is compensatory. It is to put the plaintiff in the position he or she would have been in if the tortious act had not occurred, in so far as that is practically possible.[21]

Anomalous therefore though it may seem when viewed through the lens of corrective justice, tort law (and, in jurisdictions such as Canada, contract law) can accomplish goals that are primarily associated with the criminal law, namely, to censure, punish and deter. Moreover, the conduct being punished might well come within the definition of a criminal offence such as assault, harassment or interception of communications, as exemplified by some recent Irish cases where punitive damages were awarded.[22] A tort action in these circumstances bears some similarity to a private prosecution, save that the plaintiff's sole purpose is to secure compensation, even if this entails some degree of punishment for the offender. Punitive damages, when awarded in these circumstances, might be viewed as a fine or monetary penalty payable to the injured party rather than to the State. All this, of course, rests on the assumption that it is the actual wrongdoer who is being punished but that is not always, or even commonly, the case. Where the actual wrongdoer is an agent of the state or a member or employee of a corporate entity, he or she is unlikely to be personally liable for the payment of damages, punitive or otherwise. (The wrongdoer might, of course, be subject to some kind of disciplinary sanction within the organisation).

Deferred prosecution agreements

We don't, as yet, have deferred prosecution agreements in Ireland, but they do exist in England and Wales, the United States and elsewhere. In very brief terms, deferred prosecution agreements allow corporate bodies (and in some countries, individuals) to escape prosecution for admitted wrongdoing provided they undertake to adopt certain remedial measures, though they are usually required to pay a heavy financial penalty (again often running to tens of millions of pounds, dollars or Euro) as well as disgorging profits. DPAs have certain advantages. For example, they allow companies to escape the collateral consequences of conviction. A criminal conviction can disqualify a company from competing for certain contracts or securing business abroad. In addition, it

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[21] *Island Ferries Teoranta v Minister for Communications* [2012] IEHC 256, para. 29. Cass Sunstein, "The limits of compensatory justice" in John W. Chapman (ed.), *Compensatory Justice,* Nomos XXXIII (New York University Press, 1991), 281, 282 (where he goes on to say that it is not the purpose of the remedy "to engage in any kind of social reordering or social management except in so far as these functions are logically entailed by the principle of compensation"),

[22] See, for example, *Savickis v Governor of Castlerea Prison* [2016] IECA 310; *Sullivan v Boylan* [2013] IEHC 104.

can be difficult to affix criminal responsibility to a corporate body. To date, about a dozen deferred prosecution agreements have been completed in England and Wales where they were introduced in 2013. Some of the financial penalties involved have been extraordinarily high.

For instance, the DPA entered into with Airbus in 2021 imposed a total financial sanction of almost €1 billion, consisting of a penalty of almost €400 million and disgorgement of profits of about €586 million. As the President of Queen's Bench noted when approving the agreement, the total amount exceeded the total of all the sums paid under previous DPAs and was more than double the total of all the fines paid in respect of all criminal conduct in England and Wales in 2018.[23] In fact, this was merely part of a total sanction of €3.5 billion which Airbus had to pay because of equivalent proceedings in France and the United States. The SFO investigation related to bribery offences in Malaysia, Ski Lanka, Taiwan, Indonesia and Ghana.

Regulatory penalties

Civil and administrative penalties, mostly imposed by regulatory bodies, form part of the broader sanctioning network mentioned earlier. It is beyond the scope of this discussion to offer any assessment of the justice of these penalties, individually or collectively. They may well be fully deserved though they are often very severe indeed. In Ireland, for example, the Central Bank Act 1942 (s. 33AQ) provides that where the Bank finds a regulated service provider has committed a contravention, it may impose one or more sanctions ranging from a reprimand to a monetary penalty not exceeding the greater of €10 million or "an amount equal to 10 per cent of the turnover of the body for its last complete financial year before the finding is made." For a human person, the maximum penalty is currently €1 million. The Bank may also revoke a service provider's authorisation in respect of one or more of its activities for a maximum term of 12 months.

By autumn 2022, the Central Bank had concluded 152 enforcement actions, with the total fines imposed amounting to €400 million. Some of the individual penalties have been very high, at least when compared with fines imposed by courts following criminal conviction. In September 2022, the Central Bank fined the Bank of Ireland over €100 million for failings in respect of about 16,000 tracker mortgages between 2004 and 2022. In fact, the appropriate fine was assessed at €143.6 million but that was reduced to reflect a settlement discount. About the same time, the Central Bank fined Danske Bank A/S €1.82

[23] *SFO v Airbus SE* [2021] Lloyd's Rep. F.C. 159, para. 1.

million for breaches of money laundering legislation. Other regulators, including the Data Protection Commission, the Commission for Communications Regulation and the Competition and Consumer Protection Commission are also empowered to impose administrative fines. In September 2022, the Data Protection Commission fined Instagram €405 million for breaches of the GDPR and failing to protect children's information. (At the time of writing, that fine is under appeal to the High Court). In 2021, another Meta-owned platform was fined €225 million for infringements of privacy laws on WhatsApp.[24] The Data Protection Commission is reported to have imposed more than €1.64 billion in fines between January 2022 and January 2023.

CONCLUSION

This multiplicity of official sanctioning systems means that in the years ahead those of us working in the area of sentencing must learn to shift our gaze, occasionally at least, away from the criminal courts and towards the civil courts and regulatory bodies. Otherwise, we will have a very incomplete picture of how crime and financial malpractice (that may or may not come within the definition of existing offences) are punished within the jurisdiction.

[24] Cristina Criddle, "Irish regulator fines Instagram €405m for failing to protect children's data", *Financial Times,* 5 September 2022.