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The Struggle for Sentencing Reform

Will the English Sentencing Guidelines Model Spread?

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A. Sentencing Reform and Guidelines in England and Wales and Beyond

Are closely comparable common-law countries following the path forged by England and Wales by moving towards the development of systematic sentencing guidelines by a Sentencing Council? And if they are not, how are these different paths explicable? This chapter examines whether the approach of England and Wales has or will spread to its nearest neighbour, Scotland. In so doing, the chapter aims to contribute to the international endeavour to understand the politics and conditions of sentencing reform.

It will be argued that the political support for the development of guidelines and a Council is a response to one or more of five broad aspirations, support for which tend to inspire and motivate sentencing reform worldwide. These aspirations are expressed in distinct ways in different countries. In Scotland, a series of reforms have had the effect of diverting support from the introduction of systematic guidelines and a Council. Instead of appearing to confront judicial ownership of sentencing,¹ Scottish policy has largely sought to coax, enable, and persuade sentencing judges to choose to adjust their decision-making.

By charting key developments in Scottish sentencing policy, it will be argued that this largely voluntary and permissive approach has dominated Scottish policy-making discourse in part *because it appears to stand firm* against a supposedly more prescriptive, punitive, and less humane approach thought to be exemplified by systematic guidelines in England and Wales. In that sense, it is important to understand Scottish sentencing policy-making in the context of Scottish perceptions about and resistance to its

* I would like to express my gratitude to Andrew Ashworth, Julian Roberts, Neil Hutton, and Jay Gormley for their valuable comments and advice on an earlier draft of this paper.

¹ This is not to say that in England and Wales the ownership of sentencing has been wrested from the judiciary. Like its predecessor, the Council has an in-built judicial majority. Rather, the point here is about perception in Scotland.

larger neighbour to the south, and a self-conscious pride in Scotland's separate legal and civic national identity. Yet while the approaches of both jurisdictions clearly differ and those differences are magnified in political discourse, they nonetheless present shared problems, not least achieving impact on sentencing practice.

Why focus on Scotland?

Scotland represents an ideal comparator with England and Wales. Although a constituent part of the United Kingdom, Scotland's legal system is independent from the rest of the UK. Criminal law in Scotland has always been separate and distinct, as is criminal justice, with separate institutions (police, prosecution, courts, prisons, community penalties, etc). Unlike a federal system where serious matters or criminal appeals might be heard in the federal capital, criminal appeals are heard in the Scottish capital (Edinburgh), not in London. In other words, it makes little sense to talk, as some otherwise excellent texts about criminal justice in England and Wales do, of 'the UK criminal justice system' or 'UK sentencing'—there really is no such thing.

That said, while the law, procedures and practices *are* distinctive on either side of the border, they are not mutually unrecognizable—in a way that can be the case when comparing say England and Wales with the USA. There are three reasons. First, writers on political culture have noted important differences in public attitudes (such as greater support for welfare and higher taxation in Scotland),² but these are framed within an uneasy relationship with the 'Union State'³ of the UK. Second, criminal justice media stories are routinely reported as if UK-wide. So, while Scots law and justice are formally distinct from England and Wales, they are framed within wider political and media discourses. Third, important influences which affect criminal justice in Scotland emanate from or are mediated via London. One obvious example which indirectly affects criminal justice lies in matters reserved for the UK Parliament, such as changes to the welfare system. Another example is that while the systems of criminal law are separate, it is the UK as a whole (not Scotland) which is a signatory to the ECHR, and member of the European Union and Council of Europe, all of which can have a profound influence on Scots criminal law, procedure, and justice.⁴ For these reasons, the two national jurisdictions are natural close comparators—different enough yet close enough—to yield valuable and useable results.

² Together with a parliamentary electoral system which facilitates coalition government, these differences may have useful implications in literature seeking to understand the drivers of punitiveness (eg, N Lacey, *The Prisoners' Dilemma: Political Economy and Punishment in Contemporary Democracies* (2008); M Cavadino and J Dignan, *Penal Systems: A Comparative Approach* (2006); D Garland, *The Culture of Control* (2001)).

³ N Walker, *Final Appellate Jurisdiction in the Scottish Legal System* (Scottish Government, 2010).

⁴ See also A Ashworth, 'European Sentencing Traditions: Accepting Divergence or Aiming for Convergence?' in C Tata and N Hutton (eds) *Sentencing and Society: International Perspectives* (2002) pp 219–36; see also *Scottish Journal of Criminal Justice Studies* vol 18, especially E Baker, 'The European Criminal Justice Jigsaw and its Relevance to Scotland' (2012) *Scottish Journal of Criminal Justice Studies* 18: 5–25, and Hope, the Rt Hon Lord, 'The Role of the Supreme Court of the United Kingdom' (2012) *Scottish Journal of Criminal Justice Studies* 18: 26–43.

This chapter tells the recent story of reform in Scotland and how and to what extent Scotland might follow (or heed the lessons from) its neighbour south of the border. It aims not only to provide some comparison and contrast with that of England and Wales, but also to address the ~~more international~~ question posed by Roberts: ‘The question is now whether other common law countries will heed the lessons from England and Wales.’⁵

Is Scotland heading in the same direction as England and Wales? Traditionally, the idea of any public position on ‘tariffs’ or ‘going rates’ for different kinds of cases has largely been eschewed by the Court of Appeal in Scotland.⁶ Recently, legislation⁷ was passed which provides for a Sentencing Council with the ability to devise guidelines, conduct research, and promote public confidence. ~~However,~~ the proposal for Sentencing Council guidelines was passed by the Scottish Parliament in the face of fierce judicial opposition and, at the time of writing, there are no immediate plans to establish a Council, especially not one which would draft guidelines.

What, then, of guidelines in the form of general guidance from the appeal court? Although it has clear legislative authority to do so,⁸ the Appeal Court in Scotland has traditionally been reluctant to issue guidelines and some have argued that the ‘Court has shown no interest in developing guidelines.’⁹ As we will see later in this chapter, very recently there appears to be an expectation that the Appeal Court may begin to look for more opportunities to issue guideline judgments. Yet compared to England and Wales, the approach remains relatively weak, limited, and ad hoc.¹⁰

Why is this? After all ‘policy transfer’ between two national jurisdictions of Scotland and England and Wales is commonplace. This chapter seeks to explain how and why Scotland has not pursued appellate sentencing guidelines with much vigour, nor systematic guidelines developed by a ‘buffer’ body,¹¹ nor indeed a major and explicit programme of sentencing reform more generally. Is this because Scottish sentencing has been subject to less criticism than elsewhere? Are the arguments for sentencing reform less relevant to Scotland?

⁵ J Roberts, ‘Structured Sentencing: Lessons from England and Wales for Common Law Jurisdictions’ (2012) *Punishment & Society* 14(3): 267–88 at 283.

⁶ N Hutton, ‘Sentencing as a Social Practice’ in S Armstrong and L McAra (eds) *Perspectives on Punishment* (2006), pp 155–74.

⁷ Criminal Justice and Licensing (Scotland) Act 2010.

⁸ Criminal Procedure (Scotland) Act 1995, ss 118(7) and 189(7).

⁹ N Hutton, ‘The Sentencing Commission for Scotland’ in A Freiberg and K Gelb (eds) *Populism: Sentencing Councils and Sentencing Policy* (2008).

¹⁰ In its written evidence to the Scottish Parliament Justice Committee on the Criminal Justice and Licensing Bill 2009, the judges of the High Court of Justiciary acknowledged that to date the power to issue guideline judgments had been used ‘somewhat sparingly’ but signalled a new intention: ‘The court is now taking a pro-active attitude by seeking to identify cases which would benefit from guideline judgments’ (para 6).

¹¹ ‘Buffer’ is the term commonly used for permanent bodies like sentencing councils in that they seek to insulate sentencing practice and policy from the caprice of politics. See, eg, A Freiberg and K Gelb, *Penal Populism, Sentencing Councils and Sentencing Policy* (2008).

