

# The New English Sentencing System

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## INTRODUCTION

Interest in the restructuring and reform of sentencing is a worldwide phenomenon. Even to say that the United States has led the way in innovation might be contested in Finland, where major changes were introduced into the penal code in 1976. Chapter 6<sup>1</sup> was amended to state that “[p]unishment shall be measured so that it is in just proportion to the damage and danger caused by the offense,” and other changes accompanied this.<sup>2</sup> Undoubtedly, though, it is the guidelines systems in the United States which have become the focus of much discussion.

These systems vary in important ways. Only a few states have attempted to place the guidelines in primary legislation; usually the legislature has charged a sentencing commission with the task of drafting guidelines. Some systems, such as Minnesota’s, assign a distinct role to appellate guidance; others do not. Some systems have a clear statement of the primary rationale(s) of sentencing; others do not. The systems also vary in the extent to which the guidelines bind judges in individual cases. Thus, the authority and technique of sentencing guidance shows considerable diversity.<sup>3</sup>

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<sup>1</sup> For an English translation of chapter 6 of the Finnish Penal Code (1976), see Andrew von Hirsch, *Principles for Choosing Sanctions: Sweden’s Proposed Sentencing Statute*, 13 *NEW ENG. J. ON CRIM. & CIV. CONFINEMENT* 171, 177 (1987).

<sup>2</sup> See Tapio Lappi-Seppälä, *Penal Policy and Sentencing Theory in Finland*, 5 *CANADIAN J.L. & JURISPRUDENCE* 95 (1992); COUNCIL OF EUROPE, *Disparities in Sentencing: Causes and Solutions*, in 26 *COLLECTED STUDIES IN CRIMINOLOGICAL RESEARCH* 113-14 (1989) (discussing changes made to Finnish Penal Code).

<sup>3</sup> For a recent survey of the differences of technique, see Andrew Ashworth, *Sentencing Reform Structures*, in 16 *CRIME AND JUSTICE* (Michael Tonry & Norval Morris eds., 1992) (forthcoming).

Guidance systems in the United States have usually been numerical. Indeed, some readers might ask how guidance on sentencing can be given by any means other than numbers. To this question there are various answers. One was provided by the Swedish Legislature in 1988, when it amended the sentencing chapters of the criminal code. Chapter 29,<sup>4</sup> in force since January 1989, provides that "punishment shall be imposed . . . according to the penal value of the crime or crimes" and explains that "penal value is determined with special regard to the harm, offense, or risk which the conduct involved, what the accused realized or should have realized about it, and the intentions and motives of the accused." Several further paragraphs of chapter 29 set out factors which should be considered when determining the penal value.<sup>5</sup> The key to this approach is that courts are given clear guidance on the rationale for sentencing and on the approach they should take, but are left to work out the detailed application for themselves, subject to appellate review.<sup>6</sup> Another example of non-numerical guidance may be found in the new English sentencing system, which is to be the focus of this article.<sup>7</sup>

## I. AN OVERVIEW OF THE CRIMINAL JUSTICE ACT OF 1991

### A. *The English Sentencing Tradition*

Before discussing the provisions of the 1991 Act, it is important to outline the English tradition in matters of sentencing. This is not merely historical background. The new legislation neither introduces nor seeks to introduce a new sentencing code. The Act changes some aspects of the English system without changing others. It may be described as evolutionary rather than revolutionary.

The legislature has typically played a limited role in English

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<sup>4</sup> For an English translation of chapter 29 of the Swedish Criminal Code (1988), see Andrew von Hirsch & Nils Jareborg, *Sweden's Sentencing Statute Enacted*, 1989 CRIM. L. REV. 275, 278-80.

<sup>5</sup> *See id.*

<sup>6</sup> For further analysis in English, see von Hirsch, *supra* note 1, at 174-77.

