

Beyond the Technology of Quick Fixes.

Will the Judiciary Act to Protect Itself and Shore Up Judicial Independence? Recent Experience from Scotland

Introduction

It is now thirty years since Marvin Frankel published his polemic *Criminal Sentences: Law without Order*,¹ which helped to galvanise calls to restrict discretion and led on to elaborate attempts to control sentencing through law.² Yet criticism of judicial sentencing across the English-speaking world is more volatile than ever. Two of the chief grounds of criticisms have been: a judiciary “out of touch” with public sentiment; and secondly, “wide-open” disparity that has been as much assumed as it has been rigorously substantiated.³

Nonetheless, there remains a strong presumption that sentencing is characterised by a high degree of disparity and that sentencing is out of line with public opinion.

The reverberations from the experience of the US Federal Guidelines and the substantive injustices that many judges and academics have argued are produced by the mechanistic complexity of these Guidelines, have led judges world-wide to express their antipathy to numerical grid-style Guidelines, in particular those perceived to be devised by politicians or political imperatives.⁴ Unlike most other English-speaking countries, Scotland⁵ has not, as yet, undergone an attempt at systematic sentencing reform, although media criticism of sentencers, both collectively and individually, is not unusual. Against this background, in 1993 the senior judiciary of the day in Scotland initiated investigation of a project that, if successful, would introduce a Sentencing Information System (“SIS”) as at least one method of, though not limited to, pursuing consistency⁶ and could assist in helping to restore public confidence.

Some ten years later, a fully developed Sentencing Information System has been implemented in the High Court.⁷ Judges now use the information system to support their sentencing decision making. The SIS contains over 13,000 cases and around 1000 new cases will be entered each year. It is now kept up to date by the clerks of judiciary and managed by the administration service of the courts. The SIS in Scotland provides judges with fast, simple yet flexible access to good quality information about the previous sentencing of the court. Formally, the system is descriptive and not prescriptive. Although there have been a few lab-based

prototypes and a few systems for administrators, the SIS is one of only two implemented information systems in the world specifically to assist judicial sentencing, and is the only one that uses information that judges have actually asked for (rather than been presented with).

This article briefly describes the information system and how it was developed and implemented in the High Court in Scotland. It then discusses some of the broader sentencing issues raised by this project; possible wider uses of the SIS; and prospects for the future.

Legal Background

In Scotland, there are statutory and procedural rules governing the maximum penalties for certain offences and limiting the sentencing powers of the different courts, but within these broad boundaries, there are few formal constraints on judicial decision making. The Court of Criminal Appeal of Scotland has the power to issue narrative Guideline judgements (in the way that its counterpart in England and Wales has been doing) but has been very loathe to do so. The High Court SIS has been developed alongside an otherwise unchanged discretionary approach to sentencing.

The Scottish Judicial Sentencing Information System

As long ago as 1953, Norval Morris suggested that trial judges be provided with information on sentences imposed so that judges could “see clearly where they stand in relation to their brethren.”⁸ However, it was not until the 1980’s that information systems using computerised information technology became a practical reality with systems being pioneered in Canada by John Hogarth in British Columbia;⁹ and, by Tony Doob in various Canadian provinces.¹⁰

In itself, the basic idea of the SIS is very simple. The user selects the kind of case in which she is interested and the screen displays the pattern of sentencing in similar cases. Thus far, the SIS has been developed and implemented primarily with the judicial user in mind who would consult the system when she is considering sentence in a particular case. However, as we will suggest later in this article, other users and purposes should be envisaged.



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How Was the Information System Designed?

The conceptual design of the information system was devised and revised by a group of academic researchers and judges. This group met regularly throughout the three phases of the project, although during the initial stages the meetings were more intensive. The project was fortunate to have been able to learn from the unsuccessful experiences of Professor Doob and his colleagues in Canada and from New South Wales. The Scottish project was also fortunate to have been initiated by the two most senior judges in the country.¹¹ The close involvement and support of the senior judiciary, particularly in the early stages, but throughout the project, has been an important determinant in it proceeding from pilot to full implementation.

How Does the Scottish SIS Work?

Typically, a sentencer who is considering sentence is able to enter characteristics about a case into the computer and the screen displays information about previous sentencing practice in similar cases. In the Scottish SIS, the information (which was decided together with the judiciary) is about both aggregate and individual cases. In contrast to numerical Guidelines (including voluntary ones)¹² the Scottish SIS avoids a grid-style approach. It deliberately incorporates flexibility as to how the judge decides to look up sentencing in similar cases. *She* can define and refine his/her search in various ways, and may also choose to focus on a small number of individual cases in detail. The Scottish SIS is not intended to tell the judge what is "the correct sentence" to pass, but rather is a resource to allow judges to consider different sentences passed at first instance and appeal in similar cases.

A related characteristic is its voluntary nature: a judge is not compelled to consult an SIS nor is *she* compelled to follow the normal patterns of sentencing that an SIS retrieves for a given kind of case.¹³ Importantly, an SIS is not about *producing* consistency but rather about assisting judges in their *pursuit* of consistency and justice. The subtle, but important, difference is that the definition of what constitutes consistency in sentencing is left to the judiciary rather than prescribed by the legislature. There is no compulsion on judges to consult the SIS and, unlike US Federal Guidelines, the SIS does not place any formal restrictions on the judges' choice of sentence, although there is an expectation that a judge will consider the sentencing information about similar cases carefully. But what is meant by "similar" cases and can the SIS really produce meaningful comparisons?

