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Borderline sentencing:

A comparison of sentencers' decision making in England and Wales, and Scotland

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Abstract

This article draws together findings from two related studies of sentencing in England and Wales, and Scotland. It examines how sentencers in the two jurisdictions differ in their sentencing decision making, with a focus on cases on the borderline between prison and a community penalty. The article suggests that, despite differences in legal systems and criminal justice structures, sentencers' decision making in the two jurisdictions was remarkably similar. In both jurisdictions they took account of a wide range of factors in reaching their decisions, among which the legal category of the offence under sentence was often subsidiary to other considerations. The main difference between the two jurisdictions was the much more dramatic rate of increase in the adult prison population in England and Wales than in Scotland. Several possible explanations are offered for this, including the literal and metaphorical distance of Scotland from Westminster and the greater impact of sentencing guidance south of the border—which has probably had a largely unintended inflationary effect on the prison population.

Key Words

borderline cases • England and Wales • Scotland • sentencers
• sentencing

Introduction

Since the early 1990s the prison populations of both England and Wales and Scotland have increased, to a position where more people per head of the population are now imprisoned in both jurisdictions than ever before. Two recent parallel studies by the authors (Hough et al., 2003; Tombs, 2004),¹ conducted as part of the Esmée Fairbairn Foundation's Rethinking Crime and Punishment initiative, considered reasons for this change. The studies examined Home Office and Scottish Executive statistics on convictions and general sentencing patterns and trends in the use of imprisonment in the courts, and reviewed other relevant research. Both studies also focused on the processes by which sentencing decisions are made, especially in relation to cases on the borderline between custodial and community sentences. They found that sentencers were more likely to sentence someone to custody than a decade earlier and, when they did, the sentence was likely to be longer than previously—although these trends were much less dramatic in Scotland than in England and Wales.

This article discusses some of the main research findings in the two countries. It examines whether sentencers in the two distinctive legal jurisdictions talk in similar or different ways about sentencing decision making, with a particular focus on the decisions they actually make in cases on the borderline between prison and a community penalty. We consider the decision making process and examine sentencers' explanations, or narratives of sentencing. We also consider the different pressures on sentencers from the courts, from politicians, from the public and from the media. Overall, we suggest that, despite differences in legal systems and criminal justice structures, sentencers' decision making in the two jurisdictions was remarkably similar. In particular, sentencers in both jurisdictions took account of a wide range of factors in reaching their decisions, among which the legal category of the offence under sentence was often subsidiary to other considerations—a feature of sentencing that is insufficiently recognized by policy. The main difference between the two jurisdictions was the much more dramatic rate of increase in the adult prison population in England and Wales (71%) than in Scotland (24%). We offer several possible explanations for this, including the literal and metaphorical distance that Scotland enjoys from Westminster and the greater impact of sentencing guidance south of the border which, we suggest, has had an unintended inflationary effect on the prison population.

Background

England and Wales and Scotland share an adversarial basis to their criminal proceedings; however the courts differ somewhat both in tradition and function. To summarize, in England and Wales² the less serious offences, summary offences, are heard at a Magistrates' Court, either by a bench of three Lay Magistrates or by a single District Judge (formerly known as a Stipendiary

Magistrate). Cases that are at the upper limit of their jurisdiction—triable either way cases—can be transferred to the Crown Court for trial or sentence. The Crown Court hears the more serious offences, indictable offences; cases are presided over by a single Judge and tried by a 12-person jury. Appeals³ can be taken in the first instance to the Court of Appeal, and then to the House of Lords acting as the equivalent to a supreme court.⁴

In Scotland⁵ summary cases are heard by one or more Lay Justices in the District Court, in Glasgow by a legally qualified Stipendiary Magistrate or by Sheriffs⁶ sitting alone in a Sheriff Summary Court. Sheriffs, sitting in the Sheriff Solemn Court, also hear more serious—or solemn—cases.⁷ The Sheriff Solemn Court is presided over by a single Sheriff and cases are tried by a 15-person jury. As with triable either way cases in England and Wales, cases can be sent to the High Court for sentence or trial. The High Court of Justiciary, when sitting as a trial court (Court of First Instance), hears the most serious cases and is presided over by a single Judge of the High Court, known as a Senator, and tried by a 15-person jury. The High Court of Justiciary also acts as a supreme criminal court and as appeal court. Unlike England and Wales, appeals cannot be referred onto the House of Lords.

The studies

Our finding that sentencers in both jurisdictions took account of a wide range of factors in reaching their decisions, among which the legal category of the offence under sentence was often subsidiary to other considerations, is consistent with sentencing studies in other countries (e.g. Hogarth, 1971). In England and Wales, an early study by Hood (1962) in Magistrates' Courts showed that the differential use of imprisonment could not be explained by differences in the nature of the cases coming before the courts. His subsequent research on sentencing motoring offenders in Magistrates' Courts also revealed variations in practice insofar as the sentences suggested by Magistrates for the same hypothetical cases of, for example, driving while disqualified, ranged from a fine of £25 to imprisonment (Hood, 1972: 67). In explaining this kind of disparity Hood identified a strong association between Magistrates' sentences and membership of a particular bench. Similarly Tarling (1979: 1), in a study based on court records and interviews with Magistrates, found variations in the use of imprisonment of between 3 and 19 per cent which could not be explained by differences in the mix of cases coming before the courts. He too pointed to local traditions in Magistrates' benches as an explanatory factor for such divergences, a conclusion also reached by Parker et al. (1989). Such variations in sentencing practice have been shown to persist despite the introduction of the Magistrates' Association guidelines (see Flood-Page and Mackie, 1998). Thus, in his most recent study of sentencing patterns in Magistrates' Courts, Tarling (2006) continued to find wide variations in practice; for example, for burglary there was a difference of 32 per cent between those courts using custodial sentences least and most frequently.

Though there have been few studies of sentencing decision making in Scotland, Hutton and Tata (1995) found disparities in the lengths of custodial sentences passed in the Sheriff Courts for similar cases. Studies in the Crown Court in England and Wales have also identified variations in practice and shed light on the factors that influence decision making. For example, in their exploratory study Ashworth et al. (1984) revealed a number of possible influences, such as the way in which judges construct 'the facts of the case', the defendant's attitude in court, judicial views about certain types of offence and offender, judicial views about public opinion and its relevance to sentencing, attitudes towards pleas in mitigation and pre-sentence reports, trial judges' views about the Court of Appeal and the limited extent to which judges were aware of their own sentencing practices. Ashworth et al. were not, however, granted access to the judiciary to investigate fully these influences, a problem also experienced by Hood (1992) in his study of race and sentencing.