<sup>7</sup> It should be stated at the outset that the new system introduced by the Criminal Justice Act of 1991 extends only to England and Wales. The United Kingdom includes other legal systems, such as those of Scotland and Northern Ireland, but they have different legal traditions and the new legislation on sentencing does not apply there. In this article, the system to be discussed is the English, a term which in legal matters covers England and Wales.

sentencing. It has set maximum penalties for offenses, has placed limits on the jurisdiction of lower courts, and has also introduced new forms of sentencing from time to time. But, apart from a small number of laws, the predominant approach has been to leave the courts with broad sentencing discretion. Parliament has set the outer boundaries, leaving the courts with considerable room for maneuver within them. However, since 1907, the Court of Criminal Appeal (now the Court of Appeal, Criminal Division) has exercised a supervisory role—not just in hearing appeals against sentence, but also in delivering some judgments which establish principles of sentencing. The process has been a relatively slow one, but it quickened considerably during the 1980s. Appellate review in sentencing is now little short of a typical common-law system: it has a corpus of reported decisions to which counsel and judges refer quite frequently, and the courts recognize that sentencing law is not to be found only in legislation.

In one respect, the English system of appellate review goes beyond the normal features of a common-law system. Occasionally the Lord Chief Justice, when presiding in the Court of Appeal, has formulated what is called a “guideline judgment” which deals with several manifestations of a particular type of offense, and which lays down starting points for sentencing and discusses the major aggravating and mitigating factors relevant to it.<sup>8</sup> In terms of a strict doctrine of precedent, such remarks might be dismissed as gross *obiter dicta*, not required for deciding the particular appeal. In practice, these guideline judgments—which number about a dozen now—seem to be treated with particular reverence by other judges.

The development of the guideline judgment has been a major advance in English sentencing law. Such judgments amount to guidance *for judges by judges*. They are therefore well grounded in practical issues, even if they do attempt to alter practice in one way or another. They are also presented in the same narrative style as other appellate judgments, avoiding the stark numerical appearance of the “sentencing grid” (Minnesota) or the “sentencing tables” (United States Sentencing Guidelines). Of course, the guideline judgments do employ numbers as part of the guidance

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<sup>8</sup> Three guideline judgments which readers might like to consult are Aramah, 76 Crim. App. 190 (1983) (drug offenses); Billam, 82 Crim. App. 347 (1986) (rape); Stewart, 85 Crim. App. 66 (1987) (defrauding state of benefit payments).

they give. For example, the guideline judgment on rape lays down two alternative “starting points” for the sentence according to certain features of the offense. However, it then leaves it to the sentencer to decide how much to add on for aggravating factors or to subtract for mitigating factors, subject always to appellate review.<sup>9</sup>

If the guideline judgment is thought to be such an effective and “judge-friendly” technique of guidance, why was a new statute thought necessary in England? Some answers to this question can be found in the government’s declaration of legislative intent, the White Paper of 1990.<sup>10</sup> In essence, there were three main sources of concern. First, there are very few “guideline judgments,” and they cover only a small number of crimes. Most of the crimes for which courts must pass sentence are in the middle range of seriousness (for instance, theft, burglary, deception, or receiving stolen goods), and the Court of Appeal’s judgments provide hardly any guidance on the proper approach to them. Moreover, appellate guidance on noncustodial sentences and on sentencing in the magistrates’ courts (the lower tier of English sentencing) has been extremely scanty. Because of the dearth of guidance in these important spheres of sentencing, there was public concern about inconsistency.

A second and related concern was the absence of any overall rationale for sentencing in the English system. Even without detailed guidance, courts might be expected to take a common approach to sentencing if a declared aim or rationale existed. However, the typical approach has been to urge sentencers to choose whether they wish to base their sentence in a particular case on deterrence of others, deterrence of the individual, public protection, rehabilitation, desert, and so on. This constitutes a fairly free choice, sometimes derided as a “cafeteria” system—a recipe for inconsistency.

A third concern was the overuse of custody by the courts. Throughout the 1980s, England had a higher use of custody than most other European countries,<sup>11</sup> and the introduction of new noncustodial sentences in the 1960s and 1970s had done little to

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<sup>9</sup> See *Billam*, 82 Crim. App. at 350-51.

<sup>10</sup> HOME OFFICE, CRIME, JUSTICE, AND PROTECTING THE PUBLIC, 1990, CM 965 [hereafter WHITE PAPER].

