Understanding judicial discretion: Comparing judicial perceptions of their power when sentencing theft offenders in the English and Danish Lower Courts.

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Abstract:

The evolution of judicial discretion in sentencing theft offenders at the custody cusp is examined by this research. The research demonstrates that there appears to be an ongoing power struggle between the executive, legislative and judiciary. The extent of judicial discretion is regulated by mix of sentencing guidance sources which have varied in dominance over time. To inform the thesis a comparative study was carried out. The study specifically compares judicial discretion approaches in theft sentencing at the custody threshold in England and Denmark respectively in 2008 and 2009. The research critically analyses and compares how society influences the sentencing approach of English and Danish judges and how judges influence society. Historical critical discussion of both jurisdictions' recent development of judicial discretion is used to introduce the main research topics. Then a critical comparison of the conclusions of socio-legal research into sentencing refines what questions the qualitative interview guide should pose. Qualitative interviews of 12 District Court judges in 6 rural and urban areas within Denmark and 12 Magistrates in 6 rural and urban areas within England were conducted. The outcomes of this comparative study supported three conclusions. Firstly, that long term reform of theft offenders is the judicial priority. This is best achieved through mixed community punishments and enhanced rehabilitation focus during and after custody. Secondly, working relationship cohesion in England could benefit from adopting the Danish sentencing panel approach. This would entail mixed sentencing panels of one professional judge accompanied by two lay judges. Thirdly, the collective training of English judges in case law comparison skills and legislative interpretation is an important tool in encouraging judicial faith and confidence. This will lead to a more pro-active and cohesive Lower Court Judiciary and re-connect them with their more senior judicial peers in the Higher Courts.

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This research journey has been life changing for me. I have thought, learnt, shared and cared. I have developed my self confidence and through a discovery mentality which PhD research requires I have found an outlet for my highly inquisitive and questioning mind. I would like to acknowledge the long standing patience, support and love of my parents and family. Without them I would have achieved very little in life. I would like to thank my two PhD supervisors, Dr Patricia Park and Dr Rasmus Heugh Wandall. Both could see potential in me which they encouraged. In this way they showed me what a true academic is. An academic is an open mind, an explorer and a team player who inspires others. I have shared my research journey with many friends in England and Denmark. I will not mention them by name as they all already know. By guiding others I have turned from a self doubter to a leader and supporter of others. From my research colleagues I am known as the elephant. I have told them to follow the elephant through the forest. The elephant marches onward, it doesn't know where it will end up. Its mottos are to never give up and to seize the day *(carpe diem).* Finally I would like to say that it is by encouraging others that you truly encourage yourself. It is by exploring the forest that you truly come to appreciate why the pursuit of knowledge is such a privilege.

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Theoretical issues regarding judicial discretion:

There are no simple answers when a judge faces a difficult human decision of how to deal with a fellow human being. Presented before them are varying offence facts and a complex offender whose behavior requires some form of legal intervention. Unlike other legal decision making by lawyers who represent one perspective, the judge holds the final decision making power after hearing all the case facts and has to balance all the often competing perspectives. The judge's decision which must be fair, impartial and justifiable will undoubtedly impact upon the lives of the offender, their victims and the general public. Their decision also reflects their own judicial personality and identity. When sentencing the judge must ultimately exercise their own discretion for this is what he or she has been entrusted to deliver as a public servant. As Hawkins notes, discretion is essentially about the extent of free choice:

> *"Discretion has emerged from the shadows. Always known, grudgingly tolerated, it is now celebrated. Command-and-control regulation is challenged by decentralization, bargaining and flexibility…Discretion is ubiquitous, hence difficult to define. Basically it involves the existence of choice, as contrasted with decisions purportedly dictated by rules."* [1]

The extent of free choice appropriate for our judges is a balance defined by many different and competing perceptions. The concept of choice is influenced by two opposing forces, free will versus determinism. The debate on morality and law provides some further understanding of whether judicial choice specifically is more about free will or determinism. Specifically in relation to the decriminalizing of homosexuality, three different perspectives were famously postulated. Hart argued for free choice by warning against the danger of populism and saw judicial morality as an evolving perception of

[1] Hawkins, K. (ed.) (1992). *The Uses of Discretion* (First ed.). Oxford: Oxford University Press, Chapter 10, *Discretion: Power, Quiescence and Trust*, by Joel F. Handler at p 331.

harm within society.[2] For Dworkin, the pursuit of liberty by judges was paramount to moral progress.[3] For Devlin, law required a moral fabric to reflect society.[4] His principle moral concern was that judges sought to protect and respect the privacy of individuals within society. All three appear to have a common perception of judges as pro-active people rather than automatons in the sentencing process.

