

# FOUR MODELS OF JUDICIAL REASONING IN SENTENCING

## *Abstract*

*The passing of sentence by a judge on a convicted offender comprises the most public stage of the criminal justice process, but how do judges go about this task? In particular, how does the judge arrive at a sentence that adequately reflects the seriousness of the crime and the circumstances of the individual offender, whilst still taking account of the interests of society? This article reviews the sentencing methodology used in various common law jurisdictions, from discretionary-based approaches to the use of presumptively binding, numerical guidelines. It concludes that justice is best served by an approach that achieves individualisation in sentencing through the use of a wide, but guided, judicial discretion.*

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## Introduction

‘Trying a case is as easy as falling off a log. The difficulty comes in knowing what to do with an accused once they have been found guilty’.<sup>2</sup>

One of the most difficult and fundamental problems in sentencing is how the judge ought to approach the sentencing task in terms of a methodology or system of decision-making.<sup>3</sup> Sentencing judges in many common law jurisdictions have traditionally enjoyed a wide sentencing discretion. In recent years, however, attempts have been made by various bodies – including appellate courts, the legislatures, and sentencing commissions or councils – to guide judges’ sentencing discretion. This article explores four distinct methods, or systems, of judicial decision-making employed in sentencing: the so-called ‘instinctive synthesis’ approach; the ‘tiered’ or ‘staged’ approach; the use of ‘principled discretion’ through the use of appellate sentencing guidelines; and finally the ‘algorithmic’ approach, involving the use of presumptively binding guidelines set by a sentencing council. Each of these methodologies is associated with a particular jurisdiction or jurisdictions. Each methodology structures the sentencing judge’s decision-making to a greater or lesser degree, with important implications for the attainment of justice in the individual case.

## Judicial reasoning in the sentencing process: Four models of sentencing methodology

### The ‘instinctive synthesis’

The sentencing methodology that allows the widest discretion in sentencing is that of ‘instinctive synthesis’. In this approach, judges adopt a holistic view of the particular case and impose

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<sup>2</sup> McArdle J, cited in Justice Christine French, ‘The Role of the Judge in Sentencing: From Port-Soaked Reactionary to Latte Liberal – The New Zealand Law Foundation Ethel Benjamin Commemorative Address 2015’ (2015) 33 *Otago Law Review* 33, 34.

<sup>3</sup> Christopher Corns, ‘Deconstructing Sentencing Decision-Making in Victoria’ (1990) 23 *Australian & New Zealand Journal of Criminology* 145.

sentence without recourse to any externally imposed guideline structure. The sentencing task was first articulated in these terms by the Court of Criminal Appeal of Victoria in *R v Williscroft*:

Now, ultimately every sentence imposed represents the sentencing judge's instinctive synthesis of all the various aspects involved in the punitive process. Moreover, in our view, it is profitless ... to attempt to allot to the various considerations their proper part in the assessment of the particular punishments presently under examination.<sup>4</sup>

The Court in *Williscroft* acknowledged that this model of sentencing amounts essentially to a subjective judgment, largely intuitively reached, by the judge as to what punishment is appropriate.<sup>5</sup> The Court then referred to an earlier decision, that of the Supreme Court of New South Wales in *R v Geddes*.<sup>6</sup> In *Geddes* the Supreme Court had unsuccessfully attempted to set out a rational principle for determining whether a sentence was inadequate. The Supreme Court observed that it was easier to see when a wrong principle had been applied than to lay down rules for solving particular cases. In particular, the Court in *Geddes* had to satisfy itself with the conclusion that in determining the question of whether a particular sentence was unduly lenient, or indeed too severe, '... the only golden rule is that there is no golden rule'.<sup>7</sup> This led the Court in *Williscroft* to stress that the sentencer's judgment as to what is an appropriate sentence in any given case must depend upon his or her knowledge of the sentences that have been imposed for the same or similar offences. This knowledge, the Court noted, is derived from 'personal experience'.<sup>8</sup>

The decision in *Williscroft* thus expressly endorses the view that the subjective judgment of the judicial officer is an acceptable basis for determining the appropriate sentence.<sup>9</sup> The decision also suggests that sentencing cannot be undertaken in a systematic manner. For the *Williscroft* Court, the decision as to sentence is simply the result of a subjective assessment by the judge; it is categorically not a process involving the application of authoritative and ascertainable norms to a particular factual situation.<sup>10</sup>

The desirability of the instinctive synthesis approach was later affirmed by the Victorian Court of Criminal Appeal in *R v Young*.<sup>11</sup> Here, the Court stressed the discretionary and individualised nature of the sentencing task. As the circumstances of particular offences and particular offenders are 'infinitely various', the Court noted that the task of the sentencing judge had never been regarded as capable of being confined within rigid formulae; to hold otherwise would, it was said, result in injustice.<sup>12</sup> The Court in *Young* made it clear that instinctive synthesis was the only legitimate approach to the sentencing task in the State of Victoria.<sup>13</sup> Following the decision in *Young*, the term 'instinctive synthesis' entered into common usage as a description of the sentencing process throughout Australia, becoming the standard sentencing approach in most Australian jurisdictions.<sup>14</sup> In Australia, 'instinctive synthesis' has since come to represent the sentencing process itself. As Abbs explains, the *descriptive* statement of the Court in *Williscroft* has,

<sup>4</sup> [1975] VR 292, 300 (Adam and Crockett JJ).

<sup>5</sup> *ibid.*

<sup>6</sup> (1936) 36 SR (NSW) 554.

<sup>7</sup> *ibid.*, 555.

<sup>8</sup> *Williscroft* (n 4), 301.

<sup>9</sup> Neil Hutton, 'Sentencing, Inequality and Justice' in Cyrus Tata and Neil Hutton (eds) *Sentencing and Society – International Perspectives* (Ashgate 2002), 553.

<sup>10</sup> Mirko Bagaric and Richard Edney, 'What's Instinct Got to Do with It? A Blueprint for a Coherent Approach to Punishing Criminals' (2003) 27 *Criminal Law Journal* 119, 123.

<sup>11</sup> [1990] VR 951.

<sup>12</sup> *ibid.*, 954 – 955; see also the later decision in *Russell v The Queen* [2011] VSCA 147, [57] (Kaye AJA).

<sup>13</sup> [1990] VR 951, 960.

<sup>14</sup> Mirko Bagaric, *Punishment & Sentencing: A Rational Approach* (Cavendish Publishing 2001) 14.

over time, metamorphosed into a *normative* principle, anchored to the notion that it is the instinctive synthesis alone that is the correct approach to the exercise of the sentencing discretion.<sup>15</sup>

Whilst the High Court of Australia had traditionally refused to be drawn into the methodological debate and to rule on the correct approach to sentencing,<sup>16</sup> it eventually addressed the issue in *Markarian v The Queen*.<sup>17</sup> In *Markarian* the High Court confirmed the instinctive synthesis as the preferred approach to sentencing without endorsing it as the only legitimate approach.<sup>18</sup> Although the majority<sup>19</sup> stated that sentencing courts may not ‘add and subtract item by item from some apparently subliminally derived figure, passages of time in order to fix the time which an offender must serve in prison’,<sup>20</sup> their Honours also considered that ‘indulgence in arithmetical deduction’ should not be ‘absolutely forbidden’ in simple cases.<sup>21</sup>

Whilst a dissenting judgment was issued by Kirby J, the final member of the Bench, McHugh J, delivered a separate judgment. McHugh J mounted a significant defence of the instinctive synthesis approach to sentencing by reference to cognitive psychology and the jurisprudential history of sentencing under Australian criminal law, concluding that:

The acceptance of the role of instinctive synthesis in the judicial sentencing process is not opposed to the concern for predictability and consistency in sentencing that underpins the rule of law and public confidence in the administration of criminal justice ... [J]udicial instinct does not operate in a vacuum of random selection. On the contrary, instinctive synthesis involves the exercise of a discretion controlled by judicial practice, appellate review, legislative indicators and public opinion. Statute, legal principle and community values all confine the scope in which instinct may operate.<sup>22</sup>

Instinctive synthesis was later endorsed and re-affirmed as the correct approach to sentencing by the High Court of Australia in *Hili v The Queen*<sup>23</sup> and *Barbaro v The Queen*.<sup>24</sup> In *Hili* the majority stated that whilst consistency in sentencing is important, the consistency that is sought is consistency in the application of the relevant legal principles, not some numerical or mathematical equivalence; the sentencer must have regard not just to what has been done in other cases but *why* it was done.<sup>25</sup> In *Barbaro*, meanwhile, the Court reiterated its disapproval of mathematical approaches to sentencing, stating that:

Fixing the bounds of a range within which a sentence should fall or within which a sentence that has been imposed should have fallen wrongly suggests that sentencing is a mathematical exercise. Sentencing an offender is not, and cannot be undertaken as, some exercise in addition or subtraction. A sentencing judge must reach a single sentence for each offence and must do so by balancing many different and conflicting

<sup>15</sup> Ross Abbs, ‘*Markarian v The Queen*’ (2008) 10 *Newcastle Law Review* 135, 138.