<sup>11</sup> The precise calculations differ, but the rate was around 100 per 100,000 population in 1989—much lower than the United States’ figure of 350 per 100,000. See WHITE PAPER, *supra* note 10, ¶ 3.5.

stem the trend towards more and indeed longer custodial sentences. The government had attempted in the 1980s to counteract the trend by increasing the amount of remission (good time) and parole on prison sentences, but the report of a committee chaired by Lord Carlisle condemned this as an unsatisfactory approach and called for greater truth in sentencing.<sup>12</sup> The government expressed itself as content with the level of sentences for serious crimes involving violence, sex, or drugs, but wished to see a move towards "punishments in the community" for the less serious type of offender. This has come to be known as the "twin-track" approach to sentencing, and constitutes a more definite attempt to reduce the use of custody at the lower end of the scale of criminality.

### *B. The Strategy of the 1991 Act*

To deal with these three main concerns and with other issues, the Criminal Justice Act was enacted in July 1991 and will come into force in October 1992. For the first time, there is a primary rationale for sentencing in England: proportionality. However, the Act nowhere mentions the words "proportionality," "just deserts," or "desert." Its style is rather to state at several points that "the seriousness of the offense" should determine what type of sentence is to be imposed and how long or how restrictive that sentence should be.

The implication of this is that other sentencing aims are to be ignored, unless the Act states otherwise. The most controversial of these has been deterrence, particularly the aim of deterring others. This has often been accepted as a justification for severe sentences with respect to crimes which are particularly prevalent at the particular time. When the 1991 Act comes into force, a sentence which is lengthened for deterrent purposes will be unlawful. The government has argued that the impact of sentencing on crime rates is frequently overstated and that the prevention of crime should be sought through social and situational methods rather than through the occasional severe sentence from the courts.<sup>13</sup> However, the Act does permit longer incapacitative

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<sup>12</sup> HOME OFFICE, *THE PAROLE SYSTEM IN ENGLAND AND WALES: REPORT OF A REVIEW COMMITTEE*, 1988, CM 532, at 60-61.

<sup>13</sup> See WHITE PAPER, *supra* note 10, ¶¶ 1.7, 1.8, 2.8.

sentences in certain circumstances,<sup>14</sup> and it also requires courts to take some account of rehabilitative considerations in the choice of noncustodial sanctions.<sup>15</sup>

Proportionality, then, is to be the overall rationale for sentencing. But the 1991 Act, rather like the Swedish legislation three years earlier,<sup>16</sup> includes no numbers and enters into little detail. Rather, the Act provides certain legislative restrictions on the use of custody<sup>17</sup> and restrictions on the use and form of community sanctions, and then leaves the courts to develop the key concept of "seriousness" by means of appellate review. The government's White Paper envisions a "partnership" between legislature and judiciary, with the former establishing the framework and the latter developing detailed guidance.

Thus, the government saw no place for a sentencing commission in the new English system; the task of concretising the legislative framework has been left to the courts under the traditional guidance of the Court of Appeal. The key phrase is that "the Government hopes that the Court of Appeal will give further guidance, building on the legislative framework."<sup>18</sup> Apart from this expression of hope, no formal steps have been taken to ensure that the Court of Appeal overcomes the weaknesses which are apparent in its existing jurisprudence (that is, little guidance relevant to the less serious offenses, to noncustodial sanctions, or to lower courts in general).

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<sup>14</sup> See *infra* notes 39-41 and accompanying text (discussing "public protection" sentences).

<sup>15</sup> See *infra* note 32 and accompanying text.

<sup>16</sup> See *supra* notes 4-5 and accompanying text.

<sup>17</sup> The concern about the overuse of custody has been tackled by the 1991 Act, which requires courts to consider a community sanction in almost all serious cases and to give reasons for imposing custody when they decide to do so. See *infra* part II.B. (discussing community sanctions). Here also, much will depend on the attitude of the courts. The effect of the changes in the parole system is that many offenders will now serve a greater portion of any custodial sentence and will have a longer liability to recall to prison. Unless the judges adjust their sentences accordingly, longer actual terms will result. Moreover, the legislation merely uses the concept of "seriousness of the offense" when placing restrictions on the courts, and much will depend on the interpretation of this key phrase. See *infra* part II.C.1. The Act does make some provisions on prior record and related matters, see *infra* part III.C, but the judicial approach will be the key to success or failure in meeting the concerns which led to the legislation.