B. Why has Scotland not pursued a similar approach to England and Wales?

Arguments worldwide for sentencing guidelines and sentencing reform tend to be inspired and sustained by five broad aspirations. These aspirations are the intellectual and rhetorical resources that calls for reform may draw upon. As such they form the basis of a potential coalition of support for any given reform project, including guidelines. One possible explanation why Scotland has not pursued the direction of England and Wales is that one or more of these aspirations is *perceived to be* significantly less pertinent to the Scottish sentencing scene. Let us consider these five aspirations¹² in turn so as to assess whether they also pertain to Scotland.

Legal equality including the promotion of genuine consistency in sentencing. Genuine consistency is not the same thing as a uniformity of outcome which is blind to relevant and important differences between cases. In the Scottish context, there tend to be two main objections to the attempt to strive for greater consistency. The first objection is one which is familiar to sentencing scholars worldwide and which we could term ‘inter-case incommensurability’.¹³ This is the mantra that there is no such thing as consistency because every case is unique and that therefore it is impossible to compare one case with another. If taken literally, this claim is as illogical as it is morally nihilistic. As Roger Hood exposed some 50 years ago, the claim of inter-case commensurability is illogical when set against the frequent plea to trust the experience of each individual sentence:

magistrates and judges frequently turn to precedent for their ruling and place particular value on their experience in sentencing. Now, if this experience is to be of value, then all cases cannot be unique, they must be comparable at least in some respects; and even if it is agreed that all cases are unique in some sense, this cannot be decisive in the practice of sentencing, for frequently decisions are reached with the aid of ‘experience’.¹⁴

The second argument is more plausible. It runs something like this: Scotland is a relatively small national jurisdiction and contrasts sharply with its larger neighbour. Unlike England and Wales, where ~~nearly~~ the vast majority of sentencing work is done by some 27,000 lay magistrates, more than 75 per cent of the sentencing work is done by relatively small number (under 250) of intermediate court judges, (known as Sheriffs),¹⁵ who are lawyers by professional background, and so tend to be more tight-knit because

¹² I accept, of course, that there can be legitimate debate about the precise number and labelling of these aspirations and that my categorization is necessarily a rough and ready simplification. ~~I hope though the informed reader will at least regard these as recognizable.~~

¹³ I use this term rather than ‘individualized sentencing’, (which is the term sometimes used to denote this claim), as it is more precise than ‘individualized sentencing’, which can easily appear to be taken simply to mean paying attention to the individuality of cases.

¹⁴ R Hood, *Sentencing in Magistrates’ Courts: A Study in Variation of Policy* (1962) p 16.

¹⁵ Including stipendiary Justices of the Peace (JPs) who sit in Glasgow, are not lay JPs but lawyers and have the same sentencing powers as Sheriffs. There are under 500 lay JPs in Scotland and they hear less than one-fifth of all criminal cases.

many have known each other as practising lawyers. So, the argument runs, Scotland is much less exposed to inter-sentencer disparities than its southern neighbour.¹⁶

However, there is nonetheless evidence of a degree of inconsistency in sentencing practices¹⁷ and, more to the point in terms of sentencing reform, it is also widely perceived. Indeed, the judicially led Sentencing Commission's Report into consistency took the view that it did not need to commission any research ~~to be conducted~~ because:

Whilst there may be limited empirical research evidence available that indicates that sentencing in Scotland lacks consistency and shows the extent and prevalence of such inconsistency, we are persuaded that there is a significant body of anecdotal evidence which demonstrates that inconsistency in sentencing actually occurs. Whatever the actual degree of inconsistency in sentencing in Scotland, we are satisfied that there is a very clear perception amongst both practitioners and the public in general that sentencing in this country is inconsistent. Such a perception is damaging to public confidence in the criminal justice system.¹⁸

Despite this, as recently as 2009 some senior legal and judicial figures expressed the view that consistency is not possible in a system that treats each case on its individual merits; and that in any event there is no evidence of inconsistency. The Scottish Parliament did not accept this view and passed legislation based on the need to improve consistency in sentencing. In other words, the consistency argument for sentencing reform in Scotland is reasonably strong. However, in a national jurisdiction which has around one tenth of the population of England and Wales, and where most of the sentencing is done by judges who are lawyers rather than lay magistrates, the anxiety about disparity is not nearly as prominent in Scotland as it appears to be south of the border.

The need for greater predictability in sentencing patterns. Often a spin-off of consistency, the argument for reform based on predictability emphasizes its efficiency gains for the wider criminal justice system, including the planning and resourcing of functions

¹⁶ On relative size of jurisdictions as an important constituent of self-image, see also O'Malley, this volume.

¹⁷ Scottish Government data might appear to suggest evidence of disparity between courts (see, eg, the reports 'Costs, Sentencing Profiles and the Scottish Criminal Justice System' which have been produced annually under s 306 of the Criminal Procedure (Scotland) Act 1995). However, in common with other officially derived data suggesting disparity in other countries, this data does not make sufficiently control relevant variables (eg, multi-conviction as opposed to single conviction cases, seriousness of the offence, previous convictions) to make genuinely meaningful comparisons. For more controlled studies suggesting evidence of widespread disparity: see C Tata and N Hutton, 'What "Rules" in Sentencing? Consistency and Disparity in the Absence of Rules' (1998) *The International Journal of the Sociology of Law* 26(3): 339–64; A Creamer, L Hartley, and B Williams, *The Probation Alternative: A Study of the Impact of Four Enhanced Probation Schemes on Sentencing Outcomes* (1992) p 12; C Tata, 'In the Interests of Clients or Commerce? Legal Aid, Supply, Demand, and "Ethical Indeterminacy" in Criminal Defence Work' (2007) *Journal of Law and Society* 34(4): 489–519 at 514–5; simulation exercises in research into pre-sentence reports as well as their 'live' use, C Tata, S Halliday, N Hutton, and F McNeill, 'Advising and Assisting the Sentencing Decision Process: The Pursuit of "Quality" in Pre-Sentence Reports' (2008) *British Journal of Criminology* 48: 835–55. In acknowledging that the data is limited, similar weaknesses are found in disparity research elsewhere, most of which relies on official data sources and thereby provides a rather crude, even misleading, comparison between cases: see C Tata, 'Conceptions and Representations of the Sentencing Decision Process' (1997) *Journal of Law and Society* 24(3): 395–420.

¹⁸ The Sentencing Commission for Scotland, *The Scope to Improve Consistency in Sentencing: Report* (Scottish Government, 2006) para 1.9.

such as imprisonment, community sanctions, the court service (eg, the diminution of ‘judge shopping’), legal aid, pre-sentence report writing. Scotland is no more predictable than most other jurisdictions.¹⁹ However, while the predictability ~~and planning~~ argument for reform are put forward by those concerned with the planning of custodial and community resources it has not been prominently deployed in Scottish penal political debate.

The value of openness, including articulation, and transparency. Through greater openness in policy-making and in sentencing decision-making, it is widely believed that key benefits will flow. These include: reason-giving, the development of reasoning; opportunities for a degree of democratic input.²⁰ While it would be difficult to make a convincing case that Scottish sentencing practices are significantly more open than that of its neighbours, openness has not been a major rallying call for sentencing reform in Scotland.

The promotion of public confidence in sentencing. Research into public opinion, attitudes, and knowledge in Scotland reveals broadly similar misconceptions and a pervasive belief in leniency similar to that which research found in England and Wales.²¹ The ~~separate~~ tabloid press ~~in Scotland~~ tends to be highly critical of ‘soft touch Scotland’ including ~~what international readers will recognize as the familiar portrayal of:~~ lenient sentencing; the apparent hypocrisy of ‘early release’; and the perceived ability of offenders to avoid a proportionate punishment through sentencing discounting for guilty pleas. The desire to increase public confidence has been prominent in motivating and justifying the case for sentencing reform, especially in the desire to encourage support for greater penal moderation.