By contrast, our studies benefited from full access to the judiciary at all court levels in both jurisdictions. We were therefore able to build on the body of work referred to earlier and, in particular, examine in more detail many of the influences on decision making identified by Ashworth et al. (1984). This we did through a specific focus on the factors that determine whether or not sentencers impose prison sentences in cases that they themselves perceive as lying on the borderline between a custodial and non-custodial sentence. Given this focus, the core of both studies comprised in-depth interviews with sentencers. In England and Wales one-to-one interviews were carried out with 48 Crown Court Judges, Recorders and District Judges. Additionally, five members of the Senior Judiciary were interviewed. In Scotland, one-to-one interviews were conducted with 34 Sheriffs from across the country, a Stipendiary Magistrate and with five members of the Senior Judiciary, hereafter referred to simply as Judges. The Crown Court Judges, Recorders, District Judges and Sheriffs were each asked to provide details of four of their own cases which lay on the borderline between custodial and non-custodial penalties and it is their decision making in relation to these cases that forms the basis of this article. The article also draws on focus groups in England and Wales conducted with a total of 80 Magistrates, who, in addition, completed a questionnaire that provided details about their borderline sentencing decisions and views on non-custodial penalties. Where appropriate we draw on our examination of Home Office and Scottish Executive statistics.

Why did the prison populations rise?⁸

During the period of study in England and Wales the average adult prison population rose by half from 36,246 in 1991 to 54,376 in 2001. Over the period of study in Scotland the increase was not as large, but it was still significant: the average adult prison population stood at 4470 in 1993, increasing by nearly a quarter to 5530 in 2002. At the time of writing the prison populations of both jurisdictions were continuing to rise.

Both studies looked at reasons for the increase. First, the growth in the prison population could not be explained by more offending, as crime—however measured—had been falling from the mid-1990s onwards (McVie et al., 2004; Scottish Executive, 2004; Bhimjiyani and Allen, 2005). Analysis of Home Office and Scottish Executive statistics showed that the rise in prisoner numbers was not the result of more convictions; neither was it due to an increased court workload. Greater use of remand could not explain the very large increases, although in Scotland a 57 per cent increase in the use of adult remands over the period of study had undoubtedly contributed.

In both jurisdictions two key contributing factors were identified: sentencers' use of custody had increased and offenders who would previously have been sent to prison were being given longer sentences than before. During the period covered by the study in England and Wales (1991–2001) the custody rate for Magistrates' Courts increased from 5 per cent to 16 per cent and for the Crown Court it rose from 46 per cent to 64 per cent. Over the same period there was greater use of long sentences at the expense of middle-range sentences; sentence length increased particularly in relation to convictions for sexual offences and burglary. In Scotland custody rates increased in the Sheriff Summary and Solemn Courts over the period of study,⁹ albeit much less dramatically than in England and Wales. Similarly, there was greater use of long sentences in Scotland, mainly at the expense of short sentences; the numbers of adults arriving in prison with sentences of 4 years and over, excluding life, increased by 51 per cent.

Other factors in both jurisdictions relevant to the increase in the prison populations included large increases in the number of persons found guilty of drugs offences. Legislative changes also contributed, for example the introduction of mandatory minimum prison terms for third-time drug traffickers¹⁰ and the doubling of the maximum sentence for causing death by dangerous driving.¹¹ While the majority of such legislative changes has created pressure in an upward direction, changes have usually been targeted at small sub-groups of offenders. However, the more that sentencers aim for proportionality—with offences of similar gravity and culpability receiving similar sentences—the more effect there will be on broader sentencing practice (see Woolf, 2002). Some procedural changes in both jurisdictions have similarly pushed up the prison population, including changes in parole and automatic release and, in England and Wales, changes in committal practice. Both jurisdictions also experienced declines in the use of fines, though again less dramatically in Scotland. Reduced use of fines may have contributed to the rise in the prison populations since offenders who receive community penalties (rather than fines) early in their criminal careers exhaust alternatives to imprisonment more rapidly (see, for example, Morgan, 2003). Last, even though there was no statistical support for their views, sentencers in England and Wales and in Scotland thought that the quality of cases coming before them was getting worse—that is, typical cases of offences such as wounding were 'nastier' or more serious than previously.

Whether the prison population should be contained is a political decision,¹² and with no single cause to the rise, there is unlikely to be a single effective way of reversing the trend. However, our findings suggest that the core of any strategy to reduce reliance on imprisonment, in both jurisdictions, will be concerned directly with sentencing decisions, and in particular the decisions whether to imprison and for how long to imprison.

Sentencing decisions

Sentencers participating in the two studies were asked both about their general approach to sentencing, and about how they make decisions in relation to borderline cases. In terms of their general approach, the majority of sentencers in both jurisdictions spoke in terms of prison being a sanction of 'last resort' (as they are required by legislation), or as the 'ultimate penalty'. As one Crown Court Judge in England and Wales observed, 'We do try to keep people out of prison if at all possible.' Similarly a Sheriff in Scotland noted, 'I try very hard to keep people out of custody. I send someone to prison only when there is no other sanction applicable.' Several expressed considerable discomfort in imposing custody:

Without a doubt sentencing someone to prison is the most difficult thing I do. Bluntly, I don't like sending people to prison.

(Sheriff, Scotland)

It is something that you reflect, that you have taken the responsibility with a couple of others of depriving someone of their liberty.

(Magistrate, England and Wales)

Nevertheless, however much they claim to dislike doing so, sentencers are in practice sending proportionately more people to prison, and for longer. While the studies did not focus on decisions about sentence length, both went into considerable depth about the factors that sentencers take into account when deciding whether or not to imprison.

The decision-making process

For both studies sentencers were asked to describe how they approached the sentencing decision-making process; in particular whether the process of arriving at a given sentence was primarily structured, intuitive or based on experience. While there was no overall consensus, some differences in the general pattern did emerge. In Scotland, sentencers most commonly described what they viewed as a structured decision-making process, in terms of stages in the sentencing task, though they noted that intuition and experience also played a part. As one Scottish Judge noted, 'The process is structured, but the feeling you get from experience comes into it.' Others argued that the process was not particularly structured and that the 'feel' of a case, based on experience and

intuition, was more influential; some said their decision-making process was entirely intuitive and based on experience.