<sup>18</sup> WHITE PAPER, *supra* note 10, ¶ 2.17.

## II. SENTENCING PROVISIONS OF THE 1991 ACT

The Criminal Justice Act of 1991 contains 102 sections and 13 schedules, covering several matters apart from sentencing. This Part offers an outline of the three central sentencing provisions covered by the Act—financial penalties, community sanctions, and custodial sentencing.

### *A. Financial Penalties*

Financial penalties have for many years been a more prominent part of English than of American sentencing. Not only is the vast majority of summary offenses dealt with by a fine, but even “indictable” offenses result in a fine in around forty percent of the cases.<sup>19</sup> The proportion declined during the 1980s, partly because of the widespread unemployment in the early part of the decade.

The government wishes to see more use of financial penalties, including the making of compensation orders in favor of victims. The whole tone of the 1991 Act is to regard the fine as the natural or regular sentence for most crimes. This is done essentially by requiring the court to justify the imposition of a more severe sanction, such as a community sentence or a custodial sentence.

The problem of fairness in determining the quantum of fines is tackled directly by introducing a variant of the “day-fine” system called “unit fines.” According to section 18 of the 1991 Act, all fines imposed on individuals by the magistrates’ courts (which are lower courts dealing with the majority of crimes) should be expressed in terms of units. The magistrates place the number of units on a scale from one to fifty according to the relative seriousness of the particular offense. The amount to be paid per unit depends on a calculation of the individual offender’s weekly disposable income according to certain formulas.

The objective of the new system is to improve the fairness of fines by trying to achieve an approximate equality of impact on offenders with differing financial resources and differing outgoings. However, the unit fine system will not operate in the Crown Court, where more serious offenses are tried and the fine is used less frequently. For the Crown Court, section 19 of the Act reaf-

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<sup>19</sup> In 1989, 42% of adult indictable offenders were fined. See HOME OFFICE, 1989 CRIMINAL STATISTICS, ENGLAND AND WALES, 1990, CM 1322, tbl. 7.13.

firms the principle that any fine should be adjusted to the means of the offender.

In any case involving death, injury, loss, or damage, a court is required to consider making a compensation order in favor of the victim.<sup>20</sup> The amount of the order should be adjusted downwards if the offender has insufficient means. Where the court decides to fine an offender *and* to make a compensation order, the latter order has priority if the offender does not have enough money to satisfy both.<sup>21</sup>

### *B. Community Sentences*

Important as the fine undoubtedly is in the English sentencing system, it is not ranked as a community sentence under the 1991 Act. The fine occupies a lower level in the hierarchy of sanctions. If a court considers passing a community sentence, it must first be satisfied that the offense is "serious enough to warrant such a sentence."<sup>22</sup> The 1991 Act embodies a significant change in the use of language on this subject. In earlier years, these sanctions were known as "noncustodial sentences" or as "alternatives to custody." Now the government has decided to promote them as tough and demanding punishments in their own right, and they are now termed "community sentences" or "community orders."

For an adult offender, a community sentence may consist of one or more of four community orders, with the addition of a financial penalty where this is considered appropriate. The four main orders are community service, probation, combination orders, and curfew orders. These are now described briefly in turn.

The community service order requires the offender to do unpaid work in the community for between 40 and 240 hours, as specified by the court. The probation service assigns the tasks and provides overall supervision of the work, which is usually carried out alongside volunteer workers (for example, to improve community facilities or work with the mentally or physically handicapped).

The probation order places the offender under the direct supervision of a probation officer for between six months and three years, as specified by the court. The court may also include

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<sup>20</sup> Criminal Justice Act, 1988, § 104 (Eng.).

<sup>21</sup> Criminal Justice Act, 1982, § 67 (Eng.).