A Change in Penal Direction. The desire to change the penal direction of sentencing (more or less severe) ~~generally or in a particular~~ way is a frequent driving argument for reform. Unlike the USA, Jones and Newburn show that ‘UK’²² sentencing policy has not, save for the tabloid press, been significantly affected by a ‘get tough’ lobby seeking harsher sentencing. Instead broadly liberal bodies argue for greater penal moderation, which is the goal of many, but by no means all, of those seeking sentencing reform. Most common is the aspiration among reformers for greater penal parsimony, especially in the use of custody as a sentence.

At first blush, the aim of achieving some change in penal direction seems not to have much connection with guidelines. For instance, it is barely mentioned in legislation, nor in official documentation about the guidelines of England and Wales. Indeed, the connection is not a ~~logical or~~ necessary one. However, ~~I would suggest that~~ although official documentation tends to avoid explicit mention of this goal explicitly, it is often implicit. Furthermore, penal moderation has been and continues to be a key aspiration

¹⁹ Audit Scotland, *Managing Increasing Prisoner Numbers in Scotland* (2008).

²⁰ See for instance Reitz, this volume; M Miller, ‘Guidelines are Not Enough: The Need for Written Sentencing Opinions’ (1989) *Behavioural Science and the Law* 7(1) Winter; D Thomas, ‘Sentencing—the Case for Reasoned Decisions’ [1963] *Crim LR* 245–53. While I agree reason-giving is a good thing, there are also good grounds for scepticism about the efficacy of reason-giving as a simple and unmediated exposition of reasoning; see C Tata, ‘Accountability for the sentencing decision process—towards a new understanding’ in C Tata and Hutton (eds) *Sentencing and Society: International Perspectives* (2002) pp 399–420.

²¹ S Anderson, D Ingram, and N Hutton, *Public Attitudes Towards Sentencing and Alternatives to Imprisonment*, Scottish Parliament Paper 488 (2002); N Hutton, ‘Beyond Populist Punitiveness?’ (2005) *Punishment & Society* 7(3): 243–58.

²² T Jones and T Newburn, *Policy Transfer and Criminal Justice* (2006). Throughout Jones and Newburn refer to ‘the UK’ though in fact their study is only of England and Wales, rather than Scotland or Northern Ireland. However, this specific point about the contrast with USA is true for Scotland also.

motivating and sustaining the support of a key constituency in a coalition of opinion in favour of systematic guidelines. This is not to say that guideline reform in England and Wales has, does, or ever will achieve greater penal moderation—it may or it may not.²³ Rather, the point is that for some, guideline reform should be supported because it holds out the chance of realizing the aspiration of greater penal moderation.

The penal moderation agenda is arguably implicit in references to ‘cost effectiveness’, ‘value for money’ ‘predictability’, ‘impact on the wider system’. All of these terms have the potential to open up questions about the judicial use of custody as a sanction.

The birth of the Coroners and Justice Act 2009, which provided for the new Sentencing Council, can be traced to the government’s desire to counter the steep rise in the prison population due to the increasing use of custody at sentencing.²⁴ The 2007 Carter Review of sentencing argued for a means of gaining some control of the burgeoning prison population.²⁵ Reitz describes the failure of the legislation which set up the Sentencing Council ‘to effect what many would have said was its animating purpose’,²⁶ namely addressing the problem of prison population growth. So even though the goal of penal moderation was eventually largely frustrated, guidelines continue to offer the hope of achieving that goal—if not now then in the future. Those proponents of guidelines who also seek greater penal moderation tend to acknowledge that the ability of guidelines to achieve greater penal moderation is far from assured, but is the best hope,²⁷ or, as Morgan has put it, ‘the only potentially progressive policy approach available’.²⁸

In the work of non-official Sentencing Commissions, the goal of encouraging greater parsimony in the use of custody is more explicit. For instance, Hough and Jacobson argue that one of the two main aims of the Sentencing Commission should be: ‘Achieving greater consistency and stability in sentencing practice, thereby preventing any further upward drift in sentencing severity’ and thus reducing the problem of ‘prison over-use’.²⁹

Among most academics, criminal justice practitioners and policy groups there tends to be ‘widespread agreement that any sensible crime control policy must include scaling back our use of custody’.³⁰ ‘Penologists and penal administrators treat it as axiomatic.’³¹

Nonetheless, the connection between support for sentencing guidelines and support for the reduction the use of custody is highly contingent. In this there is debate about the practical stance which the penal reformer should take. What is the appropriate balance between the ‘reform’ and ‘restatement’ of existing practices in the use of custody? Can restatement be a form of subtle reform?³² One may take the pragmatic view that penal moderation is an important and worthy goal and hope that greater consistency and predictability will be a step towards that goal. In other words, support for systematic

²³ In this much depends on the detailed content and format of guidelines but also the political climate which envelopes their practical interpretation.

²⁴ Roberts, above note 5.

²⁵ Lord Carter, *Securing the Future: Proposals For the Efficient and Sustainable Use of Custody in England and Wales* (2007).

²⁶ Reitz, this volume.

²⁷ Reitz, this volume.

²⁸ R Morgan, ‘Where Now?’ in M Hough, R Allen, and E Solomon (eds) *Tackling Prison Overcrowding: Build More Prisons? Sentence Fewer Offenders?* (2008) pp 123–31 at 128.

²⁹ M Hough and J Jacobson, *Creating a Sentencing Commission for England and Wales: an Opportunity to Address the Prisons Crisis* (2008).

³⁰ Morgan, above note 28, p 127.

³¹ A Ashworth, ‘Reducing the Prison Population in the 1980s: the Need for Sentencing Reform’ in *A Prison System for the Eighties and Beyond* (1983) pp 1–20 at 1.

³² A Ashworth, ‘Devising Sentencing Guidance’ in K Pease and M Wasik (eds) *Sentencing Reform: Guidance or Guidelines?* (1987).

guidelines partly comes from those who see it as ‘a vehicle for a reduced rate of imprisonment’.³³

The tactical dilemma facing academics who are able to convert the aspiration of penal moderation into policy action is a familiar one: how far can one coax a conservative judiciary, and elected politicians, in the direction of penal moderation before one loses their support? For instance, having argued explicitly for systematic guidelines and a sentencing council as a means of addressing the pressing need for greater parsimony in the use of custody,³⁴ Andrew Ashworth chose to develop a more inclusive position explaining that he had:

abjured the aim of reducing the prison population by means of sentencing guidance, which may seem particularly strange in view of my previous pronouncements.³⁵ *I have not changed my view on what is desirable, but I am seeking to suppress that personal view in the hope of putting forward a scheme whose acceptance would not depend on one’s view of the prison population.*³⁶

In other words, the explicit guideline objectives of consistency and predictability are *not necessarily* underpinned by a motivation to achieve penal parsimony: one can want consistency and not be much interested in the use of custody. This more minimal position can sustain another key element in building a coalition of support for systematic guidelines. Nonetheless, there is also a significant body of opinion which believes that penal parsimony could be more easily achieved through guidelines than without guidelines. For these penal moderates, systematic guidelines offer the chance to alter the direction of sentencing.