<sup>16</sup> Richard G Fox ‘Sentencing in the Garden of Eden’ (2006) 32 *Monash University Law Review* 4, 16; Richard G Fox and Arie Freiberg, *Sentencing – State and Federal Law in Victoria* (2nd edn, OUP 1999) 196; and Arie Freiberg, ‘Sentencing Reform in Victoria: A Case-Study’ in Chris MV Clarkson and Rod Morgan (eds), *The Politics of Sentencing Reform* (Clarendon Press 1995), 63.

<sup>17</sup> [2005] HCA 25 (Austl.).

<sup>18</sup> Kate Warner, ‘Sentencing Review 2004 – 2005’ (2005) 29 *Criminal Law Journal* 355, 360; Geraldine Mackenzie and Nigel Stobbs, *Principles of Sentencing* (The Federation Press 2010) 28.

<sup>19</sup> Gleeson CJ, Gummow, Hayne and Callinan JJ.

<sup>20</sup> *Markarian* (n 17), [39].

<sup>21</sup> *ibid.*

<sup>22</sup> *Markarian* (n 17), [84] (McHugh J).

<sup>23</sup> [2010] HCA 45 (Austl.).

<sup>24</sup> [2014] HCA 2 (Austl.).

<sup>25</sup> *Hili* (n 23), [18].

features. The sentence cannot, and should not, be broken down into some set of component parts.<sup>26</sup>

Thus the decisions in *Hili* and *Barbaro* strongly assert both the inherent value of a broadly unfettered judicial sentencing discretion and the notion that such discretion should be as wide as possible within the parameters of the maximum penalty, the limiting principle of proportionality, and any statutory constraints.<sup>27</sup> As Krasnostein observes, the *Hili* and *Barbaro* judgments reflect the continued view of the High Court of Australia that the fairness of sentencing outcomes ‘is in a direct relationship with the amount of discretion accorded to individualise sentences’.<sup>28</sup>

It would be a mistake to conclude that the Australian courts – from *Williscroft* to *Barbaro* – have conceptualised the sentencing process as a form of judicial guesswork. In referring to the importance of instinct and intuition *derived from judicial experience*, the Court in *Williscroft*, for example, was referring to the complex process involved in the exercise of the judge’s sentencing discretion. This is a process in which the judge is effectively required to make a value judgment. The decision is made having considered each mitigating and aggravating circumstance, and having accorded each relevant circumstance such weight as it deserves in combination with all other relevant circumstances.<sup>29</sup> Far from ‘plucking figures from the air’,<sup>30</sup> the instinctive synthesis is a form of decision-making that draws upon conventional reasoning skills from other areas of law.<sup>31</sup>

In sentencing by way of instinctive synthesis, the factors bearing on a sentencing decision are aggregated and assessed in a single, global process of reasoning.<sup>32</sup> Whilst the sentencing judge can have recourse to a number of guides, the most important remains his or her own intuition regarding both the circumstances of the particular offence and the personal circumstances of the individual offender.<sup>33</sup> In sentencing using the instinctive synthesis methodology, the judge’s discretion is not entirely unconstrained since any substantive rules of criminal law and procedure must, of course, be followed. Sentencing by way of instinctive synthesis, however, involves the judicial officer balancing and weighing all the circumstances of the case in order to make a judgment as to the appropriate sentence.<sup>34</sup> It is an approach that treats sentencing as an essentially pragmatic exercise: the judge is tasked with intuitively synthesising all the aims of

<sup>26</sup> *Barbaro* (n 24), [34], references omitted.

<sup>27</sup> Arie Freiberg, ‘The Road Well Traveled in Australia: Ignoring the Past, Condemning the Future’ (2016) 45 *Crime and Justice* 419, 428; and Sarah Krasnostein, ‘*Boulton v The Queen*: The Resurrection of Guideline Judgments in Australia?’ (2015) 27 *Current Issues in Criminal Justice* 41, 42.

<sup>28</sup> Krasnostein (n 27), 47.

<sup>29</sup> Sarah Krasnostein, ‘Pursuing Consistency – The Effect of Different Reforms on Unjustified Disparity in Individualised Sentencing Frameworks’ (Ph.D. thesis, Monash University 2015), 39.

<sup>30</sup> Richard Edney, ‘Still Plucking Figures Out of the Air?: *Markarian* and the Affirmation of the Instinctive Synthesis’ (2005) 1 *High Court Quarterly Review* 50.

<sup>31</sup> Neil Hutton, ‘The Definitive Guideline on Assault Offences – The Performance of Justice’ in Andrew Ashworth and Julian V Roberts (eds), *Sentencing Guidelines – Exploring the English Model* (OUP 2013) 88; Neil Hutton and Cyrus Tata, ‘The Judicial Role in the “Balance” Between Two Visions of Justice in Sentencing’ in Sean Doran and John D Jackson (eds), *The Judicial Role in Criminal Proceedings* (Hart Publishing 2000) 310.

<sup>32</sup> Abbs (n 15), 136; Mirko Bagaric and Theo Alexander, ‘Addressing the Curious Blackspot that is the Separation between the Principle of Legality and Sentencing’ (2015) 41 *Monash University Law Review* 515, 534; Mirko Bagaric, Theo Alexander and Richard Edney, *Sentencing in Australia* (6th edn, Thomson Reuters 2018) 31 – 33; and Terry Hewton, ‘Instinctive Synthesis, Structured Reasoning, and Punishment Guidelines: Judicial Discretion in the Modern Sentencing Process’ (2010) 31 *Adelaide Law Review* 79, 80.

<sup>33</sup> Sarah Krasnostein and Arie Freiberg, ‘Pursuing Consistency in an Individualistic Sentencing Framework: If You Know Where You’re Going, How Do You Know When You’ve Got There?’ (2013) 1 *Law and Contemporary Problems* 265, 268.

<sup>34</sup> Arie Freiberg, *Fox & Freiberg’s Sentencing – State and Federal Law in Victoria* (3rd edn, Thomson Reuters 2014) 228 – 229; Geraldine Mackenzie, *How Judges Sentence* (The Federation Press 2005) 14 – 20 and 163 – 165.

sentencing, including retribution, rehabilitation, deterrence and incapacitation.<sup>35</sup> There is no need for the judicial officer to neatly and ‘correctly’ set out the basis on which he or she arrived at the final sentence. The instinctive synthesis methodology dictates that judges need not (indeed, should not) ‘show their working’; rather, what matters is the final ‘result’.<sup>36</sup>

The instinctive synthesis approach to sentencing is not confined to Australia. As a means of achieving *individualised* justice, and as an approach in which judicial experience is a key factor,<sup>37</sup> the instinctive synthesis methodology accords with practice in certain other common law jurisdictions in which judges enjoy a wide sentencing discretion. Scotland is one such jurisdiction: recent judgments from the High Court of Justiciary acting in its appellate capacity<sup>38</sup> demonstrate a strong preference for sentencing by way of instinctive synthesis. In *Gemmell v HM Advocate*,<sup>39</sup> for example, a full Bench of the Appeal Court approved the instinctive synthesis methodology.<sup>40</sup> In delivering the leading judgment in *Gemmell*, the Lord Justice Clerk (Gill) stressed that the assessment of sentence is ‘not a matter of precise arithmetical calculation’ and noted that the exercise ‘involves the making of an overall judgment from a consideration of numerous factors based on judicial experience’.<sup>41</sup>

Lord Gill’s comments were later cited with approval by his successor as Lord Justice Clerk, Lord Carloway, in the decisions in *McGill v HM Advocate*,<sup>42</sup> *Ferguson v HM Advocate*<sup>43</sup> and, most recently, in *Wilson v PF, Aberdeen*.<sup>44</sup> In *Ferguson*, for example, Lord Carloway explained, by reference to Lord Gill’s observations in *Gemmell*, that:

Sentencing is ‘a delicate art based on competence and expertise’ rather than an exact science. A judge should not have to go through a formal checklist of procedures before arriving at the appropriate and proportionate sentence ... [The sentencing decision], although often involving a complex matrix of factual and legal material, will be instantaneous, if not quite instinctive, once the material is ingathered and understood.<sup>45</sup>

### The ‘tiered’ or ‘staged’ approach

If the instinctive synthesis sentencing methodology is associated particularly with the Australian courts, then the alternative methodology involving a ‘tiered’ or ‘staged’ approach to sentencing is evident in the sentencing practices of the courts in both New Zealand and the Republic of Ireland. As in Australia, the most significant feature of sentencing in both these jurisdictions is the discretion vested in the sentencing judge.<sup>46</sup> In New Zealand, the traditional, discretion-orientated approach to sentencing was described in *Fisheries Inspector v Turner*.