In England and Wales the Magistrates surveyed tended to say they followed a structured decision-making process and made full use of guidelines issued by the Magistrates' Association. District Judges, Recorders and Crown Court Judges were more likely to say that the decision-making process is intuitive and based on experience, at least to some degree. However, sentencers often spoke in terms of a mixed process; as one Crown Court Judge observed, decision making was, 'partly intuitive, but largely structured'. A Recorder noted an intuitive process, but one that is checked against case law: 'Intuitively I think, "well what do I think is right?" And then I check with some case law for sentencing purposes to see whether I'm off the mark.'

A Senior Judge interviewed in London observed a push for structure and conformity, while at the same time recognizing a need for subjectivity:

In training, judges are told there's a desirability that two judges in different courts should end up with the same sentence. We teach people there's a need for some degree of conformity. Equally, we teach people that no two cases are the same; you must make a judgment on each individual case. Judges do approach it in that kind of way. There's a subjective element to it, starting from an objective basis.

It is possible that the more sentencers receive judicial training, the more conformity there will be. Deciding whether this is a good or bad thing is beyond the scope of this article. However, several sentencers in England and Wales suggested that attempts to achieve conformity tended to have more success in bringing lenient sentencers into line than tough ones, the net result being an increase in the use of custody in borderline cases. As one Recorder put it:

I wonder if the effect [of training] has been to firm up judges who might otherwise be softer or a bit more inventive about sentencing. My guess is as soon as you're more systematic about it you end up with more custodial sentences.

In England and Wales conformity, or regularity, in sentencing has also been emphasized through Court of Appeal guideline judgments, use of practice directives and through the establishment of the Sentencing Advisory Panel in 1999, and more recently the Sentencing Guidelines Council. (At the time of fieldwork, the Council had yet to issue any guidance, however.) Precisely how responsive sentencers are to guidance is unclear, although some of the Crown Court Judges interviewed clearly talked in terms of proofing their decisions against prosecutorial appeals against sentence. As with legislative changes, one would expect guideline judgments or directives on specific offences to have knock-on effects, given the priority sentencers claim to place on proportionality and parity. Taking the example of Court of Appeal judgments in England and Wales, Dunbar and Langdon (1998) observed that, because of the nature of its workload and the experience of

its judges, the Court, 'operates the highest tariff of all and ... takes a view of less serious offences that is markedly more severe than the view of the lower courts' (1998: 69). As a consequence one would anticipate greater pressure on more and longer prison sentences. Of course, not all guideline judgments will push up the prison population; at the time of the study influential judgments by the Court of Appeal in *Ollerenshaw* (1999),¹³ *Mills and Kefford* (both 2002)¹⁴ and *McInerney and Keating* (2002)¹⁵ all encouraged the sparing use of custody.

Similarly, the few existing guideline judgments in Scotland are not necessarily in an upward direction. At the time of the study influential judgments included *Ogilvie* (2001),¹⁶ where the sentence was cut in a case of downloading pornography, and in *Du Plooy, Alderdice, Crooks and O'Neil* (2003)¹⁷ with regard to discounts for a guilty plea. The main reference point for sentencers in Scotland was their perceptions of how the Appeal Court (at the High Court of Justiciary) would be likely to view the sentence. Decisions were generally 'proofed' against appeals against sentence and, to a much more limited extent than in England and Wales, against the very few guideline judgments that exist in Scotland. Scotland lacks a well-established tradition of guideline judgments such as those from the Court of Appeal in England and Wales. There is no history of anything equivalent to that tradition, nor is there anything in Scotland equivalent to the Sentencing Advisory Panel, or indeed the Sentencing Guidelines Council in England and Wales. This position is, however, likely to change in the near future given that the Sentencing Commission for Scotland, in its final report (SCS, 2006), recommends the introduction of an Advisory Panel on Sentencing in Scotland (APSS) to be responsible for the preparation of draft sentencing guidelines for consideration by the Appeal Court.

Appeal court guideline judgments generally have limited relevance for Magistrates' Courts in England and Wales or District and Sheriff Summary Courts in Scotland. For this reason, and as already noted, in England and Wales the Magistrates' Association developed a series of sentencing guidelines—from 1989 covering most relevant offences. Ninety per cent of Magistrates who completed the questionnaire stated that they refer to the guidelines when retiring and none said they make little use of them. However, some Magistrates argued that these guidelines have had an inflationary effect on sentencing as 'entry points'—the recommended sentence for typical cases—were higher in the guidelines than in previous practice. It is likely that the Magistrates' Association guidelines, along with Court of Appeal guideline judgments, drew lenient sentencers up to the recommended norm, while leaving the decisions of tougher sentencers untouched.

Scotland has no equivalent to the Magistrates' Association guidelines in England and Wales. However a couple of the Sheriffs interviewed who were in favour of guidelines actually used the Magistrates' Association guidelines for England and Wales as an aid to their sentencing. These two Sheriffs were, however, the exception. The written 'guidance' referred to and used by most of the sentencers who took part in the study in Scotland was contained in the weekly digest of law reports, a textbook on sentencing law and practice in

Scotland, and what sentencers commonly referred to as the ‘Bench Book’, produced by the Sheriffs’ Association and containing information on criminal procedure, evidence and sentencing. While most of the sentencers in Scotland said that they would welcome more *guidance* from the Appeal Court on sentencing, they were on the whole against the use of *guidelines*. There was little support for the introduction of any guidelines similar to those used by Magistrates in England and Wales. As one of the Judges observed:

There’s a place for the Appeal Court to do more in the way of giving guidance than they’ve previously done but I’m resolutely opposed to the tick box approach to sentencing guidelines. That is not the proper way to administer justice. If judges make wrong sentencing decisions, you have the Appeal Court; that’s where to look for consistency.

This view was echoed by the majority of Scottish sentencers. One of the Sheriffs, for example, said that:

The search for consistency through guidelines is illusory. There is no doubt that guidelines would make sentencing easier but there are strong arguments against them. I like the room to be able to do what’s right. The ‘let out’ clauses in guidelines are insufficient. They are too restrictive, prescriptive and they inhibit the exercise of sound discretion. We—not guidelines—should take responsibility for our intervention in people’s lives.