For Vila, who provides a detailed modern philosophical discussion of what discretion is the attributes of weak and strong discretion are defining characteristics.[5] Increasing the subjectivity allowed for within a sentencing system's discretionary decision making ranges provides more independence, creativity and confidence to deviate from the norm. This in turn increases the strength of judicial discretion as a judge led means to develop sentencing law. Vila argues that judicial discretion starved of individual personality is therefore more objective and weak. The inherent concerns of individual judges such as morals, religion, culture, education, self confidence and motivation levels are all power sensitive. Furthermore, judicial perceptions of their empowerment by society to sentence with independence, creativity and free choice depend on more subjective judicial interpretations of public, media and political consent, trust and respect levels.

Hoffmaster[6] comprehensively discussed the historical development and philosophy behind judicial discretion whose popularity as a term was traced back to Dworkin.[7] Hoffmaster notes that in Aristotle's time an objective academic understanding of judicial discretion was preferred.[8] This meant that interpretation of sentencing decisions was based on established and shared sentencing norms. As such discretion was determined by collective standards rather than individual perceptions. In more recent

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[2] Hart, H.L.A. (1961) *The Concept of Law,* Clarendon Press, Oxford concluded that judicial discretion was based on recognised patterns of reasoning employed within the legal community.
[3] Dworkin, Ronald. M. (1977). *Taking rights seriously* (First ed.). Cambridge, Massachusetts: Harvard University Press.
[4] Devlin, P. (1959) *The Enforcement of Morals,* (First ed.). Oxford: Oxford University Press.
[5] Vila, M. I. (2001). *Facing Judicial Discretion: Legal Knowledge and Right Answers Revisited* (First ed. Vol. 49). Dordrecht: Kluwer Academic Publishers.
[6] Hoffmaster, Barry. (1982). Understanding judicial discretion. *Law and Philosophy, 1 (1)* (April), 21 – 55.
[7] Dworkin, Ronald. (1963). Judicial Discretion, *Journal of Philosophy,* 60, 624 – 638.
[8] Aristotle's *Rhetoric,* Book I, Chapter 13, 1374 b 20 – 21.

times academic scholars such as Pound have encouraged the development of 'the individualization of justice' and subjective discretionary thinking.[9]

For Roscoe Pound, it was the human element of judging and being judged that was the essential element to be considered when attempting to understand the operation of judicial discretion. Pound saw the direct and central role of human judges in often complex legal decisions as universally paramount:

> *"In law some situations call for the product of hands, not of machines, for they involve not repetition, where the general elements are significant, but unique events, in which special circumstances are significant."*[10]

Hoffmaster concludes that the resolution of the judicial discretion controversy requires a theory of the justification of judicial decisions. Judges by such a theory it seems can both objectively and subjectively define their required discretionary limits.

Judges can more objectively define sentencing application norms from national guidance regimes in the form of previous similar fact case law comparisons and or comparing judicial bench norms within the constraints of structured guidelines. They can also use objective discretion to define working relationship norms and the impact of established court room procedures. Judges can more subjectively define the most relevant sentencing aims, the merits of case facts and the meaning of different offender backgrounds. This may lead to very personal judicial interpretations of judicial mercy towards an offender or denunciation of the offenders' conduct within the local community. At the heart of subjective judicial discretion there appears to be a power struggle relationship between judicial choice and wider societal (public, media and politics) constraints upon it.

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[9] Pound, R. (1954). *An Introduction to the Philosophy of Law* (Second ed.). New Haven:Yale University Press, Chapter 3, p 70.

[10] Pound, R. (1954). *An Introduction to the Philosophy of Law* (Second ed.). New Haven: Yale University Press at p 70.

The golden thread running throughout this research is how judges over time subjectively perceive and interpret their empowerment as part of the State to make sentencing choices on their fellow members of society. With this golden thread comes a philosophical warning about the influence of power on humanity and what an imbalance in the separation of powers *can* lead to. Although recognized throughout history in relation to absolutism, Sir John Emerich Edward Dalberg-Acton (1834 – 1902) famously commented in his letter to academic colleague Mandell Creighton[11] in April 1887 about the growing concern of Roman Catholic division after the decree of papal infallibility: [12]

> *"I cannot accept your canon that we are to judge Pope and King unlike other men with a favorable presumption that they did no wrong. If there is any presumption, it is the other way, against the holders of power, increasing as the power increases. Historic responsibility has to make up for the want of legal responsibility. Power tends to corrupt, and absolute power corrupts absolutely. Great men are almost always bad men, even when they exercise influence and not authority: still more when you superadd the tendency or certainty of corruption by full authority. There is no worse heresy than the fact that the office sanctifies the holder of it. "*[13]