<sup>35</sup> Arie Freiberg, ‘The Victorian Sentencing Advisory Council: Incorporating Community Views into the Sentencing Process’ in Arie Freiberg and Karen Gelb (eds), *Penal Populism, Sentencing Councils and Sentencing Policy* (Hawkins Press 2008) 155; and Arie Freiberg and Stuart Ross, *Sentencing Reform and Penal Change – The Victorian Experience* (The Federation Press 1999) 202.

<sup>36</sup> Grant Hammond, ‘Sentencing: Intuitive Synthesis or Structured Discretion?’ (2007) *New Zealand Law Review* 211, 214.

<sup>37</sup> Mirko Bagaric and Richard Edney, *Sentencing in Australia* (3rd edn, Thomson Reuters 2016) 27.

<sup>38</sup> Hereinafter ‘the Appeal Court’.

<sup>39</sup> [2011] HCJAC 129; 2012 JC 223.

<sup>40</sup> *ibid* [59].

<sup>41</sup> *ibid*.

<sup>42</sup> [2013] HCJAC 150; 2014 SCCR 46 [13].

<sup>43</sup> [2014] HCJAC 19; 2014 SCCR 244.

<sup>44</sup> [2018] HCJAC 50 [18].

<sup>45</sup> *Ferguson* (n 43) [103] and [104], references omitted.

<sup>46</sup> See, respectively, Geoff Hall, ‘Sentencing’ in Julia Tolmie and Warren J Brookbanks (eds), *Criminal Justice in New Zealand*, (LexisNexis New Zealand 2007) 253; Warren Young and Andrea King, ‘The Origins and Evolution of Sentencing Guidelines – A Comparison of England and Wales and New Zealand’ in Andrew Ashworth and Julian V Roberts (eds), *Sentencing Guidelines – Exploring the English Model* (OUP 2013) 211; and Thomas O’Malley, *Sentencing Law and Practice* (3rd edn, Round Hall 2016) 1 and 6; Susan Leahy and Margaret Fitzgerald O’Reilly, *Sexual Offending in Ireland – Laws, Procedures and Punishment* (Clarus Press 2018) 212.

It is only by allowing the sentencing authorities a wide discretion that they are enabled to take account of the innumerable factors affecting the nature of the offence, the circumstances of the offence, and the circumstances of the offender, all of which should ordinarily be weighed in determining the appropriate sentence in the particular case.<sup>47</sup>

In the Republic of Ireland, meanwhile, the Court of Appeal in the recent decision in *People (DPP) v O'Brien* explained the traditional sentencing methodology of the Irish courts as follows:

[T]he Irish courts have never regarded the process of sentencing as amenable to a rigid algorithmic or mathematical approach, but rather have always recognised that each sentence must be individual, and that in determining the overall weight to be afforded to factors weighing in the balance at either stage of the sentencing process, i.e. the assessment of gravity or the affording of discount for mitigation ... the sentencing judge will bring to bear his or her professional experience, intuition and subjective judgment and arrive at a figure on the basis of what is sometimes called in the academic literature on sentencing ‘instinctive synthesis’. The sentencing judge must be afforded a significant margin of discretion in doing so.<sup>48</sup>

In neither jurisdiction is the wide sentencing discretion intended to allow individual judges to pursue personal sentencing preferences; rather, its purpose is to enable the judge to tailor the sentence both to the facts of the case and to the offender’s personal circumstances.<sup>49</sup> As Hall explains:

Sentencing is not a rational mechanical process; it is a human process and is subject to all the frailties of the human mind. A wide variety of factors, including the Judge’s background, experience, social values, moral outlook, penal philosophy and views as to the merits or demerits of a particular penalty influence the sentencing decision.<sup>50</sup>

In New Zealand, when the judge determines imprisonment to be the appropriate disposal, the decision-making process is based around a methodology which was first explained by the Court of Appeal in *R v Taueki*.<sup>51</sup> This methodology was refined by the Court of Appeal in *Hessell v R*,<sup>52</sup> and subsequently endorsed by the Supreme Court in its decisions in *Hessell v R*<sup>53</sup> and *R v Clifford*.<sup>54</sup> The New Zealand sentencing methodology involves a staged approach. As a first step, the judge must identify a starting point sentence that appropriately reflects the intrinsic seriousness of the offence. The starting point thus takes into account aggravating and mitigating features of *the offending* but excludes mitigating and aggravating features relating to *the offender*.<sup>55</sup> As the Court of Appeal explained in *R v Mako*,<sup>56</sup> the starting point is a level of sentence that would be appropriate in a case of conviction after trial in the absence of any relevant mitigating or aggravating factors relating to the offender.

<sup>47</sup> [1978] 2 NZLR 233 (CA) at 237 (Richardson J).

<sup>48</sup> [2018] IECA 2 [35].

<sup>49</sup> See, respectively, Geoff Hall, *Sentencing Law and Practice* (3rd edn, LexisNexis New Zealand 2014) 5; and Niamh Maguire, ‘Consistency in Sentencing’ (2012) 2 *Judicial Studies Institute Journal* 14, 19 – 20.

<sup>50</sup> Hall, ‘Sentencing’ (n 46), 254.

<sup>51</sup> [2005] 3 NZLR 372 (CA).

<sup>52</sup> [2009] NZCA 450; [2010] 2 NZLR 298.

<sup>53</sup> [2010] NZSC 135; [2011] 1 NZLR 607.

<sup>54</sup> [2011] NZCA 360; [2012] 1 NZLR 23.

<sup>55</sup> *Taueki* (n 51) at [8].

<sup>56</sup> [2000] 2 NZLR 170 (CA) at [34].

The second step involves evaluating the aggravating and mitigating factors personal to the *particular offender*: the starting point sentence is adjusted up or down to reflect these factors.<sup>57</sup> Thus, as Hall<sup>58</sup> explains, the actual sentence may be higher or lower than – or, occasionally, the same as – the starting point sentence. The third step in the process involves the application of an appropriate discount in sentence if the offender pleads guilty. Whilst the Court of Appeal initially considered the application of a sentence discount as comprising part of the second step in the sentencing methodology,<sup>59</sup> it refined its approach in *Hessell v R*<sup>60</sup> so that it formed a separate and distinct third step.<sup>61</sup> This third and final step is to be undertaken only after the sentencing judge has determined what sentence would have applied in the absence of the guilty plea, having taken into account all other personal mitigating and aggravating factors.<sup>62</sup> The extent of any discount is a matter for the discretion of the sentencing judge.<sup>63</sup>

Following the staged approach to sentencing forces the judge to quantify the various decreases, discounts and increases. This methodology is seen as striking a balance between consistency and individualised justice, whilst also providing transparency.<sup>64</sup> In *R v Fanguna*, for example, the Court of Appeal noted that:

It is vital that sentencing is approached in the systematic way mandated by this Court in *R v Taueki*. It is important to do so for at least three reasons. First, the offender and the community are entitled to know the reasoning process by which the Judge arrives at a sentence. Secondly, the systematic approach required is designed to ensure that similar starting points and discounts for factors such as a guilty plea are adopted in similar cases in order to promote consistency in sentencing. Thirdly, the failure to articulate starting points and departures therefrom makes it very difficult for the appellate court to identify the weight the Judge regarded as appropriate for the various factors including the discount for a guilty plea and any other mitigating factors. In such cases, the Court is obliged to form its own assessment without the assistance of the view of the sentencing Judge.<sup>65</sup>

The Court of Appeal later acknowledged in *R v AM*,<sup>66</sup> however, that heavily structured approaches to sentencing of this nature are not universally popular, with some critics maintaining that the staged approach reduces sentencing to a mathematical exercise and is wrong in principle. Nevertheless, the Court in *AM* considered structured sentencing to have advantages in terms of consistency and transparency, noting also that the staged approach was ‘well embedded’ as the appropriate sentencing methodology in New Zealand.<sup>67</sup>

In the Republic of Ireland, meanwhile, judges must also follow a staged approach in imposing sentence. The staged approach was established as the appropriate sentencing methodology by the Supreme Court in *People (DPP) v M*.<sup>68</sup> In the course of his judgment in *M*, in which he considered the impact of mitigating factors in sentencing, Egan J explained:

<sup>57</sup> Paul Marcus, et al, ‘A Comparative Look at Plea Bargaining in Australia, Canada, England, New Zealand, and the United States’ (2016) 57(4) *William & Mary Law Review* 1147, 1202 – 1203; and Justice Christine French (n 2), 41 – 42.

<sup>58</sup> Hall, ‘Sentencing’ (n 46), 263 – 264.