Is penal moderation an aspiration that is pertinent to Scotland? There has been and continues to be an important argument in response to the idea of guidelines as a means of encouraging penal parsimony in Scotland. This lies in the belief that Scottish penal culture has strongly embedded and distinctive values which militate against the ~~more~~-mechanical and punitive approach of its English neighbours. Scotland is said to have ‘retained a distinctively welfare approach’³⁷ and to have been ‘relatively immune from the populist tendencies that were rapidly infecting its southern neighbour’.³⁸ Indeed, it is a fairly widespread view north of the border that the penal landscape is less harsh and more humane than that of England and Wales. Not infrequently, this is attributed to a culturally distinct Scottish national identity which stands in contradistinction to and resistance of the approach south of the border. For instance:

Scottish cultural identity, which has for centuries been constructed in opposition to its neighbours south of the border, together with civic pride in the maintenance of its separate legal system as guaranteed under the Act of Union 1707, appears to have contributed to a less populist approach to penal matters.³⁹

Three examples tend to be cited in support of this view of Scotland as pursuing a more humane and less punitive approach than England and Wales. First, and most notably,

³³ Morgan, above note 28, p 131.

³⁴ Ashworth, above note 31.

³⁵ Ashworth, above note 31.

³⁶ Emphasis added. Ashworth, above note 32, pp 81–2.

³⁷ H Croall, ‘Criminal Justice in Post-Devolutionary Scotland’ (2006) *Critical Social Policy*, 26(3): 587–607 at 589.

³⁸ Cavadino and Dignan, above note 2, p 231.

³⁹ A Millie, J Tombs, and M Hough, ‘Borderline sentencing: A Comparison of Sentencers’ Decision Making in England and Wales, and Scotland’ (2007) *Criminology & Criminal Justice* 7(3): 243–67 at 262.

Scotland has a unique welfare-based ethos of youth justice (known as ‘children’s hearings’) which is concerned with ‘the best interests of the child’ and has enjoyed ‘continued support of key elites including the judiciary’,⁴⁰ largely (though not entirely) avoiding recourse to youth courts. Second, the traditional probation function based on welfare values has not been displaced so retaining an approach which is crime-reductive rather than a punitive.⁴¹ Unlike probation officers in England and Wales, in Scotland, Criminal Justice Social Workers continue to be generically trained social workers, and are employed by local authorities rather than a central national offender management body. Third, save for murder, mandatory minimum sentences (eg, three-strikes style laws) have not been implemented in Scotland.

This view of Scotland as more humane and less punitive tends to be based on the sense that a small, patrician, liberal-minded elite of officials, judges, and other leading practitioners succeeded in running penal policy-making more or less ‘under the radar’ of politicization—a position which some have argued receded after the reintroduction of a Scottish Parliament in 1999.⁴²

All of this might suggest that Scotland has (or at least had) avoided relatively high rates of imprisonment and high levels of public cynicism about criminal justice. However, neither is ~~or appears to have been~~ the case. Scotland’s rate of imprisonment has long been relatively high and similar to that of England and Wales. Importantly, this has been recognized by successive Scottish administrations, leading third sector bodies, and Audit Scotland as something which needs to be addressed, most recently in the work of the 2008 Prisons Commission. In other words, there is strong support among criminal justice policy elites for greater penal moderation. Yet there is relatively sparse support for systematic guidelines developed by a Council.

Albeit in slightly different combination, I have suggested that the five aspirations that motivate and inspire the case for systematic guidelines, a sentencing council and reform more generally are also found in Scotland. Why, then, has there not been a significant programme of reform of the kind seen in England and Wales? I shall suggest that in fact there have been a series of initiatives which have been motivated by these five aspirations and *which in the politics of sentencing were presented as alternatives to* systematic guidelines drafted by a Council, or, indeed, any other form of ‘interference’ in sentencing policy.

C. Sentencing Reforms in Scotland without (or as an Alternative to) Guidelines

The use of the Sentencing Information System in the aspiration of consistency

During the period when sentencing guideline reforms developed apace in England and Wales and elsewhere, one initiative in Scotland spanning the 1990s and

⁴⁰ L McAra, ‘Modelling Penal Transformation’ (2005) *Punishment & Society* 7(3): 277–302.

⁴¹ Eg Millie et al, above note 39, 263.

⁴² Eg McAra, above note 40; L McAra, ‘Crime, Criminology and Criminal Justice in Scotland’ (2008) *European Journal of Criminology* 5(4): 481–504; Cavadino and Dignan, above note 2, pp 231–2; Croall, above note 37; Millie et al, above note 39.

early 2000s partly explains how Scotland, and more particularly the Scottish senior judiciary, ~~has~~ avoided guidelines.

In the early 1990s, the Conservative Secretary of State for Scotland, Michael Forsyth, proposed the introduction of mandatory minimum ‘two-strikes’ style custodial sentences for some classes of cases. The senior judiciary at the time responded with its own initiative: a Sentencing Information System (SIS) which would show that it took seriously the public perception of inconsistent sentencing. The idea of the SIS was, and is, to use database technology to provide judicial sentencers with good quality systematic information about sentences passed (including those ‘corrected’ on appeal) for similarly situated cases. In this way, the SIS was intended to aid the sentencing process and the judicial pursuit of consistency. The idea of providing judges with systematic information as an aid to consistency is not a new one. In 1953, Norval Morris suggested that trial judges be provided with data on sentences imposed so that they could ‘see clearly where they stand in relation to their brethren’.⁴³ However, it was not until the 1980s that systems were trialed in Canada by John Hogarth in British Columbia⁴⁴ and by Tony Doob in other Canadian provinces⁴⁵ both of which were later abandoned, and then in the late 1980s by the Judicial Commission in New South Wales which continues to this day.⁴⁶ In 1993 after seeing the New South Wales SIS at a conference, the senior Scottish judiciary approached academics at Strathclyde University Law School for assistance and it was agreed that a study of the feasibility of introducing an SIS into the High Court should be undertaken. The feasibility study went on to create a prototype SIS.

In the understanding of the politics of sentencing reform, two aspects stand out. First, this was an initiative by the senior judiciary. Rather than waiting for legislation to be passed and then complaining about it (as happened elsewhere), the senior judiciary took the initiative. Taking such a proactive initiative is as unusual for the Scottish judiciary, as it is for most judiciaries elsewhere. It was prominently and favourably reported in the media.⁴⁷ Meanwhile, the government was content to allow the judiciary to take a lead and the initiative was also often cited in response to calls to restrict judicial discretion. In this way, the political function of the SIS was to head-off populist pressure to ‘do something’ about sentencing. However, it was not a ~~wholly~~ presentational exercise: the two most senior judges at the time

⁴³ Morris (1953) at 200 quoted in R Frase, ‘Sentencing Principles’ in M Tonry (ed) (1997) *Crime and Justice: A Review of Research* 22: 366.

⁴⁴ J Hogarth, *Sentencing Database System: User’s Guide* (1988).

⁴⁵ A Doob and N Park, ‘Computerised Sentencing Information for Judges: An Aid to the Sentencing Process’ (1987) *Criminal Law Quarterly* 30: 54; A Doob, ‘Evaluation of a Computerized Sentencing Aid’, *Report of the Select Committee of Experts on Sentencing*, (European Committee on Crime Problems, Council of Europe, Strasbourg, 1990).

⁴⁶ C Tata, ‘Resolute Ambivalence: Why Judiciaries do not Institutionalise their Decision Support Systems’ (2000) *International Review of Law, Computers and Technology* 14(3): 297–316; I Potas, ‘Consistency of Approach in Sentencing: A Description of the Judicial Commission’s Sentencing Information System’ paper delivered to the workshop on ‘Decision Support Systems’, Melbourne (1997).

⁴⁷ For example, Lord Ross gave an interview to Scotland’s biggest circulation newspaper, *The Daily Record*: ‘Judges go Hi-Tech’/‘I want computers on the bench’ (14 October 1993).

who were behind the initiative, the Lord Justice General (Lord Hope) and the Lord Justice Clerk⁴⁸ (Lord Ross), were genuinely committed to the pursuit of consistency in sentencing and they saw this as infinitely preferable to guidelines or other forms of ‘interference’, such as mandatory ~~minimum~~ sentencing.