Borderline sentencing

In both jurisdictions sentencers recognized that borderline cases—those on the cusp between a community sentence and custody—were more frequent in the lower courts. None the less, most said that they had heard at least some such cases. A Recorder in the study in England and Wales who followed a fairly structured decision-making process—in terms of stages in the sentencing task—described a borderline decision thus:

First step, does it pass the custody threshold? That of itself does not mean it has to be custody. You then go on to the second stage ... can you bring it down so as to pass a community penalty or not?

At this point in the decision-making process various mitigating and aggravating circumstances are taken into account. Even though in Scotland there has been no specific development of the concept of a custody threshold, the process of decision making described by Scottish sentencers in relation to borderline decisions was similar to that described by their counterparts in England and Wales. Likewise, though much less frequently in both jurisdictions, a borderline case could work in reverse, where the starting point is a community sentence, but other factors push the sentence towards custody.

Before looking at decisions on the borderline in more detail, we first consider whether the sentencers saw custody as a unique punishment, or whether

there was an overlap with equivalent community sentencing options; in effect, whether there is a fuzzy border or a definite, distinct sentencing threshold. In short, when asked whether they viewed any community sentence as equivalent in penal weight to a prison sentence, the overwhelming majority of sentencers in both jurisdictions made it unambiguously clear that they did not. The concept of equivalence did not apply. One District Judge in England and Wales observed, 'if you reach a conclusion [that] it's custody, how can you come back down from that?' Most sentencers in Scotland and in England and Wales saw prison as a unique punishment, as the most severe punishment that no community sentence could conceivably equal. Indeed, for the most part they viewed prison as qualitatively different. Thus one of the Scottish Judges noted that:

Restriction of liberty orders and drug treatment and testing orders can be demanding but prison is qualitatively different. People forget this. That we are asking ourselves—'do I have to send this person to prison?'—indicates that it is the worst sentence.

The point made by another Judge interviewed in Scotland—that, 'Prison is something different, I'm certain of that. Community Service is not in the same league'—was made over and over again. Moreover, one of the Sheriffs echoed the sentiments of the majority of sentencers in emphasizing that he saw a community sentence as an 'alternative' to custody, rather than an 'equivalent' and that these were 'different concepts' that had very different practical consequences for an offender. The main distinguishing feature of custody—the one that stood it apart from any community option—was the deprivation of liberty, of personal freedoms. As one of the Sheriffs argued:

Tagging and community service are supposed to be equivalent but they're not. Shutting the door and locking someone up is not the same. Jail is reserved for when you've tried everything else. There's something awful about taking away someone's liberty. People don't understand just how severe a punishment prison is.

None the less, there were some sentencers in both jurisdictions who did see some community sentences as equivalent to custody. In England and Wales some of those interviewed could see tagging as equivalent to a short prison sentence as it deprived the offender of a certain degree of liberty. A few of the Sheriffs in Scotland also mentioned tagging as 'almost equivalent' and one expressed his view of penal equivalence as follows:

Sometimes I look at a strict probation order as an equivalent to a short custodial order. The duration of a probation order can be for much longer. For some people a non-custodial order can be very difficult. I am not convinced that custody is the most severe sentence.

This view was, however, in the minority. Most sentencers in both studies regarded prison as qualitatively different to available community options. None the less, the concept of borderline cases still applies as sentencers still

have to decide whether or not to imprison; they have to decide what tips the balance towards or away from their use of custody. As noted earlier, the strong message from sentencers in both jurisdictions was that they use custody sparingly; they argued that they resort to custodial sentences only when the seriousness of the offence and/or the offenders' records leaves them with no option. In such circumstances they talked in terms of the unavailability of prison as if they simply had no choice in the matter; that they 'had to' impose a prison sentence.

The sentencers stressed that the unavailability of custody applied to short as well as to long sentences; that they imposed short sentences only because they were compelled to do so by the nature or circumstances of the offence and/or the offender's record of previous breaches for community sentences and criminal history. They did not issue short prison sentences because they lacked confidence in the community alternatives (see also Millie and Jacobson, 2004). In only 2 of the 150 borderline cases that went to custody in England and Wales and in none of the 48 borderline cases that resulted in custody in Scotland was a lack of satisfactory community sentences cited as a key factor in the sentencing decision (see Hough et al., 2003; Tombs, 2004). Neither did sentencers impose custody because they believed short prison sentences were likely to be particularly constructive for the offender. One District Judge in England and Wales observed:

I don't think even sentencers are naive enough to actually claim [short sentences] do anything in terms of rehabilitation. It locks people up, and in many respects, that's the best outcome at this moment in time you can get for a lot of people. It just keeps them away from those who they're causing problems to.

The perceived value of temporary incapacitation was noted by a Sheriff in Scotland, but this time as respite for the offender: 'getting them off the streets and away from drugs'. How realistic this was is another issue.

A few sentencers held the view that, for those who had no prior experience of custody, a short prison sentence could be beneficial; one Recorder in the study in England and Wales observed, 'sometimes I feel that people need a little shock to the system, the clang of the prison gates'. In Scotland a Judge commented on the shock value of a short prison sentence, especially for young offenders:

There is nothing like the close of the prison gate in bringing home the seriousness of the situation ... the short, sharp, shock. A short period for young offenders might shock them and stop them re-offending if they can be kept apart from more hardened criminals.

Even when no positive benefit in terms of the impact on the offender's likelihood of re-offending or otherwise could be claimed, several sentencers agreed with the Sheriff who argued straightforwardly for the strictly punitive value of a prison sentence. He remarked:

I haven't been shaken out of the view that there are certain things that people should be punished for. There has got to be a time when you say—'right, that's

just too much, enough is enough'—where you've simply got to give an unpleasant sentence.

Sentencers in both jurisdictions shared this Sheriff's view of the need to impose a prison sentence when an offender's behaviour had become 'just too much'. They also agreed that in such circumstances a prison sentence was necessary precisely because it was, in the words of another Sheriff, 'a uniquely severe and unpleasant punishment'. They felt that 'everything else had been tried'; that they had simply 'run out of alternatives'.