Can the Scottish SIS Capture Case Similarity?

An SIS is intended to display information about sentencing practice in previous similar cases. Clearly, "similarity" is the crucial term here. One claim often recited in legal circles is that, in principle, it is impos-

sible to talk about similar cases as "each case is unique and therefore turns on its own facts." However, this not only confuses "similarity" with "sameness," it is also a claim that is logically incompatible with the claim that decisions derive from previous "experience."¹⁴ To draw on previous sentencing "experience" is to make comparative judgements. Although all cases are, of course, to some degree "unique," they are also necessarily comparable with, and relative to, each other. Sentencing is inconceivable in the absence of any comparison.

A more sustainable objection to a judicial SIS is that it is so difficult to represent the similarity of cases, that any attempt to research and develop a judicial SIS is bound to end in practical failure. It is often assumed that judges operate their own personal policies and philosophies and thus it would be impossible to gain agreement about a shared basis of similarity. Thus, the major challenge lay in devising a means through which the judicial SIS could meaningfully represent to judges the nature and seriousness of the case. In practice, and in common with other studies,¹⁵ we found that once the practical business of case classification was underway, there was generally a high degree of consensus between judges rather than entrenched ideological disparity. Judges were almost always able to agree practical and sometimes relatively imaginative resolutions. If the judicial SIS is to continue to provide useful information, this process of discussion, monitoring, and taxonomy revision must be continuous, otherwise representations of similarity will be left in a time warp.

Use of Primary Sentencing Information and the Need to Avoid Administrative Information

If an SIS is to stand any chance of being useful to judges it must present valid case comparisons that are meaningful to sentencers. A useful SIS cannot be created by simply taking administratively-collected data and feeding it into a computer. There are no quick fixes. Considerable thought and research has to be devoted to originating a suitable structure and taxonomy of comparison. In the Scottish project, judges were actively involved in the vital decisions about how to represent the "similarity" of cases. The information used in the Scottish SIS was collected (according to an SIS-specific taxonomy designed and agreed by the judiciary) from the full Trial/Case Papers held in High Court's archives.¹⁶ The structure and classifications that the system uses to store and retrieve this information were designed specifically for the information system with the aim of providing a resource that would be useful to sentencers and it was the sentencers themselves who made the important decisions about how case similarity would be operationalised.

The use of pre-existing administrative data was investigated but it was apparent that it would not be adequate in itself. Administrative data-sets are normally

constructed for criminal justice-wide, and not sentencing-specific, purposes. Inevitably, therefore, they tend to provide superficial and inadequate information about sentencing with insufficient control for the relative seriousness of cases. This can create highly misleading impressions. In recent years, for example, a table of local courts' custody rates was published by the government in Scotland,¹⁷ which attracted headline coverage critical of "inconsistent" sentencing. Unfortunately, the tables are based on administrative data that fails to address "input differentials" such as the relative seriousness of cases adequately and also failed to take due account of convictions resulting from multiple (as opposed to single charges). Sadly these custody rate tables are spurious because they make spurious case comparisons.

With the relative novelty of computerised information systems to assist judges comes the need to avoid the easy supposition that these can provide a "quick fix" by simply feeding in second-hand data. Administrative and IT officials tend to have limited interest in scrutinising the utility of data from the perspective of sentencing. Yet if such information systems are to attract support then very careful thought must be given to how to produce a genuinely useful information system.

Illustration of the Flaws in Using Administratively Generated Information: Single and Multi-Conviction Cases

One important feature of the Scottish SIS is how it conceptualises single- and multiple-conviction cases. This is a very important problem and if glossed over can easily produce misleading results. Statistical reports on sentencing using administrative data-sets world-wide tend to pay inadequate attention to this, with explanations or recording methods normally confined to technical footnotes. Administrative data in most countries count a case as a person sentenced at one hearing for one or more convictions. However, one net sentence for all convictions in a case is recorded against what is deemed (normally by the police who maintain such systems) to be "the main offence." The problem is that single conviction cases and multiple conviction cases are rendered indistinguishable from each other, even though in reality they often vary considerably in their seriousness. This difference in case seriousness is concealed, however. The result is that a misleading statistical picture is produced especially when attempts are made to compare courts (and indeed sentencers) in terms of disparity, approaches etc. For example, cases with only a single conviction appear to have been sentenced much more leniently than supposedly "similar" cases that are often in reality multi-conviction cases.