Second, the SIS in Scotland was not, and was never intended to be, something which was imposed upon the judges. The SIS was a system to be created by judges for judges.⁴⁹ Yet this point seems to have been lost in some accounts. For example, the widely cited neo-Foucauldian account by Franko Aas portrays the Scottish SIS as, alongside US federal guidelines, one of the main case studies exemplifying the loss of judicial discretion and wisdom replaced by hyper techno-rationality. However, the Scottish SIS was never to be ‘sentencing by computer’ in the way portrayed by Franko Aas’ account.⁵⁰ Far from it. Senior judges were to remain firmly in control: the SIS was to be theirs alone for their use—it was directed by the senior judiciary for the senior court. On the grounds of it being a ‘pilot project’, the SIS was not publicly accessible. As well as the media, prosecution service, and defence lawyers, intermediate court judges⁵¹ wanted access to the SIS or to ~~create~~ something like it for themselves.⁵² They were all to be denied access unless and until a decision had been taken by the senior judiciary about public access.

Moreover, the portrayal of the SIS to conjure a sense of dystopian technocracy is also wide of the mark: it neglects the fact that the degree of prescription was always to be non-binding and that judicial choice was an essential defining feature.⁵³ That said, by describing the normality of sentencing there is also a normative implication, which was intended.⁵⁴ But prescription was to be suggestive only.

Conceived as a flexible tool, the SIS represented sentencing according to a range of different ways of conceiving ‘similarity’ in the same case.⁵⁵ The SIS is searchable in a wide range of ways which allows the user a high level of flexibility so that patterns of case similarity can be defined in a range of different ways (including both aggregate terms and by examining individual cases). In other words, the SIS does not attempt to direct the judge to ‘the correct’ sentence, but rather provide information about previous sentences passed (as ‘corrected’ by the Appeal Court) in similar cases. For some,⁵⁶ this lightness of direction was a fundamental error, but for others if nothing else it was a strength since it represented sentencing in more

⁴⁸ The Lord Justice Clerk is the second most senior judicial position in Scotland after the Lord Justice General/Lord President.

⁴⁹ C Tata, “Neutrality”, “Choice” and “Ownership” in the Construction, Use, and Adaptation of Judicial Decision Support Systems’ (1998) *The International Journal of Law and Information Technology* 6(2): 143–67.

⁵⁰ K Franko Aas, *Sentencing in the Age of Information: from Faust to Macintosh* (2005).

⁵¹ These judges are known as ‘sheriffs’—lawyers by background who hear three-quarters of criminal cases.

⁵² Scottish Parliament Justice 1 Committee, *Official Record Meeting no 4*, Tuesday 18 February 2003: col 4611–2.

⁵³ Tata, above note 49.

⁵⁴ Tata, above note 49.

⁵⁵ Tata, above note 17.

⁵⁶ Eg A Lovegrove, ‘Statistical Information Systems as a Means to Consistency and Rationality in Sentencing’ (1999) *International Journal of Law & Information Technology* 7(1): 31–72.

realistic ~~and acceptable~~ ways.⁵⁷ This mirrors the tension between direction and judicial acceptance in the production of guidelines.⁵⁸

Implementation of the SIS was phased in during the late 1990s and responsibility handed over to the Scottish Court Service (SCS) in 2003. At that time, the SIS contained relatively in-depth information, and remains the best data available, on over 15,000 sentenced cases (including appeals) over the previous 15 years. Importantly, the information (categorization and classification) was devised in a way agreed with the judiciary. This quantitative information was supplemented by textual comments by individual judges ~~where they felt it necessary~~ to explain features not captured by data recording taxonomy. It was agreed that with the handover to the SCS, court clerks would take over recording of information. In the event, it became quickly apparent that the quality assurance processes recommended by the University Team were not going to be followed and it was decided by SCS that there would be no processes to ensure clerks recorded data, let alone accurately. Clearly there was no senior judicial lead requiring clerks to do so. Foreseeably, the SIS appears to have been quietly left to wither away. Why?

Two factors coincided. First, the immediate political pressure on the judiciary dissipated—the SIS had fulfilled a tactical role to see off political pressure for more intrusive reform. In contrast to England and Wales, in Scotland immediately after the reintroduction of a Scottish Parliament in 1999, judicial sentencing discretion had slipped down on the political agenda. The new Justice Minister took a more liberal and permissive approach regarding judicial sentencing discretion as relatively benign. Second, the SIS lost its judicial champion. Soon after political pressure had receded, there was also a change in personnel at the apex of the judiciary, which was to prove critical. By the mid 1990s the two most senior judges who took the initiative for an SIS had left the scene: Lord Ross retired and Lord Hope (Lord Justice General) had been appointed to the House of Lords. The new Lord Justice Clerk (Lord Cullen) appeared deeply sceptical about the idea of an SIS and cooler about the involvement of external academics. By 1999, on the basis of a supposed breach of protocol,⁵⁹ Lord Cullen called a halt to any further work until the matter had been fully debated by all High Court judges. Although it was eventually decided that work could continue, progress to full implementation slowed and the arrangements to ensure proper data collection were frustrated.

The key underlying anxiety, which was never properly resolved, was who could have access to the SIS. The University Team recommended public access, proposing that if managed in the appropriate way such access need not be a threat to the judiciary, but rather an opportunity to improve public understanding of sentencing. For example the SIS data could produce occasional reports about the true patterns

⁵⁷ Tata, above note 49.

⁵⁸ Roberts, above note 5.

⁵⁹ In June 1999, I co-ran an international conference on sentencing. Following a university news release, BBC Radio asked me to give a short interview about the conference in which, among other subjects to be discussed, I mentioned briefly (and approvingly) the SIS, which was to be discussed later that day, by Lord Ross in the opening address to the conference.

of sentencing for different kinds of cases.⁶⁰ However, nervousness about access beyond the judiciary was coupled with an awareness that access could not be denied forever, especially once the SIS was no longer deemed to be ‘a pilot’ project.⁶¹ Given that political pressure had dissipated by this point, the simplest approach was to wish the whole thing could be quietly forgotten. And that is largely what happened.

One possible criticism of an SIS is that, like guidelines, it tends simply to replicate existing practices. However, as Ashworth reminds us this exercise of clarification and categorization (or codifying) is to some extent a ‘normative enterprise’.⁶² In the same way, devising the SIS, especially in the case of Scotland which originated its own sentencing taxonomy, was a process of classifying and categorizing. In that process, lies a subtle potential for ‘incidental reform’,⁶³ which might strike a balance between the demands of judicial acceptance and reform.

While the SIS was used in the political debate about sentencing reform as an alternative to guidelines (especially the US Federal variety), in fact an SIS can also be used as a complement to guidelines and ‘can be a boon to even the most successful guideline systems’.⁶⁴ There is no reason why the two approaches cannot be developed in parallel. Indeed they can be ~~mutually~~ complimentary and ~~sustaining~~. A weakness in the development and monitoring of guidelines is a way of measuring practices in a way that is meaningful to sentencing.⁶⁵ Conversely, an SIS is weak in its formal authority⁶⁶—a key quality of formal guidelines. Nonetheless, the potential for such synergy has tended to be lost in the somewhat polarizing discourse about reform in Scotland.

⁶⁰ C Tata and N Hutton, ‘Beyond the Technology of Quick Fixes: Will the Judiciary Act to Protect Itself and Shore up Judicial Independence’ (2003) *Federal Sentencing Reporter* 6(1). This could be particularly valuable given that the Scottish SIS was more or less unique in collecting information based on a taxonomy originated with the judiciary for the SIS project. The thinking was that official data sources would not provide a meaningful comparison between cases from the perspective of sentencing.

⁶¹ By contrast, in the SIS which has recently been introduced into the Republic of Ireland an early decision was made to allow the information to be publicly accessible: T O’Malley, *Sentencing: Towards a Coherent System* (2011) pp 156–84.

⁶² Ashworth, above note 32, p 82.