The point at which 'enough is enough' was reached, however, was not defined in terms of legal categories. In both jurisdictions, borderline decisions, including those that resulted in custody, covered a very wide range of crimes and offences. The most commonly mentioned in England and Wales were violence and motoring offences, both of various degrees of seriousness. Other offences were theft and handling (including several cases of theft in breach of trust), burglary and fraud and forgery. Those suggested by sentencers in Scotland were assaults and motoring offences, again both of various degrees of seriousness, drug offences, theft (including shoplifting), fraud cases and housebreaking (burglary).

Despite this wide coverage, no consistent differences emerged, either in Scotland or in England and Wales, between the offence categories resulting in custodial decisions and those attracting community penalties. In short, contrary to many of the assumptions underlying contemporary penal policies and despite the legal and cultural distinctiveness of the two jurisdictions, legal categories were rarely significant in determining whether a custodial sentence was imposed. What was most important was that, from the vantage point of sentencers, the 'time had come' when they had 'no alternative' but to impose a prison sentence. This 'time' was less to do with legal categories than to do with the interaction between the offender's criminal history—importantly including her/his history of having been breached for earlier community penalties—and the seriousness with which sentencers viewed the offence in question (see Tombs and Jagger, 2006).

Factors tipping borderline decisions

Thus while offence categories alone did not distinguish between borderline cases that resulted in custodial as opposed to non-custodial sentences, there were marked differences in the sort of aggravating and mitigating factors which tipped decisions one way or the other.

As noted earlier, Crown Court Judges, Recorders, District Judges, Sheriffs and Magistrates were asked to recall four borderline cases. Where possible these were two that resulted in custody and two resulting in a non-custodial penalty. For England and Wales details were collected on 311 such cases, and for Scotland, 108. These were analysed to determine which factors tipped decisions one way or the other. Broadly speaking, there were very few differences apparent between sentencers in the two jurisdictions (see Table 1).

Table 1. Factors considered in borderline cases (108 cases for Scotland and 311 for England and Wales)

<i>Factors^a</i>	<i>Borderline cases resulting in custody</i>				
	<i>Scotland</i>	<i>England and Wales</i>	<i>District Judges</i>	<i>Recorders</i>	<i>Crown Court Judges</i>
	<i>Sheriffs</i>	<i>Magistrates</i>			
Nature of offence ^b	32	42	18	18	13
Criminal history	28	45	13	4	9
Response to prosecution	7	13	3	6	5
Offender's circumstances	2	5	1	3	—
Offender's condition	4	4	2	3	—
Other ^c	9	10	7	10	7

<i>Factors^a</i>	<i>Borderline cases resulting in community penalty</i>				
	<i>Scotland</i>	<i>England and Wales</i>	<i>District Judges</i>	<i>Recorders</i>	<i>Crown Court Judges</i>
	<i>Sheriffs</i>	<i>Magistrates</i>			
Nature of offence ^b	7	18	4	5	12
Criminal history	12	31	8	9	10
Response to prosecution	15	31	6	15	9
Offender's circumstances	30	29	10	19	13
Offender's condition	26	28	19	14	12
Other ^c	17	21	10	12	16

Notes: ^aKey factors which tipped decision towards or away from custody.

^bSeriousness of the offence, including offence-related aggravating or mitigating factors.

^cIncludes reference to deterrence, the need to send a 'message' about certain offences, perceived risk of reoffending, Pre-Sentence Report/Social Enquiry Report recommendations, attitude of the victim and other factors.

The nature of the offence and the offender's criminal history were the most influential factors in borderline cases in both studies that resulted in custody (custodial borderline cases). Cases that resulted in custody tended to result from the offence being deemed so serious that a non-custodial sentence was not thought possible; alternatively, the offender's past convictions and failure to respond to past sentences, often ruled out non-custodial options.

For both studies the offender's circumstances and condition were the most influential factors in cases resulting in a non-custodial penalty (non-custodial borderline cases). Where the studies differed slightly was that Magistrates in England and Wales tended also to give more weight to an offender's criminal

history and response to prosecution in non-custodial borderline cases. Recorders also tended to consider response to prosecution, while Crown Court Judges also took account of the nature of the offence and criminal history. These differences were slight. What was overwhelmingly the case in both jurisdictions was that in practice sentencers consider a whole range of factors. Above all, again in both jurisdictions, is the large emphasis placed on personal mitigation for non-custodial borderline cases (see Jacobson and Hough, 2007).

The kinds of factors—relating to the offender's circumstances—that tipped a decision towards a community penalty included: family responsibilities; support from family; having a stable relationship; current employment or training; or prospects; and/or having accommodation. Factors related to the offender's condition that made community sentencing more likely included: evidence of motivation to address problems causing offending behaviour (drugs, drink, violent tendencies etc.); physical and mental health problems; and/or the offender's age (a young or elderly offender). Sentencers who considered the offender's response to prosecution took account of a demonstration of genuine remorse, or the capacity to understand the repercussions of the offence; evidence of co-operation with the court; and/or a guilty plea. Factors related to the offender's criminal history that tipped decisions towards a non-custodial outcome tended to be 'previous good character' (i.e. no prior convictions); not *many* (or recent) prior convictions; or no *related* prior convictions.

As other studies have found (Shapland, 1981, 1987; Ashworth et al., 1984), defence pleas in mitigation could bear directly on the sentence. Sentencing decisions tended to be tipped away from custody by a range of issues related to personal mitigation, as exemplified in the following quotations:

You have an idea where it's going but then you hear the plea in mitigation; all the mitigating circumstances. You would be surprised how many times custody is not chosen, how often I move back from that.

(Sheriff, Scotland)

Quite often you read [the case papers] and think, 'well this chap's got to go inside'. And then you ... hear all the mitigating circumstances and you come down on a non-custodial.

(Recorder, England and Wales)

Narratives of sentencing

The decision-making process—whether structured, intuitive or based on experience—was often expressed as a narrative. It was evident from the ways in which the sentencers described their borderline cases that sentencing as currently practised is an unavoidably value-laden process, reflecting the fact that the court process as a whole, especially where there is a trial,

centres on the complex human stories of the accused and those affected, as much as on the law. In both studies sentencers' accounts of borderline decisions involved social and moral reasoning as well as expertise in applying the law. Decisions were framed within a set of explicitly ethical—and subjective—concepts, assessments of an offender's intentions and capabilities, as well as attitudes towards the offence and signs of remorse. As signs of remorse, for example, could tip a sentence away from custody, several sentencers in both studies emphasized that they would need to assess the authenticity of remorse, that the accused was 'truly repentant':

He's blubbing away there and the only reason he's blubbing away is that he's sorry for himself; or look at him, he does actually realize that this has had a devastating effect on the victim.