<sup>59</sup> Hall, ‘Sentencing’ (n 46); see also *R v Fatu* [2006] 2 NZLR 72 (CA) at [21].

<sup>60</sup> *Hessell v R* (n 52).

<sup>61</sup> *Hessell v R* (n 52) at [14], approved by the Supreme Court in *Hessell v R* (n 53) at [73] – [74].

<sup>62</sup> *ibid.*

<sup>63</sup> Hall, *Sentencing Law and Practice* (n 49) 385.

<sup>64</sup> French (n 2), 42.

<sup>65</sup> [2009] NZCA 316 at [21].

<sup>66</sup> [2010] NZCA 114; [2010] 2 NZLR 750 at [15].

<sup>67</sup> *ibid.*

<sup>68</sup> [1994] 3 IR 306 (SC).

[A] reduction in mitigation is not always to be calculated in direct regard to the maximum sentence applicable. One should look first at the range of penalties applicable to the offence and then decide whereabouts on the range the particular case should lie. The mitigating circumstances should then be looked at and an appropriate reduction made.<sup>69</sup>

In her concurring judgment, Denham J said this:

[H]aving assessed what is the appropriate sentence for a particular crime it is the duty of the court to consider then the particular circumstances of the convicted person. It is within this ambit that mitigating factors fall to be considered.<sup>70</sup>

Thus in constructing a proportionate sentence, Irish judges are required to use the same sentencing methodology as judges in New Zealand. The judge must first locate the particular offence on the overall scale of gravity in order to identify a presumptively appropriate sentence, often referred to as the ‘headline’ sentence. This first stage involves the judge having regard to the *harm* caused to the victim and to the offender’s *culpability* in order to assess the gravity of the particular offence.<sup>71</sup> As the Court of Criminal Appeal recently explained in *DPP v Walsh*:

The assessment of the gravity of an offence involves a consideration of the offender’s culpability and the harm done. In assessing culpability the court looks at the generic nature of the offence in terms of: its fundamental ingredients; the range of penalties available to address the various circumstances in which the offence may be committed, the particular circumstances in which the actual offence was committed; whether the offence was committed negligently, recklessly or intentionally; and any case specific circumstances tending to aggravate or mitigate the moral culpability of the offender. In assessing the harm done the court must consider the position of the victim, as well as the requirements of society in terms of the need to deprecate and deter future instances of the offending conduct.<sup>72</sup>

Thus aggravating circumstances of an individual case are factored into the first stage of the decision-making process.<sup>73</sup> The second stage of the process involves consideration of the offender’s personal circumstances; in particular, the judge applies any mitigation to the headline sentence to reach the final sentence.<sup>74</sup> Whilst, as O’Malley explains, the Irish courts have never agonized to the same extent as the Australian courts over the comparative merits of a structured approach to sentencing versus the ‘instinctive synthesis’,<sup>75</sup> the Court of Appeal has consistently stressed the need for judges to follow the staged approach to sentencing.<sup>76</sup> In *People (DPP) v O’B*,<sup>77</sup> for example, the Court described the staged approach as ‘best practice’, noting that the sentencing judge’s failure to follow this approach made its own task in reviewing the sentence

<sup>69</sup> *ibid* 315.

<sup>70</sup> *ibid*.

<sup>71</sup> Niamh Maguire, ‘Sentencing’, in Deirdre Healy, et al (eds), *The Routledge Handbook of Irish Criminology* (Routledge 2016) 304; Maguire, ‘Consistency in Sentencing’ (n 49), 25; and O’Malley, *Sentencing Law and Practice* (n 46) 72 – 73.

<sup>72</sup> [2017] IECA 187, [13].

<sup>73</sup> Leahy and Fitzgerald O’Reilly (n 46) 222; Thomas O’Malley, ‘Living Without Guidelines’ in Andrew Ashworth and Julian V Roberts (eds), *Sentencing Guidelines – Exploring the English Model* (OUP 2013) 224 – 225; *People (DPP) v R McC* [2008] 2 IR 92 (SC), 104; and *People (DPP) v Ryan* [2014] IECCA 11, [3.2].

<sup>74</sup> O’Malley, *Sentencing Law and Practice* (n 46) 72 – 73.

<sup>75</sup> O’Malley, ‘Living Without Guidelines’ (n 73) 224.

<sup>76</sup> O’Malley, *Sentencing Law and Practice* (n 46) 74.

<sup>77</sup> [2015] IECA 255 [36].



more difficult. These observations were repeated by the Court shortly afterwards in its decisions in *People (DPP) v Fhynn*<sup>78</sup> and *People (DPP) v Molloy (Richard)*.<sup>79</sup>

In commending the staged approach, the Court of Appeal has sought to promote greater consistency in sentencing. Perhaps more importantly, the Court views the staged approach as being more conducive to better reasoning in sentencing, whilst also encouraging a greater rigour of analysis on the part of sentencing judges.<sup>80</sup> As the Court of Appeal explained in *People (DPP) v Molloy (Raymond)*:

Sentencing should ... be about substance over form, rather than the reverse, although it is increasingly recognised based on parallel developments in the field of judicial review that as an aspect of constitutional due process, and as an aspect of the right to a fair trial guaranteed by Article 6 ECHR, an accused is entitled to have the reasoning process, by means of which a sentencing court has arrived at the sentence which it has imposed upon him or her, rationally and adequately explained ... We have ... favoured the staged approach because it seems to us that it is likely to best focus judges at first instance on the overriding criterion of ensuring that sentences are proportionate both to the gravity of the offence and the circumstances of the offender ... In addition, it has the advantage of producing better reasoned sentencing judgments, that better explain to the interested parties why a particular sentence was imposed and which are also more readily amenable to review at appellate level.<sup>81</sup>

Discretion remains at the heart of the Irish sentencing system and, whilst some structure in sentencing is favoured by the Court of Appeal, such structure is intended only as an aid to the correct exercise of the judge's discretion, rather than as a fetter on judicial discretion.<sup>82</sup> Whilst sentencing judges must follow the two-stage approach, they nevertheless make their decisions at both stages of the process by recourse to a form of instinctive synthesis in which professional experience, intuition, and subjective judgment are employed to determine the appropriate sentence.<sup>83</sup>

O'Malley explains that the staged, or two-tiered, approach to sentencing means that it is not unusual to find courts stating that a particular offence is 'high on the scale of gravity', 'in the upper reaches of the mid-range', or 'low on the overall scale', and so forth.<sup>84</sup> Judicial categorisation of types of offence and their gravity, to the extent that it exists, generally occurs purely on a case by case basis.<sup>85</sup>

### **The use of guideline judgments and 'principled discretion' in sentencing**

Guideline judgments are judgments of appellate courts that go beyond the facts of the particular case by articulating sentencing principles.<sup>86</sup> An appellate court may, for example, consider numerous variations of a particular offence, the importance of particular aggravating factors and

<sup>78</sup> [2015] IECA 290 [13] – [19].

<sup>79</sup> [2016] IECA 239 [30] – [34].

<sup>80</sup> Mr Justice J Edwards, 'Sentencing Methodology – Towards Improved Reasoning in Sentencing' (Judicial Studies National Conference, Dublin Castle, November 2018).

<sup>81</sup> [2018] IECA 37 [17] and [20], references omitted.

<sup>82</sup> J Edwards (n 80).

<sup>83</sup> *People (DPP) v O'Brien* (n 48).

<sup>84</sup> Thomas O'Malley, *Sexual Offences* (2nd edn, Round Hall 2013) 644.