⁶³ N Hutton, C Tata, and J Wilson, ‘Sentencing and Information Technology: Incidental Reform?’ (1998) *International Journal of Law and Information Technology* 2(3), 255–86.

⁶⁴ M Miller, ‘Sentencing Reform: the Sentencing Information System Alternative to Guidelines’ in M Tonry (ed) *The Future of Imprisonment: Essays in Honour of Norval Morris* (2004) pp 121–53.

⁶⁵ Official data sets tend to suffer from various key problems worldwide. For instance, they tend to represent multi-conviction cases poorly and are generally weak in representing case seriousness. This is perhaps unsurprising given that they are produced for multiple purposes of which sentencing is only one. An SIS which collects information from the perspective of sentencing (and perhaps supplements existing data in this way) can provide a vital resource to sentencing councils, policy-makers and criminal justice service planners.

⁶⁶ For instance, M Tonry, ‘Punishment, Policies and Patterns in Western Countries’ in M Tonry and M Frase, *Sentencing and Sanctions in Western Countries* (2000) pp 3–28 at 23 has suggested that an SIS is similar to voluntary guidelines. However, although choice is crucial there are some important distinctions between the two models, not least the way that ‘similar’ cases can be ‘looked up’.

The use of the promise of Appeal Court guideline judgments in the aspiration of consistency

With the prison population continuing to rise and concerns about public confidence, during the early-mid 2000s, a judicially led, but not overwhelmingly judicially dominated, short-life Sentencing Commission was established.⁶⁷ As its very final task, the Commission examined the issue of consistency. It accepted that there was inconsistency and recommended:

the creation of a statutory body, the Advisory Panel on Sentencing in Scotland (APSS). That body would be responsible for the preparation of draft sentencing guidelines for consideration by the Appeal Court of the High Court of Justiciary.

However, the decision as to whether or not to adopt those guidelines would be a matter for the Appeal Court.⁶⁸ While it found little support among High Court judges, the Sentencing Commission detected support from intermediate court judges who ‘expressed some support for more extensive guidance on sentencing to be developed and promulgated by the Appeal Court, supported by a research facility, along the lines of the Sentencing Advisory Panel in England and Wales’.⁶⁹ The Sentencing Commission proposed that the APSS be of ‘similar composition and have similar powers to those of the Sentencing Advisory Panel in England and Wales’.⁷⁰ However, in embracing a model which England and Wales had discarded it appears that concerns about the loss of judicial ownership of sentencing were decisive:

We regard this [Advisory Panel] approach as preferable to the creation of a sentencing commission, or a body like the Sentencing Guidelines Council in England and Wales, in which other individuals are involved along with judges not only in the drafting of such guidelines but also in their finalisation and promulgation. We do not support such an innovation. While different models to that which we propose operate in other jurisdictions, we consider that in Scotland the Appeal Court should be allowed to remain in overall control of sentencing policy, subject of course to any legislation that either the Westminster Parliament or the Scottish Parliament may enact.⁷¹

At the same time as sentencing reform was back on the political agenda, the mid 2000s saw a small increase in Court of Appeal guideline judgments.⁷² There are still no more than a handful of guideline judgments⁷³ and they have tended to

⁶⁷ See Hutton, above note 9.

⁶⁸ Sentencing Commission for Scotland, above note 18.

⁶⁹ Sentencing Commission for Scotland, above note 18, 8.37.

⁷⁰ Sentencing Commission for Scotland, above note 18, 9.14.

⁷¹ Sentencing Commission for Scotland, above note 18, 9.15. The report of the Sentencing Commission also argues that England and Wales is a rather different place and preferred to see New Zealand as more comparable: ‘We have thought it appropriate to refer, somewhat extensively, to the developments in New Zealand because in terms of the size of its population it is similar to Scotland and, like Scotland, its criminal justice system is fundamentally a common law jurisdiction.’ para 7.10.

⁷² Renton and Brown *Criminal Procedure* (6th edn) Part VII, ch 22.

⁷³ The number of such judgments is debatable because: ‘The Court does not specifically state that an Opinion issued is a guideline judgment, using its powers in the 1995 Act, and so relevant Opinions are neither reported nor indexed as such’: Sentencing Commission for Scotland (2006) above note 18 at 4.11.

concentrate on certain subjects such as the ‘punishment part’ of life sentences and especially on the vexed question of sentence discounting for a guilty plea.⁷⁴

Recently, in direct response to the proposals for a Council with the power to develop guidelines to which objected in the strongest terms, the senior judiciary acknowledged that hitherto the power to issue guideline judgments had been used ‘somewhat sparingly’ but promised a more proactive approach:

The court is now taking a pro-active attitude by seeking to identify cases which would benefit from guideline judgments... A much less expensive course [than a Sentencing Council drafting guidelines] would be to develop and expand the present arrangements under which the court itself identifies cases which are suitable for guideline judgments... [and that a senior judge is] considering whether there would be advantage in enlarging the personnel who might be involved—possibly the legal profession or even wider interests.⁷⁵

However, as of late 2012, there had been no clear movement towards a significantly more proactive approach and there had been no move to establish the wider reference group. It appears that these comments were made in the context of the proposed legislation to create a sentencing council with the power to develop guidelines. Since that legislation has not yet been implemented it was felt that there was no requirement to create a reference group.⁷⁶ It is possible, then, that the apparent promise of a more proactive approach to appellate court guideline judgments may thus have been presented as a response to the perceived threat of guidelines drafted by an ‘external’ Council. In this way, the senior judicial response to the threat of external ‘interference’ appears to parallel that seen earlier in the history of the SIS.

In any event, whether or not these guideline judgments are succeeding in bringing about greater consistency of approach is, as the English experience suggests,⁷⁷ a moot point. Before compliance is even practically possible, relevant actors need to understand what the law is. There is some evidence, for example, that the practical effect of sentence guideline judgments in guilty plea cases may be understood and interpreted in a range of rather disparate, even idiosyncratic, ways by lawyers and judicial sentencers⁷⁸ and other relevant practitioners such as social work pre-sentence report writers.⁷⁹ Second, the law needs to be settled and clear which, as Leverick shows⁸⁰ has not resulted from recent judgments which have left the position on sentence discounting ‘in a state of some confusion’.⁸⁰

⁷⁴ Eg *Du Plooy v HM Advocate* [2005] JC 1; *Ogilvie v HM Advocate* [2002] JC 74; *Spence v HM Advocate* [2008] JC 174; *Gemmell v HM Advocate* [2011] HCJAC 129.

⁷⁵ Written submission of the judges of the High Court of Justiciary to the Justice Committee in response to the Criminal Justice and Licensing (Scotland) Bill 2009, paras 6 and 14.

⁷⁶ This view has been confirmed by private communications.

⁷⁷ Ashworth, this volume, notes that: ‘What we do not have is reliable research into exactly how these major changes have affected sentencing.’

⁷⁸ Tata, above note 17, pp 511–15.

⁷⁹ C Tata, ‘A Sense of Justice: The Role of Pre-sentence Reports in the Production and Disruption of Guilt and Guilty Pleas’ (2010) *Punishment and Society* 12(3): 239–61.

⁸⁰ F Leverick, ‘Sentence Discounting for Guilty Pleas: a Question of Guidelines’ (2012) *Edinburgh Law Review* 16: 233–8.

Attempts to achieve greater penal moderation by indirect (subtle and surreptitious) means

Until the late 2000s the efforts to moderate the rate of imprisonment concentrated on two indirect strategies: subtle persuasion ~~against the~~ use of custodial sentences, and second, executive release. Both strategies are indirect and unlike systematic guidelines drafted by a Council do not appear to confront or problematize judicial ‘ownership’ of sentencing.

The attempt to persuade judicial sentencers to make greater use of non-custodial sanctions, wherever possible.