<sup>22</sup> Criminal Justice Act, 1991, § 6(1) (Eng.) [hereafter 1991 Act].



an additional requirement in the order, such as a requirement as to residence in an approved hostel, daily attendance at a probation center, participation in specified activities, treatment for a mental condition, or treatment for drug or alcohol dependency.<sup>23</sup>

The combination order is a new form of sentence consisting of between one and three years of probation together with forty to one hundred hours of community service.<sup>24</sup> This is intended as an especially demanding and restrictive form of punishment in the community, which might be suitable for some of those who in the past have received custody.<sup>25</sup>

The curfew order enables a court to require an offender to remain at her home for between two and twelve hours on any days for a period of up to six months.<sup>26</sup> The Act also introduces the possibility of electronic monitoring of a curfew order.<sup>27</sup> However, this will only become a reality if the government decides to make facilities available to the courts, and the results of an experiment were not at all encouraging.<sup>28</sup>

Once the court has decided that the offense was serious enough to justify a community sentence, rather than a mere fine, the Act also regulates the choice of community sanctions. A court must select the community order or orders by applying two criteria.<sup>29</sup> First, the restrictions imposed on the offender's liberty must be "commensurate with the seriousness of the offense."<sup>30</sup> Second, the sentence must be "the most suitable for the offender"<sup>31</sup>—a requirement which may import rehabilitative considerations. At first sight, these requirements might appear to be contradictory, but in practice they need not be. A court may find that the seriousness of the offense may be reflected by, say, 120 hours of community service or by a 2 year probation order. The choice between these orders should then be made by reference to the needs or probable response of the individual offender.<sup>32</sup> The Act

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<sup>23</sup> See *id.* sched. 1A (detailing provisions).

<sup>24</sup> See *id.* § 11(1).

<sup>25</sup> For a discussion of custodial sentences, see *infra* notes 33-35 and accompanying text.

<sup>26</sup> 1991 Act, § 12(2).

<sup>27</sup> *Id.* § 13.

<sup>28</sup> See GEORGE MAIR & CLAIRE NEE, ELECTRONIC MONITORING: THE TRIALS AND THEIR RESULTS (1990) (Home Office Research Study No. 120).

<sup>29</sup> 1991 Act, § 6(2).

<sup>30</sup> *Id.* § 6(2)(b).

<sup>31</sup> *Id.* § 6(2)(a).

<sup>32</sup> The new approach follows roughly the proposals of Martin Wasik &

gives the courts various powers for dealing with breaches of community sentences, including the power to impose a custodial sentence if there has been a “wilful and persistent failure to comply” with the order.

### C. Custodial Sentences

The 1991 Act requires a sentencer to state in open court why the conclusion has been reached that only a custodial sentence can be justified, and to explain this in ordinary language to the offender.<sup>33</sup> The Act provides two main justifications for imposing a custodial sentence. The first and principal ground for imposing a custodial sentence is that the offense was so serious that only a custodial sentence can be justified for it.<sup>34</sup> This is intended to provide a custody threshold, with cases falling back into the realm of community sentences if they fail to overcome the threshold. The second ground for a custodial sentence only applies where the offense is a violent or sexual offense. In such a case, custody may be given only if a custodial sentence would be adequate to protect the public from serious harm from the offender.<sup>35</sup> These two justifications give a limited role to incapacitative sentencing in the English system.

#### 1. The “Seriousness” Threshold

If the seriousness of the offense is to be the criterion for the “in/out” line between custodial and community sanctions, the obvious question is, “How serious is so serious?” The answer to the question is regulated to some extent by the 1991 Act, which as we shall see below, introduces some guidance on seriousness.<sup>36</sup> But the real issues will turn on judicial interpretation and judicial guidance-giving in appellate judgments.

The Court of Appeal has been interpreting a similar provision in relation to custody for young offenders since 1982, but its jurisprudence after ten years gives rather few clear pointers. What the Court has stated on several occasions is that the facts of the case

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Andrew von Hirsch in *Non-Custodial Penalties and the Principles of Desert*, 1988 CRIM. L. REV. 555.

<sup>33</sup> 1991 Act, § 1(4).

<sup>34</sup> *Id.* § 1(2)(a).

<sup>35</sup> *Id.* § 1(2)(b).

<sup>36</sup> *See infra* part III.

are more important than the legal category it falls into.<sup>37</sup> It is thus quite wrong for a judge to say, "This is a case of house burglary, therefore custody is unavoidable." Much will depend on the age of the offender, her prior criminal record, whether the burglary was at night, whether damage was caused, and so on.