Judicial decision making freedom brings with it great trust and responsibility. For Soeharno the key to understanding the extent of constraint necessary on judicial discretion within a society depends on the perceived level (public, political, academic, media) of judicial integrity at any given time.[14] He critically analyzed the integrity of judges throughout the World through the ethical lens of public trust and professional responsibility. He then compared the established rule of law and high public trust in developed democracies with the damage to accountability from fraud and corruption in developing democracies. He then developed a model to show the importance

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[11] Dixie Chair of Ecclesiastical History, University of Cambridge and Bishop of Peterborough and London.
[12] In the First Vatican Council (1869) Pope Pius IX decreed papal infallibility such that his version of the life of the Virgin Mary could not be questioned. This led to a split in the Roman Catholic Church into those that accepted papal infallibility and those that did not, i.e.) members of the See of Utrecht.
[13] Dalberg-Acton, J. (1949). *Essays on Freedom and Power*, Boston: Beacon Press at p 364.
[14] Soeharno, Jonathan. (2009). *The Integrity of the Judge: A Philosophical Enquiry* (First ed.). Oxford: Ashgate Publishing.

safeguarding judicial integrity by providing links between the long term ethical conduct of judges and the legitimacy of their day to day decision-making powers.

For Lasser, the extent of constraint necessary on judicial discretion was examined by comparing American and French notions of judicial transparency. [15] In legitimizing their arguments, he noted that common law tradition American judges gained legitimacy from their specific sentencing precedents standing up to populist public scrutiny. However, for civil law tradition French judges, their legitimacy was gained more broadly from the expertise and quality of the whole judicial institution as a separate arm of State power. In this sense, the French judicial legitimacy was based on judges respecting and reacting to established social and republican values accepted by the public. For common law American judges their legitimacy required more pro-active effort in justifying their sentences to evolving public sentiments. His arguments appear to support a lesser extent of constraint on judicial discretion being more appropriate where judicial legitimacy was dependent on more proactive public justification effort.

Both Soeharno and Lasser seem to be making value judgments about our judges. Both accentuate the relevance of day to day sentencing decisions handed out as beyond mere judicial commentary recorded in Court. Instead, these day to day judgments feed into wider societal perceptions of judicial integrity and legitimacy. If the wider societal perception of judicial integrity and legitimacy is predominantly negative for example, could the level of constraint be gradually pushed higher over time to reflect this lack of faith? In order to determine the appropriate level of external constraint, judicial perceptions appear to provide the closest answer at any given time. This is because in order to know how to regulate we need to first know what we are trying to regulate. Of course, the confusing element about human perceptions is that they themselves change over time. Drawing the line between individual and collective perceptions and then assigning wider value judgments to them on this basis is unwise. Instead, perceptions should simply be seen as their constituent parts, logic and emotion. They are a reflection

[15] Lasser, Mitchel. De. (2004). *Judicial Deliberations: A comparative analysis of judicial transparency and legitimacy* (First Paperback ed.). Oxford: Oxford University Press.

of our own complex psychology. Human perceptions matter and judicial perceptions particularly matter for this research due to the focus on sentencing regulation and judicial discretion. It is only our judges and for theft particularly the lower Court judges who have been specially entrusted to make the final decision.

As judicial perceptions have competed with the perceptions of the government this has led to periods of sentencing regulation harmony and conflict over time. The philosophy of Heraclitus (c. 535 BCE – c. 475 BCE) as interpreted by Plato in *Cratylus* famously posited that change was central to the universe:[16]

"Everything changes and nothing remains still."[17]

History has also shown that the extent of judicial discretion constraint changes over time. The power balance between the executive, legislative and judiciary reflects an unending human struggle for dominance and control. In this sense, discretion is a protection used by judges to defend their continued independence and free choice. Key to the power balance is therefore the determination of the extent of discretion given to judges by the State (executive and legislative) to sentence (regulate) as they deem appropriate. This is further developed by structuring sentencing guidance and choosing which sources of guidance are consulted.

Increasingly, specifically drafted sentencing reforms through legislation have been used by governments to influence judicial perceptions when sentencing, i.e.) both Denmark and England have seen this occur. Sentencing reform through national consistency guidelines that have sought to structure discretion have also increased in popularity across the World, i.e.) Minnesota Sentencing Grid in USA, Sentencing

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[16] Sedley, D. (2003). *Plato's Cratylus,* Cambridge University Press, Chapter 5, Section 7 at p 114 further analyses the dominance of flux in the universe. He explores how change can be a positive force of renewal.