<sup>85</sup> *ibid.*

<sup>86</sup> Freiberg, *Fox & Freiberg's Sentencing – State and Federal Law in Victoria* (n 34) 977 – 978.

common mitigating factors. The court may discuss the relevance of different sanctions to the particular offence, and may set out appropriate ranges of sentence.<sup>87</sup>

In common law jurisdictions that favour individualised approaches to sentencing, guideline judgments have been issued by the appellate courts with the aim of guiding and structuring – but not restricting or abolishing – judicial sentencing discretion.<sup>88</sup> The attitude of the appellate courts in such jurisdictions towards the use of guideline judgments is well illustrated by the decision of the New South Wales Court of Criminal Appeal in *Murray v The Queen*.<sup>89</sup> In stressing that guideline judgments are merely directory, and not mandatory, the Court said this:

A guideline judgment is a tool or servant; not a master. It is to be used by sentencing judges as one more factor that allows sentences to be fixed, bearing in mind the need for equal justice and consistency in sentencing. It is not a mandated outcome from which sentencing judges subtract or to which they add in a mathematical exercise.<sup>90</sup>

In the Republic of Ireland, there has recently been a move away from the traditional approach of the courts that eschewed either the use of sentencing guidelines or the setting of ranges of sentence, towards a system of guideline judgments.<sup>91</sup> In the course of delivering its first guideline judgment in which it set out ranges of sentence for offences involving the possession of firearms, the Court of Criminal Appeal in *DPP v Ryan*<sup>92</sup> was nevertheless careful to stress the continued importance of judicial discretion in applying such guidance:

It clearly remains a matter for the sentencing judge to form a judgment, on all of the relevant facts, as to where on that range the offence for which the accused is to be sentenced lies. It is also clearly a matter for the sentencing judge to decide on the extent to which any aggravating or mitigating factors identified ought to increase or decrease the sentence to be imposed. Thus, *any such range provides broad guidance but does not seek to impose any form of standardisation of penalty*.<sup>93</sup>

In Scotland, primary legislation<sup>94</sup> provides that in disposing of an appeal, an appellate court may pronounce an opinion on the sentence or other disposal that is appropriate in any similar case. Sentencers must ‘have regard’ to such opinions when issued.<sup>95</sup> Thus, where either the Appeal Court or the Sheriff Appeal Court issues such a guideline judgment in terms of the legislation, the lower courts must *have regard* to the guideline judgment but are not *obliged* to follow it. This approach has the advantage of providing judges with a framework within which they can locate the individual case, without depriving them of the discretion to deal differently with a case that

<sup>87</sup> Richard Edney and Mirko Bagaric, *Australian Sentencing – Principles and Practice* (Cambridge University Press 2007), 37; Krasnostein, ‘Pursuing Consistency – The Effect of Different Reforms on Unjustified Disparity in Individualised Sentencing Frameworks’ (n 29), 163; and Krasnostein and Freiberg (n 33), 281.

<sup>88</sup> For the position in various Australian jurisdictions see Bagaric, Alexander and Edney (n 32), 64 – 74; in New Zealand see Hall, *Sentencing Law and Practice* (n 49) 12 – 18; in the Republic of Ireland, see O’Malley, *Sentencing Law and Practice* (n 46) 15 – 20; and in Scotland, see Graeme Brown, *Criminal Sentencing as Practical Wisdom* (Hart Publishing 2017) 155 – 157.

<sup>89</sup> [2013] NSWCCA 12 (Austl.).

<sup>90</sup> *ibid*, [44].

<sup>91</sup> Andrew Ashworth, *Sentencing and Criminal Justice* (6th edn, CUP 2015) 453; Elizabeth Davey, ‘Sentence Structure’ (2014) 108(5) *Gazette of the Law Society of Ireland* 30, 31; and O’Malley, *Sentencing Law and Practice* (n 46) 15 – 18.

<sup>92</sup> See note 73.

<sup>93</sup> *ibid*, paragraph 2.3 (emphasis added). See also *DPP v Fitzgibbon* [2014] IECCA 12 [8.11].

<sup>94</sup> Sections 118(7) and 189(7) of the Criminal Procedure (Scotland) Act 1995.

<sup>95</sup> Section 197 of the 1995 Act.

has unusual features.<sup>96</sup> Used in this way, guideline judgments produce a discretion that is underpinned by principles rather than hemmed in by rules.<sup>97</sup>

The *form* that the sentencing guidance takes is also important: rather than presenting judges with a table of numbers, a grid, or a sentencing matrix, the appellate guidance is narrative and has the familiar form of an appellate court judgment. Guideline judgments are prepared *by* judges, *for* judges. Guidance that comes with the authority and approval of an appellate court is more likely to quickly and effectively attract the acceptance and compliance of sentencing judges. Experience with early guideline judgments in various jurisdictions shows that such appellate guidance is not subjected to the suspicion and hostility that judges sometimes show towards legislative attempts to structure sentencing.<sup>98</sup>

Any concern that Scottish judges may traditionally have had regarding sentencing guidelines acting as a fetter on their discretion have been addressed by repeated statements from the Appeal Court emphasising the discretionary nature of such guidelines. The Court has, for example, stressed that sentencing guidelines ‘provide a structure for, but do not remove, judicial discretion’;<sup>99</sup> that sentencing should ‘always involve the sentencer’s judgment and discretion’;<sup>100</sup> that guidelines are intended to help sentencers, rather than being ‘straitjacket[s] from which they cannot escape’;<sup>101</sup> and that they are not to be ‘interpreted and applied in a mechanistic way’.<sup>102</sup> The Appeal Court has also made it clear that, whilst guidelines ‘assist in the exercise of [the sentencer’s] discretion’, the decision as to the appropriate sentence lies with the sentencing judge alone.<sup>103</sup> As the Lord Justice Clerk (Gill) stated in his dissenting judgment in *Mitchell v H.M. Advocate*,<sup>104</sup> sentencing guidelines are subject always to the discretion of the sentencer and, on appeal, to the discretion of the Appeal Court.

In Scotland, the Appeal Court has made increasing use of its power to issue guideline judgments in recent years. Guideline judgments have, for example, been issued for offences involving child pornography;<sup>105</sup> sexual offences committed in breach of a position of trust;<sup>106</sup> the imposition of punishment parts in cases of murder;<sup>107</sup> so-called ‘cannabis farming’;<sup>108</sup> and social security fraud.<sup>109</sup> A series of guideline judgments have also been issued by the Appeal Court on the issue of granting an offender a discount in sentence to reflect his or her guilty plea.<sup>110</sup>

The use of non-binding guideline judgments is conducive to achieving what O’Malley terms ‘principled discretion’. O’Malley argues that in order to comply with the demands of justice, sentencing must remain discretionary. It thus follows that the selection of sentence in specific cases must remain exclusively a judicial task. In order to comply with other important values

<sup>96</sup> See Andrew Ashworth, ‘Techniques for Reducing Sentence Disparity’ in Andreas von Hirsch, Andrew Ashworth and Julian V Roberts (eds), *Principled Sentencing – Readings on Theory and Policy* (3rd edn, Hart Publishing 2009) 243.

<sup>97</sup> Ian O’Donnell, ‘Publication Review – Sentencing: Towards a Coherent System (Thomas O’Malley)’ (2012) 47(1) *Irish Jurist* 255, 256.

<sup>98</sup> John L Anderson, ‘Leading Steps Aright’: Judicial Guideline Judgments in New South Wales’ (2004) 16 *Current Issues in Criminal Justice* 140, 151; Ashworth, ‘Techniques for Reducing Sentence Disparity’ (n 96) 244; Krasnostein, ‘*Boulton v The Queen*: The Resurrection of Guideline Judgments in Australia?’ (n 27), 53.

<sup>99</sup> *HM Advocate v Graham* [2010] HCJAC 50; 2011 JC 1 [21].

<sup>100</sup> *ibid* [22].

<sup>101</sup> *ibid*.

<sup>102</sup> *Neill v HM Advocate* [2014] HCJAC 67 [11].

<sup>103</sup> *Jakovlev v HM Advocate* [2011] HCJAC 90, 2012 JC 120 [11].

<sup>104</sup> [2011] HCJAC 10, 2012 JC 13 [15].

<sup>105</sup> *HM Advocate v Graham* (n 99) and *Wood v HM Advocate* [2017] HCJAC 2, 2017 JC 185.

<sup>106</sup> *HM Advocate v Collins* [2016] HCJAC 102, 2017 JC 99.

<sup>107</sup> *HM Advocate v Boyle* [2009] HCJAC 89, 2010 JC 66.

<sup>108</sup> *Lin v HM Advocate* [2007] HCJAC 62, 2008 JC 142.

<sup>109</sup> *Gill v Thomson* [2010] HCJAC 99, 2012 JC 137.