In the Scottish SIS project the judiciary and researchers together insisted that the SIS should be allowed to collect the information that would be useful

to the SIS, and not simply rely on second-hand administrative information that would produce a spurious picture of sentencing. In the event, it enabled the use of two, complementary approaches. The user may look up information using either or both of these. The "Principal Conviction Approach" allows the user to select the main conviction and then add in further offence and offender information including "sub-convictions." In many cases, the user may also find that the use of the complimentary "Whole Offence Approach" valuable. The Whole Offence Approach conceives, records and represents single and multiple conviction cases according to original holistic classifications derived for the SIS with the judiciary. This approach is less fragmented than the Principal Conviction Approach and reflects the holistic way in which judges, (in common with other skilled discretionary decision-makers¹⁸), often conceive and make sense of the narrative or "course of conduct" of the offending behaviour.¹⁹

Is the Whole Offence Approach the Same as Individualised Sentencing?

Although the Whole Offence Approach attempts to capture the intuitive and holistic way in which sentencers often tend think about sentencing, it is important not to confuse this with what might be called "individualised sentencing." Individualised sentencing maintains that every case is "unique" and entirely turns on its own facts. By contrast, the Whole Offence Approach attempts to offer a meaningful way of comparing cases. It is not necessarily bound to strict classifications of legal conviction, but rather uses classifications specific to sentencing. The Whole Offence Approach can provide a more effective way of capturing the sense of "streams of cases"²⁰ *from the perspective of sentencing*, rather than a strict adherence to legalistic classifications of conviction with the addition and subtraction of supposedly discrete individual "factors." The latter is not necessarily a more reasoned or logical way of approaching sentencing and one should be careful not to dismiss the plea by judges to attend to the "whole case" or the "case context" as tantamount to "individualised sentencing."

Where Do the SIS Whole Offence Classifications Come From?

In working through with judges the kind of taxonomy they would find helpful from the perspective of sentencing and discussing specific cases, they typically spoke in terms of short-hand sentencing classifications. Of course, the criminal law is itself a short-hand, but one that is used for a variety of purposes rather than the specifically for the purpose of sentencing. Criminal law classifications (whether common law or statutory) were often too broad or too narrow or indeed too uninformative to be useful. Judges did not, as a rule, explain cases in linear, fragmented or mathematical terms as "X plus

Y criminal law conviction plus the addition A & B aggravating factors minus C & D mitigating factors.” Rather they spoke about typical whole-case narratives which they recognise. This does not signify a less rigorous or less logical approach. Rather, to work on the basis of holistic case narratives is often more practically meaningful than to be forced to operate an artificially analytical formality. Why? Sentencers are not the recipients of the “reality” of criminal behaviour; and the courts are not, and never can be, the window on the world of crime. As criminal justice research has demonstrated clearly, cases coming before the courts for sentencing are not a simple reflection of the criminality “out there.” Rather, sentencers receive cases that have been filtered, edited, constructed and reconstructed throughout the criminal process. It is not, nor ever can be, a simple replay of “what happened,” but rather cases (due to cognitive and organisational) are streamed into a limited number of plots. Every case has a “career” through which, of necessity, it is transformed by the criminal process: rendering the unfamiliar familiar. The criminal process inevitably normalises and typifies cases, so ensuring that they are manageable and meaningful. By the time the case reaches the sentencer much of the interpretive agenda has been set, and so the sentencer is normally able to recognise the kind of case at-hand in terms of a holistic short-hand. Thus such an approach to understanding the sentencing process is neither tantamount “individualised sentencing” nor irrational, but instead intended to be based in how the criminal process normalises and interprets cases for sentencing.

One very different approach to designing a taxonomy and scheme for case similarity would be to try to produce a “scientific” model of sentencing using criminal law classifications with the addition of “aggravating and mitigating factors.” This model would allow sentencing outcome to be predicted algebraically through calculations based on “the effects” (i.e. statistical correlations) on sentencing outcomes of particular variables. The most elaborate attempt to do this can be seen in the work of Austin Lovegrove and various Artificial Intelligence proponents.²¹ However, there are significant problems. Such a search for “the factors” that are thought to determine sentence choice is premised on the assumption that sentencing is (or ought to be) a linear, mathematical process in which decision making is based on the addition and subtraction of discrete individual factors. While sentencing is clearly patterned, these patterns are produced by judges making decisions as part of an organisational and social process. For example, judges are making decisions on information that has already been processed and transformed by other actors in the criminal justice process.

A different, and arguably more meaningful, way of achieving case sensitive data would be to use a more

interpretative methodology to develop “Typified Whole Case Stories”²² that attempt to develop case classifications based on judicial interpretations of typical case narratives. This approach is attempted to a limited extent by the Whole Offence Approach and could be developed much further.

The Performance of Balance Between Two Visions of Justice

As well as fairly detailed aggregate information, the Scottish SIS now also contains individual case information supplemented by judge-written text about the particular case. Judges expressed strong desire to write a brief narrative for the benefit of their colleagues consulting the information system. This was particularly desired where, for example, a judge after consulting the SIS finds that the sentence that she is thinking of imposing is relatively unusual, but a similar sentence has been passed before. In this situation judges reported that they would be very interested to find out further details about the previous case and how the sentencer interpreted it.²³

In this way, judges can view information about sentencing both in aggregate and individual terms. In one sense the inclusion of short judge-written passages about each case seems superfluous. Focusing on only one case may be misleading since every case is to some limited extent unique: it is therefore impossible to find “the same” or another “matching” case, only similar cases. However, at a less instrumental level the inclusion of both qualitative- and quantitatively-expressed visions of similarity appears to remind and reassure judicial users that cases can be regarded *both* against the bigger picture *and* individually. It serves perhaps as a reminder for judges that the SIS’s basic unit is the case and that sentencing is about dealing with individual human beings and not simply numbers and patterns. This flexibility allows judges literally to switch between an aggregate tariff-based vision of justice in sentencing and one emphasising the individuality of cases, thus performing a reassuring (though symbolic) balancing act between “tariff” and “individualised” sentencing.