[17] Plato. *Cratylus,* Paragraph 402 a, from Plato in Twelve Volumes, Vol. 12 translated by Harold N. Fowler, (1921) Cambridge, MA, Harvard University Press; London, William Heinemann Ltd. Available online from the Perseus Digital Library, Tufts University at: http://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A1999.01.0172%3Atext%3DCrat.%3Asection%3D402a [accessed Dec 2008].

Guidelines Council (SGC) in UK (now Sentencing Council).[18] Defining the advantages and disadvantages of different techniques of constraint across the World is problematic. This is because there is not enough qualitative data on judicial perceptions of their constraint across the World with which to make comparisons. This research attempts in a very small way to rectify this dearth in empirical knowledge.

What can be posited with less contention is that both Danish and English judges use case law precedent and consider it to be a judge led way to guide their sentencing. This approach has been supported for some time through academic sentencing books, local sentencing training and more recently through online database development, (Sentencing Information Systems). Each of these techniques of constraint can be differentiated by 1) the dominant source of influence (judicial or government) and 2) how it is being perceived and interpreted by our judges. Using a technique of constraint that is judicially led and well established appears to support a positive perception of harmony and acceptance amongst the judiciary, i.e.) see the Danish case law judicial perceptions in this research. Using a new and non-judge led technique and then giving it precedence over other more established sources appears to support a negative perception of conflict and confusion, i.e.) see the English SGC guideline judicial perceptions in this research. A good example of conflict creating confusion was in the deliberately controversial use of executive led theft guidelines to describe the SGC guidelines in England. What was surprising and revealing was that only a small minority of judges challenged this statement despite the SGC guidelines being largely defined by the judiciary themselves!

There are many stakeholders competing for influence over sentencing practice, i.e.) academics, politicians and public interest groups. They all have different perceptions and perspectives. However, currently only the judge(s) ultimately decide on the final sentence. This finality power is important as it defines the essence of the judicial

[18] Garoupa N. & Ginsburg, T. (2009). Guarding the Guardians: Judicial Councils and Judicial Independence. *The American Journal of Comparative Law, 57 (Winter)*(1), 103 – 134 provide an interesting further quantitative discussion on the recent rise of popularity in the use of judicial councils across the world to preserve judicial independence. The relevance of judicial perceptions of their independence is also an important indicator of the level of judicial conflict or harmony with sentencing reforms in a given jurisdiction.

identity. If this finality power were to be removed completely by the government, judicial free choice and independence would become almost meaningless. The ability of the judiciary to justify their sentences and develop case law precedents would also suffer a similar fate. For the English and Danish judiciary, this threat could be challenged through constitutional or indeed public engagement means. The main aim would be to restore judicial responsibility for maintaining public, academic and media trust in the sentencing process. In this sense, determining the extent of constraint appropriate to place on judicial discretion is in part defined by wider societal perceptions of what we want our judges to be and part by what they actually are, i.e.) independence, integrity, transparency and trust. A constrained discretion extent is likely to provide a weak automaton style judiciary that can only exert the finality power of others. A broad discretion extent is likely to provide a strong creative judiciary that can exert its own independent finality power. Judicial discretion historically has needed to be flexible enough that as the State (executive and legislative) increased and decreased its influence on sentencing, it could fill the power vacuum. This need for flexibility suggests that free choice and perceptions of constraint are very important and should be gathered and monitored as much as possible.

By analyzing the individual views of Danish District judges and English Magistrates through qualitative interviews regarding their judicial discretion and respective sentencing decision making guidance regimes this research attempts to gain a valuable historical socio-legal snapshot from 2008 to 2009. The research draws upon the unique perspective and current dialogue of judges who often have little opportunity in their busy professional lives to convey their perceptions to the wider public whom they serve. The research acknowledges that the extent of external constraint appropriate to place on judicial discretion is increasingly becoming a dialogue about future European sentencing integration and wider sentencing globalization. The stage is therefore set for a valuable comparative analysis between the two selected jurisdictions which reveals new data.

The comparative analysis of judicial discretion followed three stages;

1.) Comparing the historical development and socio-legal research conclusions regarding judicial discretion in theft sentencing in Denmark and England.

2.) Identifying and critically comparing the perceptions of 12 Danish and 12 English lower Court judges about their theft sentencing approach in 2008 and 2009.

3.) Identifying and justifying new directions for how both Danish and English lower Court judges can be better guided and regulated when sentencing theft offenders in the future.