<sup>110</sup> See *Du Plooy v HM Advocate* 2005 1 JC 1; *HM Advocate v Spence* [2007] HCJAC 64, 2008 JC 174; *Gemmell v HM Advocate* [2011] HCJAC 129, 2012 JC 223; and *Wilson v Shanks* [2018] HCJAC 50, 2018 SCCR 302.

such as procedural fairness, equality and the rule of law, however, O'Malley considers that mechanisms ought to be introduced to produce consistency of approach, to reduce (if not eliminate) unwarranted disparity, and to develop rational criteria for deciding on the nature and severity of appropriate sanctions.<sup>111</sup> O'Malley explains:

The challenge is to achieve consensus on acceptable methodologies for assessing offence gravity and other ethically relevant factors, on the weight to be attributed to those factors, and on the kind and quantum of punishment appropriate for various categories of offender. This is the essence of *principled* discretion.<sup>112</sup>

Under O'Malley's system of principled discretion, judges retain the discretion they already enjoy, but exercise it in accordance with settled principles. As with the use of sentencing guideline judgments, departure from these principles is permissible when a novel or exceptional aspect of a particular case so requires.<sup>113</sup> O'Malley explains that under such a system, individualised justice remains possible precisely because the *principles* operate at a higher level of generality than *rules*. Thus the principles of sentencing set out in, for example, guideline judgments are sufficiently flexible to permit departure and variation when the particular circumstances of a case so demand.<sup>114</sup> The principles contained within guideline judgments 'guide courts in navigating their way through the facts in order to arrive at an acceptable sentence'.<sup>115</sup> In this way a kind of 'sentencing canon' develops, consisting of leading appellate decisions which are authoritative but not inflexible.<sup>116</sup> Judges are expected to consider the appellate decisions and to follow them unless a different approach is justified by the facts of the case.<sup>117</sup>

Principled discretion calls for *informed* judgment.<sup>118</sup> In jurisdictions such as Scotland, New Zealand, and the Republic of Ireland, this is best achieved through judicial recourse to the instinctive synthesis in sentencing, tempered by non-binding guideline judgments issued by the respective appellate courts.<sup>119</sup>

### The 'algorithmic' approach

The paradigm example of the 'algorithmic' approach to sentencing is the system of numerical, presumptively binding sentencing guidelines currently in use in England and Wales. Whilst in the past, the Court of Appeal issued guideline judgments, taking a more active role in this regard from the 1980s through to the late 1990s,<sup>120</sup> a move towards presumptively binding guidelines has developed rapidly in England and Wales in recent years. The sentencing guideline movement in this jurisdiction has evolved through various phases, culminating in the establishment of the Sentencing Council in April 2010.<sup>121</sup> The modern focus on sentencing by way of guidelines in England and Wales is such that the Lord Chief Justice, in delivering the judgment of the Court

<sup>111</sup> Thomas O'Malley, *Sentencing – Towards a Coherent System* (Round Hall 2011) 253.

<sup>112</sup> *ibid* 5 (emphasis per original).

<sup>113</sup> Thomas O'Malley, 'Principled Discretion: Towards the Development of a Sentencing Canon' (2001) 7 *The Bar Review* 135, 135.

<sup>114</sup> O'Malley, *Sexual Offences* (n 84) 533.

<sup>115</sup> *ibid*.

<sup>116</sup> Thomas O'Malley, *Sentencing Law and Practice* (2nd edn, Round Hall 2006) 66 – 67; Thomas O'Malley, 'Resisting the Temptation of Elegance: Sentencing Discretion Re-affirmed' (1994) 4 *Irish Criminal Law Journal* 1, 9 – 10.

<sup>117</sup> O'Malley, 'Principled Discretion: Towards the Development of a Sentencing Canon' (n 113), 136.

<sup>118</sup> O'Malley, *Sentencing – Towards a Coherent System* (n 111) 5.

<sup>119</sup> For a full discussion, see Brown (n 88), 154 – 171.

<sup>120</sup> Andrew Ashworth, 'The Struggle for Supremacy in Sentencing' in Andrew Ashworth and Julian V Roberts (eds), *Sentencing Guidelines – Exploring the English Model* (OUP 2013) 16; Ashworth, 'Techniques for Reducing Sentence Disparity' (n 96), 243.

<sup>121</sup> For a full discussion, see Andrew Ashworth and Julian V Roberts, 'Sentencing: Theory, Principle, and Practice' in Mike Maguire, Rod Morgan, and Robert Reiner (eds), *The Oxford Handbook of Criminology* (5th edn, OUP 2012) 881 – 882; and, particularly, Brown (n 88) 142 – 151.

of Appeal (Criminal Division) in the recent decision in *R v Thebwall*,<sup>122</sup> stated that the English sentencing system ‘now proceeds on the basis of guidelines, not case law.’<sup>123</sup>

The Sentencing Council was established under the Coroners and Justice Act 2009. The 2009 Act changed the previous arrangements for the issuing of guidelines by amending the courts’ duty to comply with sentencing guidelines. Whilst the previous statutory requirement was for judges to ‘have regard’ to any relevant guidelines,<sup>124</sup> section 125(1) of the 2009 Act introduced the requirement that judges ‘*must follow*’ the relevant guidelines, unless satisfied that it would be contrary to the interests of justice to do so (emphasis added).

The Sentencing Council began to issue its own guidelines in 2011. They set out a multi-staged process for determining sentence and, in so doing, seek to promote what Professor Julian Roberts (a former member of the Council) describes as ‘uniformity’ [*sic*] and consistency in sentencing.<sup>125</sup> Under section 120 of the 2009 Act, the Council is required to prepare sentencing guidelines, which may be general in nature or limited to a particular offence, category of offence, or particular category of offender. Under section 121, the guidelines should specify the ‘offence range’ for particular offences and, if the guidelines describe different categories of case, they should specify for each category a ‘category range’ within the offence range. The guidelines should also specify the ‘starting point’ within the offence range or within each category range.<sup>126</sup>

In using the Sentencing Council’s guidelines, judges are directed to undertake a nine-step process in arriving at sentence.<sup>127</sup> Most Council guidelines have followed the style of the Definitive Guideline on Assault which came into effect on 13 June 2011 and which was intended to serve as a model for all future guidelines issued by the Council.<sup>128</sup> The first step in the nine-step process involves the judge determining which of three levels of seriousness is appropriate in the particular case. Once the judge has determined the appropriate category range, he or she will use the starting point within the range as a point of departure. Secondly, the judge will then ‘fine tune’ the sentence within the chosen range by considering other factors relating to the seriousness of the crime as well as any personal mitigation.<sup>129</sup> These first two steps are regarded as the most important in the process as they involve a judicial assessment of the seriousness of the particular case.<sup>130</sup>

The judge must then follow a series of seven further steps, which are required mainly for technical or legal reasons,<sup>131</sup> to determine the final sentence, namely:

- consideration of whether the sentence should be reduced to reflect assistance provided to the prosecution or police;

<sup>122</sup> [2016] EWCA Crim 1755.

<sup>123</sup> *ibid*, [22].

<sup>124</sup> Under section 172(1)(a) of the Criminal Justice Act 2003.

<sup>125</sup> Julian V Roberts, ‘Sentencing Guidelines in England and Wales: Recent Developments and Emerging Issues’ (2013) 1 *Law and Contemporary Problems* 1, 5 and 22.

<sup>126</sup> Martin Wasik, *A Practical Approach to Sentencing* (5th edn, OUP 2014) 48 – 49.

<sup>127</sup> Andrew Ashworth and Julian V Roberts, ‘Sentencing’ in Alison Liebling, Shadd Maruna and Lesley McAra (eds), *The Oxford Handbook of Criminology* (6th edn, OUP 2017) 857.

<sup>128</sup> Roberts, ‘Sentencing Guidelines in England and Wales: Recent Developments and Emerging Issues’ (n 125), 4. The Definitive Guideline on Assault is available on the Sentencing Council’s website. See Sentencing Council, ‘Assault – Definitive Guideline’ (Sentencing Council) <<https://www.sentencingcouncil.org.uk/wp-content/uploads/Assault-definitive-guideline-Web.pdf>> accessed 14 March 2019).

<sup>129</sup> Wasik (n 126) 51 – 52.

<sup>130</sup> Rob Allen, ‘The Sentencing Council for England and Wales: Brake or Accelerator on the Use of Prison?’ (Transform Justice 2016) <<http://www.transformjustice.org.uk/wp-content/uploads/2016/12/TJ-DEC-8.12.16-1.pdf>> accessed 14 March 2019, 10; Hutton (n 31), 98 – 99.

<sup>131</sup> Hutton (n 31), 96.

- consideration of whether to reduce the sentence for a guilty plea;
- consideration of whether to impose an extended sentence;
- consideration of the totality principle and whether the sentence is proportionate;
- consideration of whether to make a compensation or other ancillary order;
- explanation of the effect of the sentence; and
- consideration of any time served on remand.<sup>132</sup>

Roberts describes this process as a ‘detailed and structured methodology for courts to follow’ and acknowledges that it involves imposing ‘an algorithm’ on sentencing judges, with the intention of achieving consistency in sentencing.<sup>133</sup> Yet both the format and the operation of the present system of guidelines in England and Wales have been criticised by practitioners and academic commentators alike. For example, barristers Lyndon Harris and Felicity Gerry QC criticise the Council’s adoption of what they term ‘a template-style approach to the production of guidelines’.<sup>134</sup> The authors consider that the Sentencing Council has adopted a mechanistic and restrictive sentencing methodology that fails to appreciate the often complex nature of offending. The Council’s ‘broad brush’ approach has the potential to result in serious injustice.<sup>135</sup> Harris and Gerry continue:

We consider that the ranges and starting points system is an artificial method of calculating sentence. It places undue emphasis on a mathematical approach in that, once the category is selected, movement up or down within the range is based on reference to a list of factors. There is no assistance given to the sentencer when considering the weight to attribute to each factor that is present ... The focus is placed on the presence or absence of the factors, as opposed to identifying the real feature of the offending ... What is required at sentence is a true examination of the offending behaviour in order to ensure the correct sentence is imposed.<sup>136</sup>

Harris and Gerry report that the mechanistic nature of the Council’s guidelines frequently result in sentence hearings being reduced to ‘unseemly exercises in trading figures’ that are not conducive to public understanding of sentencing.<sup>137</sup> The authors note that use of the Council’s guidelines often hinders the judge’s ability to do justice, and conclude that the current system has ‘led to an over-dependence on mathematics and undue criticism of judges who take a fact-based approach’.<sup>138</sup>

The late Dr David Thomas QC similarly criticised the present system of English guidelines as ‘increasingly mechanistic’, as ‘time-consuming and not often productive’, and as having the potential to turn judges into ‘mere technicians oiling the wheels’.<sup>139</sup> For Professor Nicola Padfield (an academic and barrister who has sat as a part-time Recorder), meanwhile, the Sentencing

<sup>132</sup> For a full discussion, see Andrew Ashworth and Julian V Roberts, ‘The Origins and Nature of the Sentencing Guidelines in England and Wales’ in Andrew Ashworth and Julian V Roberts (eds), *Sentencing Guidelines – Exploring the English Model* (OUP 2013) 8 – 9; Brown (n 88), 148 – 149; and Wasik (n 126) 52 – 53.