Acceptance and Need

In the introduction to this article we sketched the international background to the Scottish senior judiciary’s initiative. While there is a concern to avoid the imposition of legislative Guidelines, are judges also interested, at least in principle, in using an information system to assist their pursuit of justice in sentencing? If a basic idea behind such information systems is to inform the discretion of sentencers by assisting sentencers in their pursuit of consistency by providing reliable information, do judges need and perceive the need for such information?

One of the claims commonly proposed by some

sentencers is that they know what the pattern of sentencing for any particular type of case looks like. This is said to be particularly the case in a relatively small country like Scotland. However, while some sentencers may be able to state with confidence how their own sentencing patterns fits in with other colleagues, the accuracy of such estimates has rarely been tested. Recent research in the Sheriff [ie intermediate] Court has shown evidence of *both* consistency and disparity in the sentencing practices of Scottish sentencers. Indeed it also found that it would be surprising if sentencers could state entirely accurately the normal patterns of sentencing in different sorts of cases, and that there can be a tendency among sentencers to over-estimate their ability to do so. So while the picture painted by some more polemical accounts of “wide-open” or chaotic disparity in the absence of formal rules does not appear to be substantiated, on the other hand, there does appear to be some level of disparity that may at least in part be due to limited systematic information sources.²⁴ Hitherto, the availability of high-quality and systematic information about sentencing has been limited to a relatively small range of reported judgements of the Court of Criminal Appeal; memory; and informal, anecdotal discussions between judges and their clerks about sentencing decisions in previous “similar” cases.

Furthermore, various commentators have suggested that, given the relative dearth of good quality, systematic information about sentencing practice “judges ought not only to be provided with, but would positively delight in, access to good quality, detailed information [about sentencing practice].”²⁵ Similarly, various other academics have appeared to recommend at least the serious consideration of the greater dissemination of systematic aggregate and individual case information.²⁶

Yet if there appears to be some need for this kind of information, do judges perceive the need? After all, one of the defining characteristics of the SIS is that it deliberately adopts a judicial self-regulation approach and there are no formal requirement that judges *must* take account of the information presented. Indeed it is this emphasis on judicial choice as to whether, when and how to consult an SIS that partly explains its judicial appeal. This is in marked contrast to judicial concern and hostility in many countries towards Sentencing Guidelines particularly where these are introduced or initiated by politicians. For policy-makers and politicians, one of the difficulties in sentencing reform has been judicial resistance to interference with their discretion.

While the SIS is correctly characterised as a provider of information, there is obviously some normative intention to help judges to be better able to balance the past sentencing practice of the court for a particular kind of case against the individual characteristics of the

case before them. However, as judges are not compelled to consult an SIS, a key question must be, will they actually do so?

Will Judges Use a Judicial SIS?

According to Doob and Brodeur:

“There is a natural tendency to explain away the problems of sentencing by asserting that, to a considerable extent, they are the result of a lack of knowledge. Hence it is sometimes argued that the problems of disparity could be lessened...by providing additional information to judges about court practice and the “tariffs” that are applied by their colleagues.”²⁷

In this regard, it is instructive to consider Doob’s reflections on the inadequate judicial use of aggregate information that Doob and Park (1987) pioneered in Canada. Doob has described the slow “closing out” of that project. He has questioned the assumption that (Canadian) judges “. . . want to have easily accessible to them knowledge of current sentences being handed down in comparable cases . . .” and that judges “. . . would want to know what “like cases” were getting. We were wrong . . . Judges as a rule do not care to know what sentences other judges are handing out.”²⁸ Doob emphasises that he does not intend to be critical of judges in this respect, but rather that they operate within an environment that does not reward attention to “current practice.”²⁹ Institutional “authority” in sentencing is seen by judges to emanate from Appeal Court practice.³⁰ Judges do not feel a need to obtain information about “normal practice” except, paradoxically, where they are faced with “an unusual case”! Doob found that there were “. . . no indications in any provinces other than Saskatchewan that a reasonable number of people used the system.”³¹

Doob has argued, from his own experience and also, he implies, from the similar fate met by Hogarth’s system, that judges do not perceive there to be a need for this kind of aggregate information about “normal practice.” This explains the lack of systematic information about normal sentencing practice. To what extent has this judicial indifference to aggregate data found by Doob’s experience in Canada in the 1980s been repeated in other parts of the world and with other systems since the late 1980s?