~~Tying in with exhortation to judicial sentencers to use custody as a ‘last resort’,~~ this approach has tended to task Criminal Justice Social Workers⁸¹ with the job of achieving greater parsimony in the judicial use of custody. Rather than an open debate and discussion about the use of custody, successive governments have preferred to tackle the problem indirectly by requiring social workers to attempt to dissuade sentencers from using custody in marginal cases.

This is exemplified in the use of pre-sentence reports⁸² to ‘sell’ the advantages of non-custodial options to judicial sentencers in two ways. First, pre-sentence reports are also expected to ‘sell’ community sanctions as robust, and convincing. Second, at the level of individual cases, National Standards for the writing of these reports require criminal justice social work report writers to try to ‘promote’ non-custodial options wherever possible. The logic is that through neutral reporting, sentencers will come to understand and realize the benefits of non-custodial options. A four-year study following pre-sentence reports from production to judicial interpretation found that this strategy of subtle influence through the provision of (ostensibly neutral) information and sweet reason does seem to work some of the time. But it can also backfire: encoded messages are easily misunderstood, and are undermined by processual and institutional factors, and reports are ultimately unable to satisfy their principal readers: judicial sentencers.⁸³

The use of executive release measures to relieve pressure on the prison population.

Weaver et al argue that while there are sound reasons for a policy of ‘early release’ (incentivizing good behaviour and enabling the resettlement of prisoners),⁸⁴ in practice early release has increasingly been used as a tool to try to limit the growth in the custodial population. Unable to control prison numbers through the ‘front door’ of judicial sentencing, successive governments have increasingly relied on ‘back door’ executive release as a surreptitious way of, in effect, re-sentencing. This political strategy is ultimately self-defeating, not least in feeding public cynicism about the penal system and community supervision in particular.

An example of this failure was the attempt to ‘abolish automatic unconditional early release’ which, on the grounds of transparency and public confidence, three of

⁸¹ Roughly the equivalent of Probation Officers in England and Wales.

⁸² Known in Scotland as Social Work Reports and formerly known as Social Enquiry Reports.

⁸³ Tata et al, above note 17.

⁸⁴ B Weaver, C Tata, M Munro, and M Barry, ‘The Failure of Recall to Prison: Early Release, Front-Door and Back-Door Sentencing and the Revolving Prison Door in Scotland’ (2012) *European Journal of Probation* 4(1): 85–98.

the main political parties have committed themselves to in their manifestoes at the last two Scottish general elections. A radical attempt to do this was made at the tail-end of the Labour-led administration in 2007 enshrined in the unworkable Custodial Sentences and Weapons (Scotland) Act. Critics of this legislation argued it was illogical, would only feed public cynicism, and drive up the prison population. There has been a quiet recognition that the 2007 Act is unworkable and so it remains unimplemented. The failure to analyse 'back-door' release decision-making in the context of 'front-door' sentencing was the fundamental problem. The government felt unable to place front-door judicial sentencing on the agenda at all.

Like the strategy of subtle persuasion through pre-sentence reports, this strategy is characterized by attempts to limit the use of custody through indirect means; and a marked reluctance to confront judicial sentencing itself.

The pursuit of penal moderation by direct legislative prohibition

In his evaluation of how legislatures can reduce the use of custodial sentencing, Roberts has argued that legislatures in most countries have failed to accept their responsibility to structure sentencing, preferring to abdicate that responsibility for setting the normative framework for sentencing policy to judges in individual cases: 'It is a regrettable fact that legislatures around the world have proved reluctant to intervene in the sentencing process'.⁸⁵

This was certainly the position in Scotland—save for maximum penalties the legislative framework has been fairly permissive. Indeed until recently, government policy had been marked by a reluctance to confront discretion in judicial sentencing. However, following the Prison Commission⁸⁶ the minority Scottish National Party (SNP) Government set forward proposals which were, by the international standards noted by Roberts, a bold and radical move to reduce the use of short-term imprisonment. Previously, Scottish administrations had sought to curb the prison population through indirect and surreptitious means. Now, in the late 2000s, the Scottish Government was doing what no administration had done in living memory by saying as part of an explicit 'front-door' penal reduction strategy that there should be the virtual end of short-term imprisonment. This approach was accompanied by a vigorous and high profile media campaign led by the Cabinet Secretary for Justice in the full knowledge that it would not be a vote winner. Indeed, arguments for sentencing reform in Scotland were explicit in the run-up to proposals for a Sentencing Council. The Cabinet Secretary for Justice was vocal in arguing that prison is not working for what he called 'the flotsam and jetsam' of society and for a more sparing use of custody in relatively low level offending.

To achieve penal moderation, the Scottish Government proposed a presumption against custodial sentences of six months or less.⁸⁷ However, in the face of

⁸⁵ J Roberts, 'Reducing the use of custody as a sanction: a review of recent international experiences' in M Hough, R Allen, and E Solomon (eds) *Tackling Prison Overcrowding: Build More Prisons? Sentence Fewer Offenders?* (2008) pp 103–22 at 104.

⁸⁶ Scottish Prisons Commission, *Scotland's Choice: Report* (2008).

⁸⁷ Scottish Government, *Sentencing Guidelines and a Sentencing Council: Consultation and Proposals* (2008).

robust opposition in the Scottish Parliament Justice Committee and fierce criticism from the judiciary this was halved to three months. It is too early to know for sure whether this provision has had the impact the Government and Prison Commission hoped for, or indeed, whether it has been counterproductive. Certainly, the prison population has not stopped rising and there have been anecdotal reports⁸⁸ that the provision has led to predictable (and predicted) inflationary effects. Indeed, while the number of custodial sentences of less than three months has fallen sharply, there has been a notable increase in sentences of more than three months.⁸⁹ Second, it is arguable that the selection of time (three months) as the category for the reduction of the use of custody in non-violent cases is illogical. Among those who receive a sentence of three months or less are those convicted of violent offences. Third, the policy is a public relations hostage to fortune which has, unsurprisingly, led to the portrayal of the law as an ass because it ‘prevents’ judges from sending ‘violent thugs’ to prison.

The return of the indirect pursuit of penal moderation

Most recently, government energy has reverted to a focus on two ways in which it is hoped to achieve greater penal moderation without confronting the thorny issue of the ‘ownership’ of sentencing. These are:

Implementation of the 2012 Report of the Commission on Women Offenders. Despite ostensibly dealing with women, in fact the scope of the report’s recommendations go much wider. Although the Report contains many welcome recommendations, it is doubtful whether its major aim of finding a way of reversing the doubling of the incarceration of women over the past decade will be achieved. In keeping with decades of thinking about penal reduction, the report contained virtually no discussion about sentencing reform per se. Instead the major responsibility for reducing the use of custody is assigned to criminal justice social work through fundamental reorganization of ‘a cluttered landscape’. Once again, the idea is that judicial sentencers need to be persuaded of the value of non-custodial sanctions, and (save for the important proposals about the extension of judicial training), the chief responsibility for making less use of custody is placed at the door of criminal justice social work.

The development of problem-solving courts. Although Scotland has two pilot Drug Courts and fast-track specialist courts, it has no general problem-solving court. Whether or not such courts will achieve greater penal moderation is far from assured and much will depend on the processes and structures put in place. Nonetheless, problem-solving courts can foster the development of stronger professional relationships and trust between professionals from different disciplines (eg, the judiciary, social work, health), and this has the potential to raise the awareness and understanding of judicial sentencers about the social conditions of offending and the major challenges people face in desisting from crime.

⁸⁸ Eg ‘Fears Short Term Jail Bid has Failed’ *The Herald* (16 July 2012).

⁸⁹ Roberts, above note 85, pp 109–10; Scottish Parliament Justice Committee, *Official Report on Oral Evidence on Criminal Justice & Licensing Bill* (2009) col 218–220; Scottish Government, *Prison Statistics and Population Projections Scotland* (2012).