(Senior Judge, England and Wales)

The nature of the response of the accused is important. Even in relatively serious cases, where you must take a very serious view in the public interest, evidenced contrition should be taken into account. The way in which contrition is carried through can indicate that another option [to custody] is possible.

(Sheriff, Scotland)

Explicitly moral language was also pervasive. Most obviously, sentencers often referred to offenders of 'previous good character', or cases where offenders had acted 'out of character'. But the language used was often less pedestrian. One Recorder in England and Wales, for example, commented that he did not use custody in a particular case because, 'prison is reserved for evil people and in this case the offender wasn't evil so I could be merciful'. In Scotland, one Sheriff spoke of an offender as being 'a bad wee devil!' A moral narrative could express itself in despair, or hope, for the accused, as a Judge in Scotland expressed:

One of the functions of punishment is also to show mercy. Sometimes, despite the gravity of the crime, the circumstances of the offender may influence you towards a non-custodial disposal ... where there is hope that the offender can be rehabilitated.

Signs of hope were also taken from other aspects of the offender's life, such as the mending of a relationship with parents, a new stable girlfriend or boyfriend, or the prospect of a job. The converse of the situation was when community options had been tried in the past, and failed. In the study in England and Wales a District Judge observed that courts find themselves 'out of despair using custody'; in one focus group, Magistrates spoke of people 'sentencing themselves' to custody because of past failure to respond. Similarly, several Sheriffs in Scotland talked about the frequency with which they had 'exhausted all the alternatives' before imposing a prison sentence 'in despair' of the offender.

The inevitable subjectivity of the process of assessing hope or failure, and indeed an offender's character, can help to explain the sharp inconsistencies in sentencing practice among sentencers who all assert they use custody only as a last resort. As Parker et al. observed over 15 years ago with respect to Magistrates' sentencing of young offenders in England and Wales:

It is no wonder that sentencing patterns are so difficult to explain when at the heart of the process is the belief that sentencers, and they alone, are uniquely placed to understand, not only the uniqueness of the events which constitute the offence, but also the character of the individual who has committed it.

(1989: 116)

Moreover, one of the consequences of an emphasis on personal mitigation in borderline decisions, and the moral and ethical narratives used by sentencers to explain this, is that offenders who are already economically and socially disadvantaged are likely to suffer further disadvantage in the sentencing process. Some of the sentencers interviewed were fully aware that socio-economic background had had an impact on the sentence given:

Some people would say that [the offender] is fortunate to be able to repay the money to avoid a custodial sentence. But £5000 will be recovered ... that reparation has to be taken into account.

(Sheriff, Scotland)

I always give big credit to middle-aged persons of previous good character on the basis that they are unlikely to commit an offence again and will have found a court appearance a genuinely stressful event.

(Crown Court Judge, England and Wales)

In various ways, sentencers emphasized that the personal mitigation that influenced their sentences in such cases was such that the wider public interest was protected.

Pressures on decision making

The wider public interest also exerted pressure on sentencing decision making in rather different ways. We have already discussed the influence of legislation and the legal framework, for instance in terms of Appeal Court guideline judgments or the Magistrates' Association guidelines in England and Wales. In both jurisdictions, several legislative changes have undoubtedly created pressure in the same upward direction on the prison population. In addition, though much less frequently in Scotland, sentencers talked about the political pressures from government for increasingly severe sentences. Especially in England and Wales, sentencers were very much aware that their decisions were not made in a court vacuum, but in a highly pressured political and social context. In terms of pressure from 'the centre' several regarded this as a call for increased punitiveness: 'Undoubtedly all the drivers from all

the political parties have been for longer and longer sentences, and that feeds through. The climate is punitive' (Senior Judge, England and Wales).

Moreover, sentencers in England and Wales also argued that they were being given 'mixed messages' on sentencing, both from politicians and from the senior judiciary. Not only did they perceive the Home Office, Lord Chancellor's Department/Department for Constitutional Affairs and the Lord Chief Justice as contradicting each other, they also argued that they had been aware of inconsistencies in the messages from *within* departments. A Magistrate commented that when the Government talks about being tough on crime, 'we are then told in the next breath, don't send anybody to prison'. Thus a Crown Court Judge commented: 'One minute they're shouting because you're not being hard enough with them—and the Court of Appeal are increasing sentences, and then they're telling us we shouldn't send people to jail.'

Some of the sentencers in England and Wales also talked about there being too much political interference in sentencing and remarked on tendencies on the part of government to make 'knee-jerk reactions' in order to try to influence the courts for populist gains. Magistrates in one of the focus groups, for example, argued that the judicial process should be a matter of 'justice, not popular justice'. By contrast, Scottish sentencers expressed fewer concerns about political interference and populism. They did not mention getting mixed messages from the senior judiciary. They did, however, speak about mixed messages coming from the Scottish Executive (the Government in Scotland); according to one Judge the Executive was 'increasing the number of offences on the one side' while 'repeatedly saying that the prison population is too high'. A few spoke also about too much political interference in their decision making. And in both jurisdictions some sentencers expressed concern about the amount and nature of new legislation and its impact on sentencing: 'Legislation is constantly one-off. No-one seems to look at the whole thing [sentencing] in the round. We need to be freed up from the consequences of mistakes made [in drafting legislation]' (Sheriff, Scotland).

Several sentencers were also aware that their work is constantly appraised by the media and the public, and that they are often perceived as not being tough enough. Such pressures were apparent in certain offences. In both jurisdictions sentencers referred to particular difficulties in cases of death by dangerous driving. Several Sheriffs spoke about the public pressure that had led to legislation increasing the severity of penalties and about sentencing in such cases as having 'rocketed up'. Likewise, one Crown Court Judge interviewed in the England and Wales study commented that pressure in such cases was coming from the Court of Appeal who had, 'talked up the level of sentence for this'. In addition, he echoed the views expressed by sentencers in both jurisdictions that there was, 'certainly media pressure and pressure from the public, or the fact that you've got the public gallery full of the deceased's [family] more often than not'.