<sup>133</sup> Julian V Roberts, ‘Sentencing Guidelines and Judicial Discretion – Evolution of the Duty of Courts to Comply in England and Wales’ (2011) 51 *British Journal of Criminology* 997, 1011.

<sup>134</sup> Lyndon Harris and Felicity Gerry, ‘A Behaviour-Based Approach to Sentencing for Sexual Offences’ (2013) 177(15) *Criminal Law & Justice Weekly* 239, 240.

<sup>135</sup> *ibid.*, 239.

<sup>136</sup> Harris and Gerry (n 134), 241 – 242.

<sup>137</sup> Harris and Gerry (n 134), 240.

<sup>138</sup> Harris and Gerry (n 134), 242.

<sup>139</sup> David A Thomas, ‘Case Comment – R v Karam (Mawane Ibrahim) – Rape – Sentencing Guideline – Discretion of Judge – Victim Impact’ (2013) 12 *Criminal Law Review* 998, 1000.

Council's guidelines are 'less easy to apply' and 'more difficult to use' than earlier sets of guidelines.<sup>140</sup>

The system has also been criticised by barrister John Cooper QC as being overly victim-centric, focusing on offence severity and offender culpability at the expense of personal mitigation.<sup>141</sup> Cooper states his distaste for the present system of English sentencing guidelines in unequivocal terms:

The sentencing of offenders is a complex and individual exercise; there is no blue-print or a "one size fits all" solution. In the Council's quest for consistency the complex and idiosyncratic nature of offenders has been shelved in place of a process which, it is argued, can be easily understood by the public. This approach is superficial, and perhaps worse, it is patronizing. Sometimes, sentencing cannot be reduced to this two dimensional approach ... [I]t is time to acknowledge that the sentencing exercise is often difficult, sometimes complex, and always individualized.<sup>142</sup>

The current system of English sentencing guidelines is founded on a sentencing algorithm that imposes a supposedly rational structure upon what is essentially a discretionary art.<sup>143</sup> The English system arguably seeks consistency at the expense of individualised justice.<sup>144</sup> Yet as O'Malley argues, justice is always preferable to consistency. The more courts are obliged to comply with formal sentencing norms, the greater the risk of injustice in individual cases.<sup>145</sup>

## A question of balance – the importance of judicial discretion in sentencing

Sentencing is a very human process. Most attempts to describe the proper judicial approach to sentencing are as close to the actual process as a paint-by-numbers landscape is to the real thing ... [T]he fixing of a fit sentence is the product of the combined effects of the circumstances of the specific offence with the unique attributes of the specific offender.<sup>146</sup>

In jurisdictions where sentencing is undertaken by way of instinctive synthesis – either in its 'pure' form articulated by the Australian courts, or in the somewhat diluted version employed as part of a staged sentencing methodology – the courts focus on the attainment of *individualised* justice. Rather than adopting the English approach of focusing on 'the Moloch of sentencing consistency'<sup>147</sup> to exclusion of all else (and in so doing losing sight of the individual, contextualised offender), the courts in jurisdictions such as Australia, New Zealand, Scotland and Ireland ensure that sentences are tailored to fit both the offender and the circumstances of the offence.

<sup>140</sup> Nicola Padfield, 'Exploring the Success of Sentencing Guidelines' in Andrew Ashworth and Julian V Roberts (eds), *Sentencing Guidelines – Exploring the English Model* (OUP 2013) 35.

<sup>141</sup> John Cooper, 'Nothing Personal – The Impact of Personal Mitigation at Sentencing Since Creation of the Council' in Andrew Ashworth and Julian V Roberts (eds), *Sentencing Guidelines – Exploring the English Model* (OUP 2013) 158 – 160.

<sup>142</sup> *ibid.*, 164.

<sup>143</sup> See generally C Kennedy, 'Annotation to *R v Ollenberger*' (1994) 29 *Criminal Reports* (4th Series) 166.

<sup>144</sup> Brown (n 88) 150.

<sup>145</sup> O'Malley, *Sentencing – Towards a Coherent System* (n 111) 253.

<sup>146</sup> *R v Hamilton* (2004) 186 CCC (3d) 129, [87] (Doherty J).

<sup>147</sup> Brown (n 88) 180.

In South Africa, another jurisdiction in which judges have traditionally enjoyed a wide sentencing discretion,<sup>148</sup> the then Appellate Division of the Supreme Court said of the sentencing task in *S v Zinn*,<sup>149</sup> '[w]hat has to be considered is the triad consisting of the crime, the offender and the interests of society'.<sup>150</sup> It is the task of the sentencing judge to balance the three factors forming the *Zinn* triad in arriving at the final sentence. Balancing these often competing factors cannot be done without judicial discretion.<sup>151</sup>

Thus sentencing is a process that cannot be reduced to the mechanical application of rigid formulae. Professional experience, intuition, and subjective judgment are employed to determine the appropriate sentence in any given case.<sup>152</sup> As Martha Nussbaum explains, the good judge will not decide by subsuming a case under antecedently fixed rules, and neither will she accept that there is 'a general procedure or algorithm' for computing what to do in every case: 'The appropriate response is not arrived at mechanically; there is no general procedural description that can be given concerning how to find it'.<sup>153</sup> In this regard, judges in Australia, New Zealand, Scotland and Ireland are likely to view the Sentencing Council's system of decision-making based on algorithms and abstract rules as being too remote from their own concrete experience of sentencing in the criminal courts.<sup>154</sup> The algorithmic approach of the Sentencing Council unduly restricts judicial discretion. It prevents the individualisation that is necessary to determine a sentence that is just and appropriate in all the circumstances of the particular case.

An example drawn from case law may assist in demonstrating the importance of judicial discretion in sentencing. On a Friday night in July 2015 Daniel Cieslak, a 19 year old college student, went out drinking with a friend in Edinburgh city centre. In the early hours of Saturday morning, Mr Cieslak met a young woman in a taxi queue. She had also been out drinking with friends. They got on well together and agreed to travel by taxi to an impromptu party, which was being held at a flat owned by one of the young woman's friends. From conversation in the taxi, Mr Cieslak understood that the young woman was aged 16, although from her appearance and demeanour the taxi driver formed the impression that she was aged about 20. Once at the flat, Mr Cieslak and the young woman had intercourse. The young woman left the flat the next morning; she had no concerns and there was no suggestion of her being in any way distressed. She later confided in her sister and to her GP that she thought she was pregnant.

It was at this stage that police became involved. At the time of having intercourse with Mr Cieslak, the young woman was, in fact, aged 12 years and seven months. Mr Cieslak was charged with the statutory offence of rape of a young child,<sup>155</sup> an offence which carries a maximum sentence of life imprisonment. It is an offence of strict liability: when a girl is under the age of 13 she is deemed by law to be incapable of consent. Mr Cieslak pleaded guilty at Glasgow High Court in March 2017. In her sentencing statement<sup>156</sup> the trial judge, Lady Scott, identified a

<sup>148</sup> See Stephan S Terblanche, *A Guide to Sentencing in South Africa* (3rd edn, LexisNexis South Africa 2016) 131, 140 – 141; Stephan S Terblanche, 'The Discretionary Effect of Mitigating and Aggravating Factors: A South African Case Study' in Julian V Roberts (ed), *Mitigation and Aggravation at Sentencing* (Cambridge University Press 2011) 261.

<sup>149</sup> 1969 (2) SA 537 (A) (S. Afr.).

<sup>150</sup> *ibid* at 540 G-H (Rumpff JA).