These three stages informed the research journey by;

1.) Gaining historical perspective on understanding judicial discretion in England and Denmark. This provided the context for the modern qualitative enquiry in 2008 – 2009 that gathered some judicial perceptions.

2.) Gaining qualitative data on the sentencing approach of 12 Danish and 12 English lower Court judges. The perceptions of these judges explored what is happening now when judges process their sentencing decisions and apply their discretion.

3.) Gaining new conclusions about what regulatory reforms could be considered in the future based upon the qualitative data from the modern qualitative enquiry in 2008 – 2009.

Chapter 1: Recent Historical Developments towards Judicial Discretion and Theft Sentencing within England:

1.) Legislative reform and constraint on judicial discretion:

In order to properly address the regulation of judges and their sentencing approaches to theft offenders in the Magistrate and Crown Courts an upper sentencing review court was debated in Parliament with broad sentence amendment powers. The Parliamentary debate was cautious and it took some time before the extent of control that such a court should be given was agreed upon. It was not until the Criminal Appeal Act (1907), that Parliament finally introduced a centralized regulatory Criminal Appeal court to guide the sentencing approach in the lower Courts through case law precedent.[19] The Criminal Court of Appeal was given extensive reach to conduct appeal hearings when Counsel requested this against the sentence given to theft defendants convicted in the Crown Courts. The role of the Court of Criminal Appeal was not merely to assess sentence lengths and reduce them where necessary. The Court also, if it felt it necessary would give a longer sentence length for those theft cases which were deemed exceptionally serious, violent, persistent or dangerous to the public.[20] The result of such broadly defined powers was the gradual development of judge-made sentencing guidance. Such judicial guidance helped in achieving the desired Parliamentary aims of more consistent and predictable norms within English sentencing practice.

The first noteworthy legislation to reflect Parliament's increasing desire for judicial discretion reform was the Criminal Justice Act (1948). The Act consolidated the

[19] Radzinowicz, Leon. (1948). *History of the English Criminal Law* (First ed. Vol. 1). London: Stevens and Sons Publishers.

[20] Gelsthorpe, L. & Padfield, N. (2003). *Exercising Discretion: Decision-making in the criminal justice system and beyond* (First ed.). Cullompton, Devon: Willan Publishing, Chapter 3, by Thomas, D. at p 54 who further notes how the Criminal Court of Appeal applied numerous sentencing amendments for theft cases especially for the first 60 years of it existence utilizing the wide reaching powers which were given by the Criminal Appeal Act (1907).

advances which had been made in relation to penal policy and expanded sentence choices for theft, but fell short of defining any clear political policy on constraining judicial discretion.[21] The judiciary was instead still expected to make sentence option choices justified by past sentencing norm precedents from the Court of Appeal. Old established deterrence based punishment options included fines and custody were retained and expanded through progressive rehabilitative punishment options. These new options sought to positively affect and redefine how theft offender behaved through probation. The Labour Government was keen to encourage judges to place greater faith in the new rehabilitative sentence options, but crucially sentencing discretion policy remained unchanged.[22]

After a period of 20 years, more sentencing legislation reforms were officially enacted by the Criminal Justice Acts of (1961) and (1967). Both Acts were Parliament's initial and fairly ineffective attempts to control what was becoming an increasingly difficult and uncertain future penal climate.[23] The information creating particular concern was the official Home Office statistical trend reports from the 1960s. These statistical reports highlighted a continuing increase in the number of reported theft crimes amongst other crimes in the period from 1880 to 1900.[24] During the two World Wars, reported theft crimes fell to their lowest levels in statistical history and remained relatively unchanged. By the end of the Second World however, reported theft case levels continually increased. By 1964, reported theft cases were double the levels during the First and Second World Wars and thus at the same levels from which they had declined during the 1880 to 1900 period.[25]

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[21] Rawlings, P. (1999). *Crime and Power: A History of Criminal Justice (1688 - 1998)* (First ed.). London: Addison Wesley Longman Limited.
[22] Hamson, C. J. (1954). *Executive Discretion and Judicial Control* (First ed.). London: Stevens & Sons Limited provides a more detailed analysis of Government policy in the 1940s and 1950s.
[23] Carter, R. Wilkins, L. (1967). Some Factors in Sentencing Policy. *Journal of Criminal Law, Criminology and Police Science, 58*, 503 – 514.
[24] Thomas, D. (1970). Establishing a Factual Basis for Sentencing. *Criminal Law Review, 2*, 80 – 90.
[25] Gelsthorpe, L. & Padfield, N. (2003). *Exercising Discretion: Decision-making in the criminal justice system and beyond* (First ed.). Cullompton, Devon: Willan Publishing, Chapter 3, by Thomas, D. at p 55. It is important to note that police and public detection of theft crimes would have been disrupted by the exceptional circumstances during both the First and the Second World Wars.