Unfortunately, it is only a short step from this to the conclusion that, since each case depends to some extent on its own facts, appellate courts will be reluctant to interfere with the assessments of seriousness made by trial judges. In relation to cases of house burglary, which lie on the troublesome "in/out" custody borderline, the Court of Appeal has stated this conclusion.<sup>38</sup> If this is also the Court's approach when construing the 1991 Act, little guidance is likely to be given to trial courts, and little progress made towards the goal of moving many of these offenders from custodial to community sentences.

## 2. "Public Protection" Sentences

By way of limited exception to the proportionality principle, the 1991 Act makes provision for incapacitation sentences in certain cases. A court may impose a custodial sentence, even if the offense is not itself so serious as to justify custody, in the case of a violent or sexual offense where the court forms the view that only a custodial sentence would be adequate to protect the public from serious harm from the offender.<sup>39</sup>

The Act provides definitions of "violent or sexual offense" and of "serious harm,"<sup>40</sup> but it does not make it mandatory for a court to obtain reports on the offender before imposing such a sentence (although most cases will be covered by other provisions which do so require). From the criminological point of view, the difficulty with "dangerousness" provisions of this kind lies in the proven fallibility of predictions made by clinicians, courts, and others. The tendency is to over-predict by a factor of one or two.<sup>41</sup> Even if it is thought necessary to incorporate some form of

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<sup>37</sup> See *Hearne and Petty*, 11 Crim. App. (S.) 316 (1989).

<sup>38</sup> See *Mussell*, 12 Crim. App. (S.) 607, 612 (1990).

<sup>39</sup> 1991 Act, § 1(2)(b). Where the offense is serious enough to initially justify a custodial sentence, the length of the custodial sentence may be extended beyond the commensurate sentence in order to protect the public from serious harm by the offender.

<sup>40</sup> See 1991 Act, § 31(2)-(3).

<sup>41</sup> See generally JOHN MONAHAN, *PREDICTING VIOLENT BEHAVIOR* (1981) (classic study of overprediction).

“a public protection” provision into a sentencing system, respect for individual rights requires the utmost procedural safeguards to minimize the chances of misidentification of “dangerous” persons.

### 3. The Length of Custodial Sentences

The 1991 Act also seeks to regulate the length of custodial sentences. Section 2(2)(a) states that the sentence shall be for such term as is “commensurate with the seriousness of the offense.” Once again, a court should take account of aggravating and mitigating factors, prior record, and other offenses, as regulated by the Act.<sup>42</sup> The wording of the Act implies that it would be unlawful for a court to impose a disproportionately long sentence in the hope of deterring the offender and others.

In *Freeman*,<sup>43</sup> for example, a man who had attempted to steal a wallet from a tourist on the London subway system was sentenced to five years’ imprisonment, and the Court of Appeal upheld the sentence as a deterrent.<sup>44</sup> Under the 1991 Act, a court would have to decide what length of sentence would be proportionate to the relative seriousness of the crime. A court would be able to take account of aspects of the offender’s prior record suggesting that he was a “professional” pickpocket. Absent such considerations, however, it is unlikely that a sentence as long as five years would be the outcome.

The 1991 Act provides no sentencing “grid” or “table” which indicates preferred ranges of custodial sentences for different crimes. Instead, the Act defers to the judicial “tariff” of prison sentences which has developed through common law and more informally in recent years. No attempt has been made to provide a summary of this tariff in one place,<sup>45</sup> but the logic of its upper echelons is relatively clear. In his judgment in *Turner*,<sup>46</sup> Lord Justice Lawton started from the assertion that it would be absurd if offenders could receive longer sentences for such crimes as armed robbery than for murder itself.<sup>47</sup> So he estimated the number of years which a murderer without mitigating circum-

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<sup>42</sup> See *infra* parts III.B-D.

<sup>43</sup> 11 Crim. App. (S.) 398 (1989).

<sup>44</sup> *Id.* at 398.

<sup>45</sup> For an exploration of its features, see ANDREW ASHWORTH, SENTENCING AND CRIMINAL JUSTICE ch. 4 (1992) (forthcoming).

<sup>46</sup> 61 Crim. App. 67 (1975).