Other than Scotland, the only other operating SIS is in the Australian state of New South Wales (NSW). The NSW SIS is distinctive from the Canadian systems in a number of ways, but most importantly in its relative longevity. The NSW Judicial Commission began work on an SIS in the late 1980s and it has since been progressively expanded. The system has been made available to every Judicial Officer in the state. Although

it might be implied that the progressive expansion and development of that system is a sign that judicial officers have found (or discovered) a need for easy access to systematic information about “normal sentencing practice,” there has, however, been no systematic programme of evaluation of the extent and nature of use of the system.

In Scotland, as part of the first phase of implementation the Scottish SIS underwent a limited programme of evaluation examining the extent and nature of judicial use. This evaluation revealed that over a period of up to eighteen months all the “pilot” judges consulted the SIS the system and reported that they had found it useful for a variety of different purposes.³²

While there has been some initial evidence from Scotland to revise the suggestion that judicial indifference to an SIS is universal, it will be intriguing to see how the nature and extent of judicial use develops over a longer period of time. In late 2002 the SIS was made available to all judges and their clerks were trained by the university team in how to enter information correctly. Recent signs are not entirely encouraging and there is now a danger that the Scottish SIS may be allowed to atrophy especially when, in the absence of long-term or institutional protection, there appears not to be a long-term strategy for future management and enhancement in line with stated user needs. It is imperative that a clear plan is made to monitor carefully and evaluate the quality of information that the courts are now expected to enter on an on-going basis.³³ Furthermore, there are important questions about how the SIS is being maintained, monitored and evaluated; and how its users are being supported: not simply with technical queries but also (and more importantly) in relation to queries about how to record and retrieve information appropriately and effectively.

In this respect, the Scottish SIS is not run by a Judicial Commission or any other official body but is an informal collaboration between the High Court judges and an academic research team. The NSW Appeal Court has referred to the NSW system in some of their judgements but has been resolutely equivocal about the extent to which the information contained in the system should influence sentencing decisions.³⁴ Doob and Park’s Canadian systems had no institutional authority and as yet, the Scottish system has no institutional home and has not been referred to by the Court of Appeal. While this unofficial status has certain advantages in allowing flexibility and imagination in development (probably impossible if it were controlled more officially), it does leave the Scottish SIS vulnerable to the financial and political pressures of the moment. Much appears to depend upon the attitude of the senior judiciary. If an SIS is not actively supported at the apex of the judiciary; is subject to very limited monitoring; and is not continuously revised in line with judicial needs then it is inevitable that it will atrophy.

Until now the Scottish SIS has been seen as an example of how judges can take proactive steps to defend their reputation and demonstrate the advantages of self-regulation over political control. The challenge for the court and the senior judiciary now is to ensure that this opportunity is not lost. If it is then there is a danger that Scotland will replicate an unfortunate recent pattern in some other English-speaking countries: a reluctance by a cautious judiciary to follow through with a relatively painless initiative, only to leave a subsequent generation of judges to have to react to an increasingly hostile climate favouring ever greater political control of sentencing.

One determinant (inter alia) of active senior judicial support for an SIS may be the perceived level of immediate political threat to judicial independence and discretion. Indeed, the initiative for the SIS came at a time of political hostility towards sentencing, whereas in more recent years Scotland’s first Justice Minister³⁵ strongly resisted calls to restrict judicial discretion. The development of the SIS was quite frequently referred to when the question arose of using legislation to restrict judicial discretion. Since that time political hostility has receded. However, following the recent general election in May 2003 a new political configuration in the Scottish Parliament is starting to take a renewed interest in Guidelines, a sentencing commission and the restriction on judicial discretion, more generally.

Wider Use of the SIS and Access

Another important issue relating to the SIS that the judiciary could and should address before politicians do so is public access.

At present, only judges and their clerks have access to the SIS. For some years now there have been requests for access to the information in the SIS from the prosecution service and defence lawyers; other public agencies both statutory and non-governmental; academic scholars and students from within Scotland and beyond; specialist criminal justice journalists; criminal justice interests groups, Parliament; and, from criminal justice policy makers in the Scottish Executive. The reason given, up til now, by the Lord Justice General, (the most senior judge in Scotland), for limiting access has been the fact that the system was “under development.” Now that the SIS has been fully implemented this becomes a less tenable justification. Whether or not the information in the SIS is, in law, “public” is a moot question, but politically it is beside the point. It seems unlikely that in the long term, the judiciary will be able to prevent non-judicial access to the system. It will be difficult to keep the information system out of the public gaze (not least because it was paid for from public funds) However, the consequences of public access need not necessarily damage the reputation of the judiciary.³⁶

The Scottish SIS presents the judiciary with a

significant opportunity to act to defend its collective independence.³⁷ Drawn as it is from extensive primary data with a taxonomy developed in close consultation with judicial users, the Scottish SIS is one of the most, sophisticated and case-sensitive sources of information on sentencing anywhere in the world. It could and arguably should be used to generate information about sentencing practices, which could help to enhance the quality of public debate about sentencing and so might play a part in restoring diminishing public confidence in sentencing.³⁸

The potential use of information from the SIS in this wider role is best explained against the background of research into public knowledge and attitudes to punishment which is widely agreed to be the key driver in penal policy. It would be possible to use the SIS reactively to help to or correct spurious claims made in the media or provide perspective for the media. Individual sentencers are understandably reluctant to enter the public fray to defend their sentencing decisions. When the media turn up the heat on particular sentences (and sentencers), almost all sentencers suffer in silence. An officer attached to, say, the senior judiciary or studies committee, would at the very least disseminate the circumstances more accurately and provide the context of sentencing patterns (see also Roberts et al 2003). Useful as it can be, such a strategy is necessarily reactive to criticism of sentencing in a particular case. It is important, therefore, to consider more proactive dissemination strategy: to help to inform opinion before the next round of spurious criticism in a particular case.