To counter these rises the suspended sentence and discretionary parole were introduced as public policy tools by the Criminal Justice Acts of (1961) and (1967), to help reduce the high prison population. The result of their short term usage was that wide judicial discretion over the normally short custodial sentence lengths given for most theft type offences was undermined. This then led to the opposite of what Parliament had originally intended with longer custodial sentences being given in a deliberate attempt by a minority of judges to evade what they considered as an illogical and potentially higher risk policy shift.[26] A series of sentencing reform statutes followed in the form of the Criminal Justice Act (1972), the Powers of Criminal Courts Act (1973) and the Criminal Law Act (1977). These Acts emphasized the Government's determination to have dominance in the future over the direction of sentencing discretion policy.[27] Sentence choices were further expanded with the important introduction of community service punishments in order to rehabilitate theft offenders. The option of using suspended sentences was also re-introduced, albeit in a much more limited form.[28]

The Conservative sentencing policy drive in the 1980s had a clear focus. This was to achieve reductions in the more petty type of offenders in prison. This policy therefore significantly impacted on the high number of minor theft offenders in prison who were serving short custodial sentences. The executive wanted to reduce the prison population by focusing custody on to the more dangerous offenders, i.e.) the most violent and or sexually motivated criminals.[29] Section 33 of the Criminal Justice Act (1982),

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[26] Rawlings, P. (1999). *Crime and Power: A History of Criminal Justice (1688 - 1998)* (First ed.). London: Addison Wesley Longman Limited.

[27] Davis, K. C. (1969). *Discretionary Justice: A preliminary inquiry* (First ed.). Louisiana: Louisiana State University Press at p 8 further discusses the approach to sentencing approach regulation in the USA where a Sentencing Commission was being considered to structure discretion and help implement criminal justice policy. This debate was reaffirmed in his later comparative work, Davis, K. C. (1976). *Discretionary Justice in Europe and America* (First ed.). Chicago: University of Illinois Press. The Sentencing Commission was created by the Sentencing Reform Act provisions of the Comprehensive Crime Control Act of 1984 and was introduced on Nov 1, 1987. However, it was not until the constitutional challenge of *Mistretta v. United States*, 488 U.S. 361 (1989) had been resolved in the Sentencing Commission's favor that the Federal Guidelines were implemented in Jan 1989. See further, United States Sentencing Commission (2009, June) *An Overview of the United States Sentencing Commission,* pp 1 – 3 available online at http://www.ussc.gov/general/USSC_Overview_200906.pdf [accessed Sep 2009].

[28] Rawlings, P. (1999). *Crime and Power: A History of Criminal Justice (1688 - 1998)* (First ed.). London: Addison Wesley Longman Limited.

[29] Rawlings, P. (1999). *Crime and Power: A History of Criminal Justice (1688 - 1998)* (First ed.). London: Addison Wesley Longman Limited.

allowed the Home Secretary to reduce the last 12 months which less dangerous offenders might be serving before early release on license. Such extended executive powers had a strong impact on how less dangerous offenders were dealt with after sentencing. The numbers of theft offenders released 6 months earlier during the last 12 months of a custodial sentence increased in 1983. The result was that a large number of theft offenders sentenced to shorter terms of imprisonment became eligible for early release. The vast majority, 4 out of every 5 theft offenders in 1983 found themselves released by the probation service early on license having only served part of their original judicial defined sentence length.[30] Thus whilst judges could still exercise significant discretion regarding the criminal trial process and set the custodial sentence length for a theft offender, they could not influence the increased use of early release on license.[31]

The Criminal Justice Act (1991) constrained the boundaries of judicial discretion further by defining how and when custodial sentences for theft and other offenders would be imposed. Judges were only given permission to impose custodial sentences if alone or combined with other offences the offence itself and the surrounding circumstances were sufficiently serious to justify a custodial period rather than a community penalty.[32] In determining the length of a custodial sentence for a theft offender, judges were asked to pass a sentence which reflected the seriousness of only two recent, similar and previous theft offence counts which had been convicted.[33] Judicial discretion was further limited by detailed sentencing criterion that encouraged community orders for less prolific theft offenders and the wider application of unit fines by Magistrates for single count petty theft.[34]

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[30] Gelsthorpe, L. & Padfield, N. (2003). *Exercising Discretion: Decision-making in the criminal justice system and beyond* (First ed.). Cullompton, Devon: Willan Publishing, Chapter 3, by Thomas, D. at p 56 who mentions a figure of around 80% for 1983.