<sup>47</sup> *Id.* at 90-91.

stances could expect to spend in prison<sup>48</sup> and then ranged the lengths of sentencing for other serious offenses just beneath that.<sup>49</sup> He took the period for the murderer as fifteen years,<sup>50</sup> equivalent to a determinate sentence of twenty-two years (after one-third remission, applicable in 1975 but not under the 1991 Act). Just beneath the notional twenty-two years for the murder, he placed a number of "wholly abnormal" offenses, such as political kidnapping and bomb attacks.<sup>51</sup> He expressed the view that armed robbery should be placed at the next level down, with fifteen years' imprisonment for a single offense and eighteen years for two.<sup>52</sup> This reasoning has continued to inform the upper echelons of the English "tariff" since 1975, even though there have been considerable changes in the sentencing system over that period.

It should not be taken to mean, however, that English courts never pass sentences longer than twenty-two years. A small number of such sentences have been upheld by the Court of Appeal. The best-known example is the case of *Hindawi*,<sup>53</sup> where a man who had sent his pregnant girlfriend onto an aircraft with a bomb in her hand-baggage, timed to explode when the aircraft and its 360 passengers were at high altitude, had been sentenced to forty-five years' imprisonment. The Court of Appeal upheld the sentence, saying that it was "not a day too long."<sup>54</sup>

While the higher reaches of the "tariff" have been fairly well documented and have been supplemented by the "guideline" judgments on serious crimes such as rape and drug trafficking,<sup>55</sup> there remains a paucity of guidance in the lower reaches. Unless the Court of Appeal evinces a new willingness to develop guidance at this lower level, it is likely to remain a large and significant Achilles' heel of English sentencing jurisprudence.

### III. JUDGING THE SERIOUSNESS OF THE OFFENSE

Many of the critical decisions required by the 1991 Act will

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<sup>48</sup> Lord Justice Lawton "estimated" the figure because there is a mandatory sentence of life imprisonment for murder.

<sup>49</sup> 61 Crim. App. at 90-91.

<sup>50</sup> *Id.* at 90.

<sup>51</sup> *Id.* at 91.

<sup>52</sup> *Id.*

<sup>53</sup> 10 Crim. App. (S.) 104 (1988).

<sup>54</sup> *Id.* at 105.

<sup>55</sup> See cases cited *supra* note 8.

depend on judgments of seriousness. This applies to the quantum of a fine, to the step up from a fine to a community sentence, to the type and quantum of community sentence, to the step up from a community sentence to custody, and to the length of the custodial sentence. The emphasis thus far has been on the role of the Court of Appeal in formulating detailed guidance for the courts, but the Act itself makes stipulations on certain issues. Four will be outlined here—presentence reports, aggravation and mitigation, previous records, and multiple offenses.

#### *A. Pre-Sentence Reports*

Reports on the background and circumstances of the offender have been prepared by probation officers and submitted to courts in many cases over the years. The government has now decided to remodel these reports with a view to making them more “user-friendly” for the courts, and the 1991 Act places them center-stage in sentencing procedure.

Courts will be required to obtain and consider a presentence report before passing any custodial sentence (except in the most serious, indictable-only cases) and before making most community orders.<sup>56</sup> The reports will not only inform courts about the offender but will also draw attention to available facilities for community sentences in the locality. This is regarded as part of the movement away from custody towards community punishment.

#### *B. Aggravation and Mitigation*

The Act places on courts a duty to consider all available information about the circumstances of the offense, including aggravating and mitigating factors, when judging the seriousness of the offense.<sup>57</sup> While the bill was going through Parliament, it was pointed out that this formula might prevent courts from taking account of other mitigating factors which do not affect the seriousness of the offense, such as the offender’s previous good character or any efforts at restitution since the crime. The government denied any intention to alter these traditional practices of the courts and inserted section 28(1) into the Act.

Section 28(1) allows courts to take account of *any* matters which

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<sup>56</sup> 1991 Act, §§ 3(1), 7(2).

<sup>57</sup> *See id.* §§ 3(3), 7(1), 18(3).

they think are relevant in mitigation. This means that there is no statutory resolution of debates such as whether, and to what extent, courts should give a sentencing discount to offenders who plead guilty. These issues will continue to "evolve" through case law, without systematic examination.