Scotland's first Justice Minister resisted confronting the judiciary or restricting judicial discretion. However, the First Minister has recently made it plain that he seeks to tackle the "crisis of public confidence" and, even if the result of this is relatively benign, there is no reason to assume that future ministers or indeed the Parliament will shy away from seeking to impose major restrictions on judicial sentencing discretion. The campaign for such restrictions is likely to be premised on the claim that it is publicly desired. There is little reason to suppose that Scottish public knowledge about sentencing is superior to that of other western jurisdictions or view the judiciary more positively than the public south of the border in England. Indeed the most recent evidence on this specific question demonstrates a similarly negative impression of judges among the general public in both jurisdictions.³⁹

A recent in-depth study commissioned by the Justice 1 Committee of the Scottish Parliament⁴⁰ found similar perceptions and misconceptions among Scots about sentencing in Scotland as have been found south of the border and throughout the western world. Asked in the abstract, only 3% thought sentencing was "too tough" and 70% thought it was too lenient, although there was some variation demographically. However, when asked

to propose sentences for different cases (using short vignettes) their sentencing practices were far less at odds with that of the judiciary than members of the public had imagined. The study also found a strong concern about perceived inconsistency in sentencing. Members of the public feel (and in this their perception was supported by the results), that they know little about crime and sentencing. "There is a pressing need to restore public confidence in the courts and the judiciary – by providing better information to the public about the work of the courts; looking at ways of improving perceptions of consistency and fairness in sentencing"; and finding ways of presenting the judiciary in a less undeservedly negative light.

A complementary, (but more proactive and effective), method of informing public (and political) awareness of sentencing would be to use the SIS data gathered by the courts to produce occasional reports with briefing notes about sentencing practice in particular areas of concern. This could be helpful in the policy consultation process on a specific matter and also to inform the debate on sentencing practice in a particular area.

Support for Major Changes in Sentencing Patterns

The Scottish SIS now provides the means to allow judges to view sentencing trend patterns in different cases. In principle this idea could be extended so that it might be used to help to project and influence future sentencing patterns. Although consistency is a virtue it is only one among many others in sentencing. The SIS could be adapted and developed to support new directions in sentencing reform. It could also assist the Criminal Court of Appeal in developing its own narrative guidelines. The Whole Offence Approach allows guidance to be developed on multiple offence cases (rather than simply on single offence cases).⁴¹ It would also be possible to supplement and link up the kind of aggregate and individual information already in the SIS with sentencing law principles and commentary on appeal court judgements.⁴²

Will the Opportunities Presented by the Scottish SIS Be Taken Up?

Over the last twenty years or so, public organisations have been required to monitor and evaluate their own performance to ensure that the public are getting value for money. In Scotland this has happened to many criminal justice agencies notably the police and prison services and more recently criminal justice social work. It seems likely that the government (which has funded the SIS's implementation) will wish to evaluate the ongoing progress. The first phase of the implementation and enhancement of the SIS was evaluated, and it is imperative that there is continued monitoring, evaluation that in turn feeds into revision and development. There is also a pressing need for a careful strategy for the dissemination of this uniquely high quality informa-

tion so as to help to balance and correct a routinely ill-informed debate about sentencing. It is hoped that these opportunities to enhance the quality of and public confidence in sentencing will be taken up.