Public confidence and transparency

Sentencing guidelines and a Sentencing Council were put forward as a way of delivering greater transparency,⁹⁰ and these proposals were, after considerable judicial opposition, enacted in 2010 alongside the presumption against sentences of three months or less. However, it is unlikely that a Sentencing Council with the power to draft guidelines will even begin to be established soon—almost certainly not before autumn 2014 when a referendum will be held on Scottish independence from the rest of the UK. At such a sensitive time, ministers are reluctant to confront or aggravate the judiciary when that could be portrayed by opponents of independence as a ‘constitutional crisis’.⁹¹ So despite the rarity of an overall majority in the Scottish Parliament, the government is unlikely to press ahead with any plans for guidelines before the next general election in 2015.

What may be established much sooner than Sentencing Council guidelines is the provision to promote greater public ‘awareness and understanding of sentencing policy and practice’, a proposal which enjoyed some degree of judicial support.

Apart from a short period in the late 1990s, the development of guidelines and a guidelines authority in England and Wales has been paralleled in Scotland by a relatively cautious approach. While arguments about the need for consistency seem to have long been won south of the border, in Scotland leading legal and judicial figures continue to claim that there is no such thing as consistency because cases are incommensurable.⁹² Guidelines are treated with a degree of nervousness north of the border. Even among groups concerned with penal moderation, support for systematic guidelines drafted by a Sentencing Council is weak because of a somewhat inchoate feeling that guidelines would increase penal severity and a belief that this occurred in England and Wales.⁹³

⁹⁰ Scottish Government, above note 87.

⁹¹ A flavour of the sort of rhetorical opposition which could be expected is the assertion that it is a constitutional principle that, save for the lightest of statutory framework, *policy* belongs to the senior judiciary: ‘[T]he central and essential element of these arrangements is the constitutional principle that, with limited and specific statutory exceptions, the High Court has always been and remains the body ultimately responsible for decision-making in the development and implementation of sentencing *policy*. We regard that principle, which is well-noted in Scotland, as of the first importance.’ (Judges of the High Court of Justiciary: written evidence to the Justice Committee considering the Criminal Justice and Licensing Bill 2009, para 8 (emphasis added)).

⁹² For example, the submission to the Justice Committee by the Sheriffs Association (which represents intermediate court judges) stated that since ‘a sentence is a decision in an individual cases, then consistency is a pipe dream, an unachievable goal unless one takes no account of individual circumstances’ (Sheriffs’ Association submission to the Justice Committee of the Scottish Parliament considering the Criminal Justice and Licensing (Scotland) Bill 2009, para 2.4).

⁹³ See, eg, the written evidence of the Scottish Consortium on Crime and Criminal Justice (roughly equivalent to the Penal Affairs Consortium in England and Wales). ‘[I]n the current climate the establishment of a comprehensive system of guidelines runs the risk of the prison population being increased.’ (Written evidence to the Scottish Parliament Justice Committee on Criminal Justice and Licensing Bill 2009). This anxiety in Scotland about the effect of guidelines has been given greater credence by comparative research. In comparative work widely discussed in Scottish penal policy circles, Millie et al, above note 39, compared sentencing in Scotland and England and Wales. They suggested, mainly on the basis of interviews with judicial sentencers, that sentencing guidelines south of the border have increased penal severity. Eg: ‘It is, therefore, possible that the more developed use of guidelines in England and Wales accounts for at least some of greater rate of increase in custody

By and large it is not the case that the five aspirations which inspire, motivate, and sustain sentencing reform are not relevant to Scotland. Indeed the self-image among liberal elites of Scotland as a more humane, tolerant, welfare-minded, and less punitive nation supports the desire for greater penal moderation. However, these aspirations have instead found expression through an approach largely characterized by the studious avoidance of discussion about judicial sentencing per se.⁹⁴ Instead, a strategy of information, advice, indirect persuasion, and at times surreptitious action has been pursued. This is self-consciously portrayed as an alternative to the approach of England and Wales, which rightly or wrongly, tends to be depicted as less welfare-orientated and more punitive.⁹⁵ This image has been crucial to the political discourse of sentencing reform.

D. Conclusions

I have suggested that sentencing reform, including the move to a Council drafting guidelines, tends to be inspired and motivated by one or more of five aspirations: legal equality including consistency, openness, predictability, the promotion of public confidence, and a change in penal direction (such as greater penal moderation). These aspirations are similarly pertinent to Scotland as they are in England and Wales and elsewhere: consistency, public confidence, and penal moderation being the most commonly invoked. That said, arguments for consistency appear to attract less support in Scotland because of the widely held *assumption* that sentencing is more consistent because it is more professional and far less reliant on a huge army of lay magistrates. Encouraging greater penal moderation has long been a cherished value of criminal justice elites, more so than consistency, and greater public confidence is seen as means to its realization.

It seems, on the face of it, somewhat puzzling that Scotland has not followed a similar approach to its closest neighbour. However, this is explicable, at least in

rates and in the lengths of prison sentences.’ (p 261). Millie et al, above note 39, also cite the 2004 Coulsfield Inquiry which claimed that ‘there is a growing consensus that the effect [of guidelines] has been to increase the average length of sentences’. (Coulsfield, Lord, *Crime, Courts and Confidence: Report of an Independent Inquiry into Alternatives to Prison* (2004) at 27). This is not to say that this perception is necessarily well-founded, but that it is a fairly widely held one north of the border.

⁹⁴ Indeed, it is not uncommon for the argument to be run that judicial ownership of sentencing policy protects Scotland against the kind of increased punitiveness seen in England and Wales. For example, Millie et al, above note 39, p 263 claim that ‘the concentration of more power in sentencing matters within the judiciary in Scotland as compared with England and Wales, together with a relative absence of political interference, appears to have contributed to the slower rate of increase in the prison population in Scotland’.

⁹⁵ Despite this image, we know remarkably little about what impact guidelines in England and Wales have had on sentencing practices because until recently the data had not been systematically collected, although the Sentencing Council has taken some modest steps to begin to rectify this omission. Indeed, the prerequisite of impact is compliance and there is little known about what sentencers (and others) know and understand (or misunderstand) about guidelines as applied to individual cases. This is not of course an argument against systematic guidelines—the same could be said of appellate court guidance.

part, by a series of measures which have ~~seemed~~ to address these aspirations, most especially the aspirations of consistency and penal moderation. These measures have largely been characterized as a way of achieving reform *without* confronting judicial ‘ownership’ of sentencing.⁹⁶ Instead, during the years when England and Wales was developing guideline judgments and institutions, Scotland pursued a strategy of encouraging self-regulation (SIS), persuasion (pre-sentence reports), surreptitious back-door re-sentencing (executive release), and diversion. To date, the only exception to this period has been the minority government of 2007–2011 when judicial discretion was explicitly suggested as a main reason for the ‘over-use’ of imprisonment and the attempt to institute a presumption against short custodial sentences together with a Sentencing Council. The Council may only be implemented in the medium term and *without* the ability to draft guidelines.

Intriguingly, it seems that these attempts to reform sentencing through subtle and indirect means of persuasion and encouragement may have the best chance of success when, for good or for ill, the political environment appears, to the senior judiciary at least, to be hostile or places judicial discretion under serious and sustained scrutiny. That scrutiny may fail and that environment may lead to wholly undesirable consequences. Yet paradoxically, it may also yield positive opportunities and judicially led initiatives. If this is so, it implies a provocative question: is the best hope for liberal reform the credible threat of proposals which are perceived by the senior judiciary to be illiberal and hostile to judicial discretion? Individual judges may ~~feel that~~ an initiative ~~might be good~~, but the Scottish experience suggests that there ~~will be no~~ collective judicial action unless a credible threat is perceived and the senior judiciary feels it may have something to defend.

⁹⁶ A Ashworth, *Sentencing and Criminal Justice* (2005).