### C. *Prior Record*

The Act includes a fairly complex provision on the vexing question of prior record. Section 29(1) states that an offense shall not be regarded as more serious by reason of any previous convictions of the offender. There have been some claims that this section renders prior record irrelevant. That is a questionable conclusion, however, since section 28(1), considered above, allows courts to take account of *any* factor in mitigation. A good prior record has always been regarded as a mitigating factor for all but the most serious of crimes. What section 29(1) probably means is that a bad prior record cannot take the sentence beyond what is proportionate to the particular offense committed on the particular occasion. It is thus intended to place a kind of ceiling on the sentence, and to prevent the escalation of sentences for persistent nonserious offenders.

However, section 29(2) muddies the waters by allowing a court to take account of aggravating factors of an offense which appear from the circumstances of other offenses committed by the offender. This appears to mean that a court could, for example, deduce that an offender is a "professional" thief<sup>58</sup> or is a racially motivated attacker by considering her prior record or the details of any other offenses committed at the time. It is not known how widely the courts will interpret this provision.

### D. *Multiple Offenders*

Most sentencing systems applying the proportionality principle find difficulty in adapting it to cases where an offender must be sentenced on one occasion for multiple offenses. The government was concerned, here as with prior record, that offenders who commit several minor offenses might receive sentences of the severity that should be reserved for really serious offenders.

The 1991 Act therefore strikes a compromise. When a court is

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<sup>58</sup> See, e.g., *supra* notes 43-44 and accompanying text (discussing the *Freeman* case).

deciding whether a case is serious enough to satisfy the threshold test for a custodial sentence, it may take *any two* of the offenses which are for sentence. If those two offenses, taken together, are serious enough to justify a custodial sentence (or community sentence, as the case may be), then the case satisfies the test. This prevents a court from aggregating eleven offenses of moderate seriousness and deciding on custody;<sup>59</sup> it must focus only on any two.

However, once the court has satisfied the threshold test, it may take account of all the offenses in deciding on the length of a custodial sentence or the nature of a community sentence, as the case may be. At this stage, the only restrictions on the court are the common-law rules on concurrent and consecutive sentences, and the "totality principle" which attempts to keep the overall sentence within approximate bounds of proportionality. These common-law rules have been preserved.

#### CONCLUSION

The new English sentencing statute does not come into force until October 1992, and so it will be some time before its practical impact can be assessed. In style it is closer to the Swedish model than to any of the United States' guidelines systems. But it is important to bear in mind that the English statute does not purport to introduce a completely new sentencing system. Rather, it seeks to graft on to the existing system a statutory framework which is new in parts while allowing many of the existing principles (for example, on aggravation and mitigation, on multiple offenses, and on the scale of "seriousness" itself) and the guidance-giving function of the Court of Appeal to continue virtually unchanged. Many American jurisdictions have no longstanding history of appellate guidance on sentencing, and so this approach may not be possible in the United States.

The legal and political background differs in other ways too. For instance, mandatory minimum sentences are not a prominent feature in England; drunk driving is the only offense (apart from murder) where a degree of compulsion is imposed. Also, overall sentence levels are much lower in England than in the United States, probably because more attention is paid and ought to be paid to noncustodial sentencing. This is a major thrust of the

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<sup>59</sup> See, e.g., Davison, 11 Crim. App. (S.) 570 (1989) (involving previous statute concerned with young offenders).



English reforms, and one measure of its success will be whether courts impose fewer custodial and more noncustodial sentences for the middle range of property offenses. The critical "in/out" borderline, however, rests in legislative terms on nothing other than the word "seriousness." Unless the courts, under the guidance of the Court of Appeal, police this borderline with vigor, the desired policy will not come to fruition.

Thus, much turns on the response of judges and magistrates to the new statutory framework. Some are already denouncing it as over-complicated and more likely to increase rather than reduce the prison population. It is certainly regrettable that some of its more progressive policies are hedged about with technicality while others are left so open as to depend almost entirely on judicial attitudes. Yet the Criminal Justice Act of 1991 has much to commend it, too. It attempts to improve consistency by stating a primary rationale for sentencing (proportionality), to increase the number of community punishments for offenders now sent to prison, and to ensure that the custodial sentences pronounced in court have clear and uniform meaning. Most of all, it leaves considerable discretion and power in the hands of the judiciary. Will this prove to be its strength or its weakness?