<sup>151</sup> For a detailed discussion of sentencing as an exercise involving the balancing of various competing aims, see Brown (n 88), 138 – 140 and Mackenzie (n 34) 163 – 165.

<sup>152</sup> Katja Franko Aas, *Sentencing in the Age of Information: From Faust to Macintosh* (The Glasshouse Press 2005) 25; Brown (n 88) Chapter 5.

<sup>153</sup> Martha C Nussbaum, 'The Discernment of Perception: An Aristotelian Conception of Private and Public Rationality' in Martha C Nussbaum, *Love's Knowledge – Essays on Philosophy and Literature* (OUP 1990) 73.

<sup>154</sup> On this point, see generally Martha C Nussbaum, 'Non-Relative Virtues: An Aristotelian Approach' in Martha C Nussbaum and Amartya Sen (eds), *The Quality of Life* (OUP 1993) 243 – 244.

<sup>155</sup> Section 18 of the Sexual Offences (Scotland) Act 2009.

<sup>156</sup> 'HMA v Daniel Cieslak' (Judiciary of Scotland) <<http://www.scotland-judiciary.org.uk/8/1754/HMA-v-Daniel-Cieslak>> accessed 7 December 2018.



number of exceptional circumstances in the case: the complainer willingly participated in intercourse; all witnesses (including police witnesses) were of the opinion that the complainer was older than 16; the context in which the accused met the complainer; the fact that the accused was told that the complainer was 16; her willingness to go to the party and thereafter engage in sexual activity; and the absence of any suggestion that the complainer was distressed. Her Ladyship also referred to the accused's genuine belief that the complainer was 16; to his youth and status as a first offender; and the stress that the prosecution and attendant publicity had placed on him over a period of some 19 months. Given the nature of the accused's culpability, Lady Scott considered that there was no need for, nor any public interest in, punishment. Her Ladyship concluded that justice was best served by taking what she described as 'the wholly exceptional decision' not to sentence the accused. He was discharged absolutely.<sup>157</sup>

An application of the Sentencing Council's Definitive Guideline on Sexual Offences<sup>158</sup> shows that a very different outcome would have been likely had Mr Cieslak committed the equivalent offence in England and Wales.<sup>159</sup> Applying the labyrinthine complexity of the Definitive Guideline,<sup>160</sup> at 'step one' the present case would be regarded as a 'Category 2B' offence given, firstly, that the victim was clearly a vulnerable individual and, secondly, that none of the 13 'culpability factors' specified in the Guideline were present.<sup>161</sup> Moving to 'step 2', a Category 2B offence has a starting point of 10 years' imprisonment, with a category range of eight to 13 years' imprisonment. The starting point 'applies to all offenders irrespective of plea or previous convictions'.<sup>162</sup> Once the relevant starting point has been determined (for example, 10 years' imprisonment), the second part of 'step 2' in the process involves the judge making further adjustments for aggravating or mitigating factors. The Guideline sets out a range of aggravating factors and a considerably shorter list of mitigating factors.<sup>163</sup> In the present case, the offence would be aggravated by the fact that the offender presumably ejaculated (given the complainer's concern about a potential pregnancy), but his status as a first offender and his remorse would serve as mitigation. Whilst 'previous good character' is listed as a mitigating factor, it is qualified by a statement that: 'In the context of this offence, previous good character ... should not normally be given any significant weight and will not normally justify a reduction in what would otherwise be the appropriate sentence'.<sup>164</sup>

Thus in Mr Cieslak's case, the balance of mitigating factors might serve to reduce the headline sentence to perhaps eight or nine years' imprisonment. Of the remaining seven steps in the Guideline<sup>165</sup> arguably the most important is the allowance of a reduction in the headline sentence to reflect the guilty plea. This might reduce the final sentence to somewhere in the region of six years' imprisonment. Granted, the sentencing judge may depart from the Definitive Guideline if he or she considers that it would be 'contrary to the interests of justice' to follow it, and it is acknowledged in the Guideline itself that it 'may not be appropriate where the sentencer is satisfied that on the available evidence, and in the absence of exploitation, a young or particularly immature defendant genuinely believed, on reasonable grounds, that the victim was aged 16 or

<sup>157</sup> See Graeme Brown, 'Absolute discharge for rape of a young child - some observations on the decision in *H.M. Advocate v Cieslak*' (2017) 147 *Criminal Law Bulletin* 1.

<sup>158</sup> Sentencing Council, 'Sexual Offences – Definitive Guideline' (Sentencing Council 2013) <<https://www.sentencingcouncil.org.uk/wp-content/uploads/Sexual-Offences-Definitive-Guideline-web5.pdf>> accessed 7 December 2018.

<sup>159</sup> Namely an offence under section 5 of the Sexual Offences Act 2003 ('Rape of a child under 13').

<sup>160</sup> See Sentencing Council (n 158), 27 – 32.

<sup>161</sup> Sentencing Council (n 158), 29.

<sup>162</sup> Sentencing Council (n 158), 30.

<sup>163</sup> Sentencing Council (n 158), 31.

<sup>164</sup> *ibid.*

<sup>165</sup> Sentencing Council (n 158), 32.

over and that they were engaging in lawful sexual activity'.<sup>166</sup> Experience has shown, however, that judges rarely depart from the Sentencing Council's guidelines.<sup>167</sup>

The English and Welsh courts have been criticised for using sentencing guidelines not as helpful signposts to proper disposals, but rather as 'fireproofing' against subsequent appeals. Reliance on presumptively binding, numerical guidelines involves the judge merely 'working on the surface'. As the decision in *Cieslak* demonstrates, however, a deep and internal understanding of the particular concrete case is needed if justice is to be individualised. This can only be achieved if the judge 'goes deeper', moving from surface to depth in examining the offender's background and personal circumstances.<sup>168</sup> That English judges are generally unable, or unwilling, to do so is all to the detriment of flexible, sensible and just sentencing. The guidelines-inspired 'box ticking' approach replaces a careful consideration of both the particular offender and the facts of the individual case.<sup>169</sup> There exists a fundamental conflict between the need for conformity and certainty in sentencing and the reality that each case will inevitably depend upon its own facts and circumstances.<sup>170</sup> Inherent within this problem is the erosion of judicial discretion to deal with each case individually and, ultimately, fairly.<sup>171</sup>

## Concluding remarks

As McHugh J of the High Court of Australia observed in the course of his judgment in *Markarian*:

No one suggests that the judicial robe carries in its seams the wisdom of Solomon, but judicial experience in sentencing is a skill to be respected by the community and other judges. Repeated exercise in synthesising sentencing factors can only hone the instinct required to translate such factors into just numerical outcomes.<sup>172</sup>

In discussing what it termed 'the profoundly contextual nature' of the sentencing process, the Supreme Court of Canada in *R v LM* noted that sentencing judges have 'served on the front lines of [the] criminal justice system' and thus possess unique qualifications in terms of experience and the ability to assess parties' submissions.<sup>173</sup> For the Court in *LM*, far from being an exact science or 'an inflexible predetermined procedure', sentencing is primarily a matter for the trial judge's competence and expertise.<sup>174</sup> Thus, judges must enjoy a considerable sentencing discretion because of the individualised nature of the process.<sup>175</sup>

Sentencing is – or ought to be – a process in which the judge seeks to achieve individualised justice through a balancing of competing sentencing aims. It is a process which is best conceptualised as a form of case-orientated, concrete and intuitive decision-making. This is a view shared by judges in Ireland, Scotland, Canada, Australia, and New Zealand. Individualised justice is best achieved by means of a more structured version of the Australian instinctive synthesis. This involves the use of 'principled discretion' in judicial decision-making, guiding the

<sup>166</sup> Sentencing Council (n 158), 28.

<sup>167</sup> Harris and Gerry (n 134), 240 – 242.

<sup>168</sup> Nils Christie, 'Preface' in Aas (n 152); Nussbaum (n 153), 257; and Richard A Posner, *Reflections on Judging* (Harvard University Press, 2013) 131 – 132.

<sup>169</sup> John Cooper, 'The Sentencing Guidelines Council – A Practical Perspective' (2008) 4 *Criminal Law Review* 277, 279 – 80.

<sup>170</sup> *ibid*, 285.

<sup>171</sup> Cooper (n 169), 286; see also Brown (n 88), 144 – 146.

<sup>172</sup> *Markarian* (n 17), [78] (McHugh J).

<sup>173</sup> *R v. LM*, [2008] 2 SCR 163, [15] (Can.), citing *R v. M* (CA) [1996] 1 SCR 500, [91] (Can.).

<sup>174</sup> *R v. LM* (n 173), [17].

<sup>175</sup> *ibid*.

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sentencing discretion by means of non-binding guideline judgments and statements of principle from the appellate courts – guidance crafted *by* judges, *for* judges.