Sentencers in both jurisdictions had developed various strategies that they deployed—singly or in various combinations—to respond to these

pressures in order to fulfil what they regarded as their duty to the wider public. The seven strategies that emerged from the two studies were to:

1. view legislation and/or guideline cases and/or Appeal Court decisions as the reflection of the general will of society, and hence as the overriding source of legitimacy for sentencing decisions;
2. take account of victims (but, perhaps, not too much account)—be aware of, but not influenced by victims;
3. pay special attention to local concerns and issues;
4. treat public opinion as one, but not the most important, factor in the balance of a sentencing decision—as a barometer;
5. make sentencing decisions with regard to reasonable but not hysterical public opinion;
6. explain sentencing decisions so they can be understood—even by those who disagree with them;
7. recognize that as a member of the public yourself, you act on behalf of the public.

In both studies some sentencers emphasized that while they were aware of the political and social context to their decision making, the main priority for judges was to take a detached view. Thus a Sheriff in Scotland observed that ‘you don’t sentence someone on the basis of public opinion’ and a Crown Court Judge in England and Wales stated, ‘we’re here as judges, we’re not here to be some kind of spokesman of the electorate’. Other sentencers, however, gave much more weight to these factors:

I think there’s much more attention in the press to the sentences that are passed. And whereas in the past, perhaps, people might have take a very lenient course, it may be that fear of attracting extremely bad publicity for taking a lenient course means that sentences that pander to that, to a certain extent, are passed.

(Crown Court Judge, England and Wales)

Discussion

Set beside each other, these two studies reveal that, despite differences in legal systems, criminal justice structures and scale, sentencers in England and Wales and in Scotland adopt remarkably similar approaches to decision making. Both studies found that, at least in borderline cases, the legal category of the offence with which someone is charged is not, as many might expect, the overwhelming determinant of the sentence. Instead, we found that other factors, and in particular factors related to offending history and personal mitigation, were at least equally influential. The emphasis on personal mitigation in non-custodial borderline cases supports the conclusion reached by the Coulsfield Inquiry into alternatives to prison that ‘the control of the use of custodial sentences does not depend on formal definitions.

Instead, it requires a shared understanding of the proper approach to sentencing in marginal cases' (EFF, 2004: 4). Thus, in illuminating what is considered important in sentencing borderline or 'marginal' cases, our findings provide knowledge upon which to build a 'shared understanding' about custodial and non-custodial sentencing.

It is important for policy to take account of the full range of factors upon which sentencers base their decisions. Sceptical readers may feel that we have simply been persuaded by special pleading on the part of a professional group that wishes to maximize its autonomy and retain extensive discretion in its decision making. Any account of their work that they are likely to offer researchers will inevitably emphasize the complexity of the process and justify the need for judicial independence and discretion. The counter-argument, of course, is that collectively the subjective judgements that constitute the 'art of sentencing' result in widespread disparity—between sentencers, between courts, between social groups. One sort of policy response to current sentencing practice would be to reduce the weight attached to characteristics of the offender, and attach corresponding greater weight to the offence—embracing, in other words, a narrow form of deserts-based sentencing. The alternative is to accept the legitimacy of wide judicial discretion. This is, of course, one of the central issues of penology. We do not intend to offer our own solutions to the dilemma here, except to make two points. First, policy discourse about sentencing generally fails to recognize the breadth of factors that currently feed into sentencing decisions. Second, many sentencers offered us persuasive arguments to the effect that judicial discretion served, rather than eroded, justice.

Our analysis also reveals an important difference between the two jurisdictions: although both countries experienced rising prison populations over the period we examined, the increase in both custody rates and average sentence lengths was much more dramatic south of the border. One possible explanation for the slower rate of increase in the prison population in Scotland than in England and Wales relates to the use of guidelines. As we saw earlier, there have been very few guideline judgments issued by the Appeal Court in Scotland, and Scotland has no written sentencing guidelines equivalent to Magistrates' Association guidelines in England and Wales. The position in Scotland therefore contrasts sharply with the tradition of guideline judgments and guidelines in England and Wales.

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 rates and in the lengths of prison sentences. Indeed, some of the Magistrates argued that the Magistrates' Association sentencing guidelines had had an inflationary effect on sentencing insofar as 'entry points'—the recommended sentence for typical cases—were higher in the guidelines than in previous practice. Together with Court of Appeal guideline judgments, it seemed likely that the Magistrates' Association guidelines drew lenient sentencers up to a recommended norm, while leaving the decisions of tougher sentencers untouched. Again there is support for this conclusion from the Coulsfield Inquiry, that there is a 'growing consensus' that the effect of

guidelines has been to increase the average length of sentences (EFF, 2004: 27). There is also support for this interpretation in the international literature (Tonry, 1993). While there is no reason why guideline systems should inevitably have an inflationary impact, when they are introduced into sentencing systems that operate within a climate of penal populism, the likelihood of this occurring is clear.

One of the main rationales behind the use of sentencing guidelines is, of course, the desire to achieve greater consistency in the sentences passed by the courts, a desire that also informs judicial training. As with guidelines, however, it is possible that an unintended consequence of the more established use of judicial training in England and Wales has contributed to pushing up the prison population more quickly. Some of the sentencers interviewed in England and Wales, for example, said that judicial training courses encouraged more conformity in sentencing, which in turn may have led to the use of more custodial sentences. This conclusion merits further testing, as does our suggestion that guidelines are likely to have contributed to speeding up inflationary drift in sentencing in England and Wales compared with Scotland. Clearly both suggestions have important implications for work intended to achieve greater consistency of sentencing. If it turns out, for example, that the Sentencing Guidelines Council in England and Wales is successful in changing the decision making only of the more lenient sentencers, its guidance will inevitably have an inflationary effect on the prison population. One can envisage ways that the Court of Appeal could be used to counteract this tendency and to curb the enthusiasm of judges at the tougher end of the spectrum. Similarly, it is possible to imagine designing judicial training courses aimed at reducing judicial use of custody.

A major part of the explanation for the slower rate of increase in the prison population in Scotland, however, must lie with its long-established tradition of imposing shorter sentences than those imposed in England and Wales. Why that 'tradition' should be so established, of course, relates to broader historical, political and cultural differences between the two jurisdictions. Even though Scotland has not escaped international trends towards more punitive responses to crime, unlike England and Wales during the 1990s, it has largely avoided the importation from the USA of 'tough on crime' approaches (see Ashworth, 2001; Newburn, 2002). Prior to the establishment of a devolved Scottish Parliament in 1999, politicians played a much less important role in the development of criminal justice policy than they did in England and Wales. Policy was made—primarily by civil servants and non-governmental experts—at a distance from the Government at Westminster and the courts, thereby insulating the courts from the influence of politicians. In addition, 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.