Notes

- ¹ Frankel (1973); see also Frankel (1972) "Lawlessness in Sentencing," *CINCINNATI LAW REVIEW* 41, pp. 1–54.
- ² The extent to which Frankel's broad vision has been implemented is questioned by J. Newman (2002) "Remembering Marvin Frankel: Sentencing Reform But Not These Guidelines," *FEDERAL SENTENCING REPORTER*, vol. 14(5) pp. 319–321. However, the broad reasoning of Judge Frankel's vision, (e.g. the need for a calculus; sentencing composed of "factors"; discretion and order as counter posed), appears to be shared by the USSC's output, even if there is debate about how these ideas should be balanced.
- ³ K. Stith and J. Cabranes (1998) *Fear of Judging: Sentencing Guidelines in the Federal Courts* (University of Chicago Press); C. Tata and N. Hutton (1998) "What 'Rules' in Sentencing? Consistency and Disparity in the Absence of 'Rules'," *The International Journal of the Sociology of Law*, vol. 26 pp. 339–360. More generally see K. Hawkins (2003) "Order, Rationality, and Silence: some reflections on criminal justice decision making," in L. Gelsthorpe and N. Padfield (2003) *Exercising Discretion: Decision-Making in the Criminal Justice System and Beyond* (Willan).
- ⁴ See also K. Reiss (2001) "The Disassembly and Reassembly of US Sentencing Practice" in M. Tonry and R. Frase (eds.) *Sentencing and Sanctions in Western Countries* (Oxford University Press).
- ⁵ Scotland is a constituent part of the United Kingdom. It has a separate Parliament from that of England and Wales (south of the border), with jurisdiction over a separate system of criminal law; a separate legal profession and a separate judiciary. The highest point of appeal in criminal matters is to the Court of Criminal Appeal of Scotland.
- ⁶ However, as will be suggested later, consistency is only one virtue in sentencing and a high quality judicially-devised SIS could be used to support a programme of major change in the direction of punishment. In other words an SIS does not necessarily only serve to narrow the normal range of sentencing practice it can also be used to help to alter normal practice.
- ⁷ In Scotland, the High Court of Justiciary deals entirely with cases prosecuted under Solemn procedure (where a jury must sit in the case of a trial) and has, inter alia, exclusive jurisdictions over prosecutions for murder, rape, and treason. The Court of Criminal Appeal is composed of several members of the High Court judiciary.
- ⁸ N. Morris (1953) quoted in R. Frase, "Sentencing Principles" in M. Tonry (ed.) (1997) *Crime and Justice a Review of Research*, vol. 22. p. 366. One Scottish High Court judge also proposed the idea during the 1980s but it was quickly dismissed by the then Lord Justice General.
- ⁹ J. Hogarth (1988) *Sentencing Database System: User's Guide*, Vancouver, (University of British Columbia).
- ¹⁰ A. Doob and N. Park (1987) "Computerised Sentencing Information for Judges: An Aid to the Sentencing Process," *CRIMINAL LAW QUARTERLY*, vol. 30 p. 54.
- ¹¹ At the time, this was the Lord Justice Clerk: The Rt. Hon Lord Ross. The Lord Justice Clerk is the second most senior judge in Scotland and is responsible for criminal matters and in effect the unofficial head of the Court of Criminal Appeal. He was supported in his initiative by the then Lord Justice General (The Rt. Hon Lord Hope).
- ¹² M. Tonry (2000) "Punishment, Policies and Patterns in Western Countries" in M. Tonry and R. Frase (2000) *Sentencing & Sanctions in Western Countries* (Oxford University Press). Tonry suggests that the difference between information systems and voluntary numerical guidelines is "primarily semantic" (p. 23). However, although choice is crucial, as we argue here, there are also some important distinctions—not least the way that case similarity can be "looked up."
- ¹³ The term "normal" in this context is ambiguous since it carries normative connotations. Formally, at least the information displayed by an SIS is not normative but merely descriptive.
- ¹⁴ R. Hood (1962), *Sentencing in Magistrates' Courts; a Study in Variations of Policy* (Stevens).
- ¹⁵ M. Cavadino and P. Wiles (1994) "Seriousness of Offences: The Perception of Practitioners," *CRIMINAL LAW REVIEW*, pp. 489–498; C. Tata & N. Hutton (1998) "What 'Rules' in Sentencing?" *THE INTERNATIONAL JOURNAL OF THE SOCIOLOGY OF LAW*, vol. 26 pp. 339–360.
- ¹⁶ It might be assumed that this primary data collection is very time consuming. Although it requires trained and appropriate staff (in this case employed by the University Team), if a well-defined and clear taxonomy has been settled in advance then collecting large amounts of information can be completed quite quickly.
- ¹⁷ Annual report produced by the Scottish Office/Executive Costs, *Sentencing Profiles and the Criminal Justice System*.
- ¹⁸ E.g.: K. Hawkins (2002) *Law as Last Resort: Prosecution Decision-Making in a Regulatory Agency* (Oxford University Press); R. Lempert "Discretion in a Behavioural Perspective"; in K. Hawkins (ed) (1992) *The Uses of Discretion* (Clarendon); Moody and Tombs (1982) *Prosecution in the Public Interest* (Edinburgh University Press).
- ¹⁹ Perhaps this is the kind of approach that Alschuler had in mind when, in the conclusion to an article critical of numerical Guidelines, he wrote: "By focusing on paradigmatic crimes rather than abstract crime categories, a Sentencing Commission could escape this apparent aggregation." A. Alschuler (1991) "The Failure of Sentencing Guidelines: A Plea for Less Aggregation," *UNIVERSITY OF CHICAGO LAW REVIEW*, vol. 58 pp. 901–951.
- ²⁰ R. Emerson (1983) "Holistic Effects in Social Control Decision-Making," *LAW & SOCIETY REVIEW*, vol. 17(3) pp. 425–455; D. Sudnow (1964) "Normal Crimes," *Social Problems*; K. Hawkins (2003) "Order, Rationality, and Silence: Some Reflections on Criminal Justice Decision Making" in L. Gelsthorpe and N. Padfield (2003) *Exercising Discretion: Decision-Making in the Criminal Justice System and Beyond* (Willan).
- ²¹ A. Lovegrove (1997) *The Framework of Judicial Sentencing: a Study in Legal Decision Making* (Cambridge University Press); A. Lovegrove (1989) *Judicial Decision Making, Sentencing Policy and Numerical Guidance* (Springer-Verlag).
- ²² C. Tata (1997) "Conceptions and Representations of the Sentencing Decision Process," *JOURNAL OF LAW AND SOCIETY*, vol. 24(3) pp. 395–420.
- ²³ C. Tata, N. Hutton, J. Wilson, A. Paterson & I. Hughson (2002) *A Sentencing Information System for the High Court of Justiciary of Scotland: Report of the Study of the First Phase of Implementation, Evaluation and Enhancement* (Centre for Sentencing Research).
- ²⁴ C. Tata & N. Hutton (1998) "What "'Rules' in Sentencing? Consistency and Disparity in Sentencing in the Absence of Formal Rules," *THE INTERNATIONAL JOURNAL OF THE SOCIOLOGY OF LAW*, vol. 26 pp. 369–394.
- ²⁵ G. Zdenkowski (1986) "Sentencing: Problems and Responsibility" in D. Chappell and P. Wilson (eds.) *Australian Criminal Justice* (Buttersworth), p. 232.