[31] Pattenden, Rosemary. (1982). *The Judge, Discretion, and the Criminal Trial* (First ed.). Oxford: Clarendon Press.

[32] Koffman, Laurence. (2006). The Rise and Fall of Proportionality: The Failure of the Criminal Justice Act 1991. *Criminal Law Review* (April), 281 – 299 at p 282.

[33] Gelsthorpe, L. & Padfield, N. (2003). *Exercising Discretion: Decision-making in the criminal justice system and beyond* (First ed.). Cullompton, Devon: Willan Publishing, Chapter 3, by Thomas, D. at pp 61 – 62 notes the frequent judicial criticism of the general restrictions imposed on courts in considering previous convictions.

[34] The relevant statutory sections in the order they have been analysed are, 1(2)(a), 3(3), 29(1), 3(1), 2(2)(a), 29(2), 28, 1(2)(b), 2(2)(b), 6 and 18.

The politically damaging public criticisms made regarding the precise meaning of the offence seriousness concept within the Criminal Justice Act (1991) from the highest echelons of the judiciary through the media, compelled the Home Secretary to respond through new legislation.[35] Parliament quickly pushed through legislative reforms through the Criminal Justice Act (1993) which abolished the unit fine system, repealed section 29 and abandoned the sentencing guidance which limited judicial discretion to the consideration of a maximum of two similar, recent and previous offences when deciding whether the threshold of seriousness for a custodial or community sentence had been reached. [36] This brought back a significant degree of pragmatism and proactive choice into judicial decisions which had previously been lacking.

2.) Judge led attempts to preserve their wide judicial discretion:

In order to help judges decide on the most appropriate sentence for convicted theft offenders, the Court of Appeal gradually over a number of years developed a collection of commonly applied sentencing decisions for similar theft cases. A judge faced with sentencing a particular offender in the Crown Court could be strongly influenced by the example decisions and guidance of the Court of Appeal in comparable like for like cases.[37] However, the influence of the sentencing database provided by the Court of Appeal gradually morphed into more formalized guidance judgments on theft offence sentence lengths from the 1980s onwards. Although the length of theft offender's sentences were not increased beyond the statutory maximum custodial sentence of seven years, the custody threshold discretionary cusp was to a limited degree influenced by the Court of Appeal's guideline judgments. This was partly due to the growing list of

[35] Oliver, D. (1991). *Government in the United Kingdom: The search for accountability, effectiveness and citizenship* (First ed.). Milton Keynes: Open University Press concluded that change was likely to be forthcoming due to the need to preserve judicial independence at p 234.
[36] Baldwin, R. (1996). *Discretionary Justice and the Development of Policy* (First ed.). Oxford: Oxford University Press.
[37] Gelsthorpe, L. & Padfield, N. (2003). *Exercising Discretion: Decision-making in the criminal justice system and beyond* (First ed.). Cullompton, Devon: Willan Publishing, Chapter 3, by Thomas, D. at p 67 who notes the existence of an informal sentencing decision database kept by judges to help guide their discretion and keep it consistent.

aggravating and mitigating factors which were first identified, secondly commented on and then thirdly were being formally added to the Court of Appeal's published sentencing practice guidance.

In relation to the specific aggravating sentencing factor of numerous similar previous theft convictions, which is commonly found in theft offenders who are often highly recidivist, the Court of Appeal's affirmation of the cumulative principle had some influence on where the lower court judges placed their own custody thresholds. In the theft sentencing guidance case of *Gilbertson*[38] the Court of Appeal demonstrated how and when the cumulative principle was to be applied. For a highly recidivist and particularly problematic female theft offender, 12 months concurrent custody was considered appropriate for two convicted thefts that amounted to a total of £9 of stolen goods. However, in line with the cumulative principle a lower custodial sentence than the original consecutive sentences that amounted to 2 years was upheld because of her 14 similar convictions for other theft offences. Such previous antecedents coupled with the aggravating epileptic profile of the theft offender prompted a supportive statement from Drake J. who stated,

> *"One thing is certain, that if she goes on committing offences, the periods of imprisonment which will be imposed on her, merely to protect shopkeepers, should become longer and longer."*[39]

The Court of Appeal wished to highlight the problem of persistent theft offenders for whom both rehabilitative treatments and deterrent based fines were obviously ineffective. The sentencing of such theft offenders required imprisonment as the last resort in order to protect the public and shop keepers. In response to clarifying the custody threshold for common and petty forms of theft under the Criminal Justice Act (1982), the Court of Appeal referred to the case of *Bradbourn.*[40] The case facts were that a dishonest young cashier at a supermarket had pleaded guilty to stealing £2 from the till