Thus, our studies show that sentencers in England and Wales felt under more pressure from the Government to impose more severe sentences than their counterparts in Scotland. During the 1990s, for example, Scotland did not experience anything like the power struggles in England and Wales that occurred between the judiciary and the legislature about sentencing (Ashworth, 2001) and members of the senior Scottish judiciary have been much less vocal in expressing their views publicly on legislative changes than their counterparts south of the border. While sentencers in Scotland have not escaped legislative restrictions on their power, they have not experienced as much political interference as sentencers in England and Wales. Sentencing power has remained much more firmly in their own hands as has the degree to which they have had choice over the use of imprisonment. As Doob and Webster (2006) have argued in relation to Canada, 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.

Moreover, throughout the period covered by the two studies, the Government in Scotland introduced policies aimed specifically at reducing the use of custody by increasing the use of community sentences. The most significant of these policies was introduced in 1991 by 'National Objectives and Standards for Social Work Services in the Criminal Justice System', together with 100 per cent central government funding to the local authorities responsible for these services. The main policy objectives specified were to reduce re-offending and to reduce the use of custody by increasing the availability, improving the quality and targeting the use of community-based court disposals on those most at risk of custody, especially young adult repeat offenders (see Paterson and Tombs, 1998). Subsequent policies, while aiming to make community sentences more effective, have maintained the focus on similar objectives (see Scottish Executive, 2004). By contrast, even though community sentences have been also promoted in England and Wales throughout the 1990s, the dominant discourses surrounding their refashioning have been punitive rather than crime-reductive.

For example, the Criminal Justice and Court Services Act 2000 in England and Wales renamed several community disposals so as to emphasize their alleged punitive as well as rehabilitative possibilities (for example, the community service order became the community punishment order). Scotland did not engage in this kind of renaming but rather maintained the focus on reducing re-offending, promoting rehabilitation and thereby reducing the use of imprisonment, through policies aimed at 'strengthening' community disposals (see, for example, Scottish Executive, 2004). By contrast, in England and Wales the focus has been on making ever more rhetorical claims about the punitive value of community sentences, resulting most recently in the Criminal Justice Act 2003 and the emergence of a new generic community sentence—the community order. Consistent with policies throughout the 1980s and

1990s, the White Paper preceding the 2003 Act (*Justice for All*, Home Office, 2002) claims that the community order would be 'even tougher' and 'more demanding'.

Moreover, unlike in England and Wales (see Tonry, 2004), there has been broad acceptance for some time by the Government in Scotland that, generally, prison does not prove the best setting for the rehabilitation of offenders, particularly for those serving short-term prison sentences (e.g. SWSI, 1993; Scottish Executive, 2004). Thus, at the time of writing Scotland is in the process of establishing multi-agency partnerships in Community Justice Authorities (CJAs) specifically aimed at reforming the implementation of community and custodial sentences in order to reduce reoffending (Scottish Executive, 2005). CJAs will bring together local authority services, voluntary agencies and the Scottish Prison Service. This approach, rooted in local organization and delivery, differs from the national approach adopted in England and Wales following the Carter (2003) review. There the aim has been to integrate the National Probation Service and HM Prison Service into a National Offender Management Service (NOMS). In addition, there has been no parallel in the emergence of the CJAs in Scotland to the tough rhetoric surrounding the emergence of NOMS, though there is now increasing evidence that the Government south of the border is also starting to think in terms of restricting the use of imprisonment:

Overall we think prison should be used for the most dangerous, violent and seriously persistent offenders; and that others are usually best punished in the community ... there are some groups of offender where there are signs that too many people are ending up in prison who would be better dealt with elsewhere; and others where the average length of sentence has been rising even though the number and seriousness of crimes has not.

(Home Office, 2006: 22)

The recommended action is for Judges and Magistrates to receive better information about sentence effectiveness, make sure courts know what is happening to offenders once sentenced and for the Sentencing Guidelines Council to give more advice on consistency. It remains to be seen how these measures will work and, in particular, whether, and if so how, the recent policy changes in Scotland and England and Wales will impact on the prison populations north and south of the border.

Notes

- 1 For a summary of the studies see EFF (2005). The study in England and Wales was conducted in collaboration with, but independent of, the Prison Reform Trust.
- 2 See also www.cjsonline.gov.uk
- 3 Appeals in England and Wales and Scotland can also be taken to the European Court of Human Rights.
- 4 A single UK Supreme Court has been suggested covering the jurisdictions of England and Wales, Scotland and Northern Ireland (see DCA, 2003).

- 5 There are proposals to unify the administration of District and Sheriff Summary Courts (see Scottish Executive, 2005). For a useful summary of the Scottish Courts see www.scotcourts.gov.uk
- 6 For legal purposes Scotland is divided into six sheriffdoms.
- 7 It is the job of the Procurator Fiscal Service (equivalent to the Crown Prosecution Service south of the border) to decide which procedure—summary or solemn—should be followed for a particular case.
- 8 A full analysis of changes in prison figures is provided elsewhere (Hough et al., 2003; Millie et al., 2003; Tombs, 2004).
- 9 The period of study for Scotland was from 1993–2002 but for custody rates it was from 1995–2002; 1995 was used as that is the earliest year for which separate comparable figures for the Sheriff Summary and Solemn Courts were available.
- 10 For England and Wales: the Crime (Sentences) Act 1997; and for Scotland: the Crime and Punishment (Scotland) Act 1997.
- 11 Criminal Justice Act 1993 (England and Wales and Scotland).
- 12 For discussions on the penal policy and social choices needed to reduce the prison population, see Hough et al. (2003), the Coulsfield inquiry (EFF, 2004) and Tombs (2004, 2005).
- 13 Ollerenshaw [1999] 1 Cr App R (S) 65.
- 14 Mills (unreported 14 January 2002); Kefford [2002] 2 Cr App R (S) 495.
- 15 McNerney and Keating [2002] EWCA Crim 3003.
- 16 Ogilvie [2001] c183/01.
- 17 Du Plooy, Alderdice, Crooks and O’Neil [2003] xc109/03; xc110/03; xc209/02; xc189/02.

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