- ²⁶ E.g., M. Miller, "Sentencing Reform Reform," in M. Tonry (ed.) (forthcoming 2004) *The Future of Imprisonment in the 21st Century* (Oxford); C. Hedderman & L. Gelsthorpe (eds.) (1997) "Understanding the Sentencing of Women:" Home Office Research Study 170 (Home Office); R. Henham (1998) "Sentencing Policy and the Abolition of Parole and Early Release," *INTERNATIONAL JOURNAL OF THE SOCIOLOGY OF LAW*, vol. 25 pp. 337-361; A. Ashworth (1997) "Sentencing by Computer: What Next?" *CRIMINAL LAW REVIEW*, pp. 153-154; A. Ashworth (1995) *Sentencing and Criminal Justice* pp. 340-41 (2nd ed.) (Butterworths); J. Roberts & A. Birkenmayer (1997) "Sentencing in Canada: Recent statistical trends," *CANADIAN JOURNAL OF CRIMINOLOGY*, pp. 459-482.
- ²⁷ A. Doob & J-P Brodeur "Achieving Accountability in Sentencing" in P. Stenning (ed.) *Accountability for Criminal Justice* p. 378 (University of Toronto Press).
- ²⁸ A. Doob (1990) "Evaluation of a Computerised Sentencing Aid," Select Committee of Experts on Sentencing, pp. 2-5 (European Committee on Crime Problems, Council of Europe).
- ²⁹ Indeed judges report that they are more concerned with internal consistency than with inter-judge consistency (e.g. R. Tarling (1979) *Sentencing Practice in Magistrates Courts*, Home Office Research Unit, Study No. 56, (HMSO); N. Hutton & C. Tata (1995) *Patterns of Custodial Sentencing in the Sheriff Court* (Scottish Office Central Research Unit; C. Tata & N. Hutton (1998) "What 'Rules' in Sentencing? Consistency and Disparity in the Absence of 'Rules'," *THE INTERNATIONAL JOURNAL OF THE SOCIOLOGY OF LAW*, vol. 26 pp. 339-360.
- ³⁰ Interestingly, however, there is little empirical evidence that sentencers actually alter their behaviour to accord with Appeal Court behaviour, as opposed to the perceived dominant climate of opinion.
- ³¹ A. Doob (1990) "Evaluation of a Computerised Sentencing Aid," p. 5.
- ³² Quantitative and qualitative monitoring data is reported in C. Tata, N. Hutton, J. Wilson, A. Paterson & I. Hughson (2002) *A Sentencing Information System for the High Court of Justiciary of Scotland: Report of the Study of the First Phase of Implementation, Evaluation and Enhancement* (Centre for Sentencing Research).
- ³³ Until 2002, the information was systematically collected by the University Team. The court itself is now directly responsible for this task (as well as now for any evaluation, monitoring, development, maintenance and support).
- ³⁴ C. Tata (2000) "Resolute Ambivalence: Why Judiciaries Do Not Institutionalize Their Decision Support Systems," *INTERNATIONAL REVIEW OF LAW, COMPUTERS & TECHNOLOGY*, vol. 14(3) pp. 297-317.
- ³⁵ Until elections in Scotland in May 2003.
- ³⁶ One understandable concern may be that the media may wish to use the SIS to try to make (probably spurious) claims about disparity between individual judges. However, the interface of the SIS was built in such a way that such comparisons are very hard to do.
- ³⁷ Even if one sees judicial independence as little more than individual independence, then the one thing that individual judges share in common is an interest in that individual independence.
- ³⁸ This would be in addition to the inevitable requirement to allow open public access.
- ³⁹ H. Genn & A. Paterson (2001) *Paths to Justice: What People Do and Think about Going to Law*, p. 233 (Hart Publishing).
- ⁴⁰ Report to Justice 1 Committee of the Scottish Parliament.
- ⁴¹ On the need to develop guidance in multi-offence cases, see also T. O'Malley (2002) "The Criminal Jurisdiction of the Courts" *Jurisdiction of the Courts Ireland Conference* (Dublin).
- ⁴² In principle a link with the "what works" literature could also be made, although great care would be needed in how to interpret the complexity and contingency of this research.