[38] *R v Gilbertson [1980] 2 Cr App R (S) 312.*
[39] *R v Gilbertson [1980] 2 Cr App R (S) 312 per Drake J. at p 313.*
[40] *R v Bradbourn (1985) 7 Cr App R (S) 180.*

and had been sentenced to three months detention. This sentence was quashed and substituted for 12 months conditional discharge because the female theft offender had already been in youth custody for a month. The Court of Appeal was initially reluctant to offer guidance on appropriate custody threshold levels and how to interpret section 1 (4) of the Criminal Justice Act (1982) on when a theft offender was unable or unwilling to respond to non custodial penalties. The appeal judges preferred to keep judicial discretion over custody thresholds undefined and based on reasonable objective sentencing notions. Lawton LJ responded to mounting academic criticisms by stated that,

> *"Although the courts can recognize an elephant when they see one, they may not find it necessary to define it.*[41] *In our judgment the phrase, 'so serious that a non-custodial sentence cannot be justified' comes to this: the kind of offence which when committed by a young person would make right-thinking members of the public, knowing all the facts, feel that justice had not been done by the passing of any sentence other than a custodial one. We think that is as good guidance as we can give to courts and that any attempt to be more specific would only add to the difficulties of courts and not help them."*[42]

The status quo of wide sentencing discretion parameters for where future theft case custody thresholds should lay was therefore retained. However, interestingly Lawton LJ's statement and the reduction in this particular offender's sentence did influence a moderate judge led decline in the future application of custodial sentences to petty theft offenders by judges in the lower courts. Lawton LJ importantly respected the decision making abilities of Crown and Magistrates' Court judges and thereby protected wide judicial discretion and where theft custody threshold levels lay without the need for more formal statutory intervention. In this way, the helpful utility and influence of top down judge made sentencing discretion guidance regarding theft cases was demonstrated.

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[41] Ashworth, A. Von Hirsch, A. (1997). Recognizing Elephants: The problem of the custody threshold. Criminal Law Review, 1(2), 187 – 200 both provide further analysis on how to determine where the custody threshold parameters lie.

[42] *R v Bradbourn (1985) 7 Cr App R (S) 180 per Lawton LJ at pp 182 – 183.*

Over time the effect of such top down internal regulatory processes created some norms in sentencing ranges for theft based on the regular aggravating and mitigating factor mixes that the Court had identified and commented on. As the Court developed sentencing practice norms in relation to common mixes of aggravating and mitigating factors in shop theft cases the discretion of judges was slowly refined. However, the sometimes vague legal terminology used by the Court of Appeal judges ensured that in reality, the width of judicial discretion boundaries in choosing theft sentence lengths was only mildly affected. From the 1980's onwards the executive's drives towards greater conformity in sentencing culture and practice was only helped in part by the Court of Appeal's guideline judgments. The Court of Appeal seemed to favor a more flexible and open ended approach to determining where the appropriate custody threshold lay when sentencing theft offenders. The inevitable result was that their guideline judgments broadly defined the acceptable sentencing ranges in which judges could make their own reasoned theft offence sentence choices.

The Court of Appeal's approach to guiding judges in the Crown and Magistrates' Courts was reaffirmed in the highly recidivist theft offender guidance case of *Bailey.*[43] In this case, the Court of Appeal reduced a two year custodial sentence to 15 months, but did not provide any additional guidance regarding how this reduction had been decided upon other than stating that any highly recidivist theft offender was a particularly difficult sentencing problem. Stocker L.J. was particularly sympathetic and realistic about how judicial discretion regarding the appropriate custody threshold should operate in such repeat theft offender cases by stating;

> *"This Court has every sympathy with the views expressed by the learned judge. There is no doubt that this appellant is a recidivist and no doubt that he is a thorough pest; and, unhappily, it seems probable that, whatever length of sentence is imposed upon him, unless he manages to change his lifestyle, he will*

[43] *R v Bailey (1988) 10 Cr App R (S) 231.*

offend again on release. Although we hope that will not occur, it would be closing our eyes to the obvious to think that it may not."[44]

The conservative sentencing guidance climate promoted by the Court of Appeal at the time supported the wide theft sentence discretion approaches adopted by the learned judges in incapacitating incorrigible theft recidivists for as long as possible. Such theft offenders seemed beyond the help of rehabilitative sentencing approaches through probation where community service and any attempts at psychological/educational reform had been tried and then failed to make any difference.[45] To provide more prescriptive guidance to a sentencing judge on the appropriate custodial lengths margins in such circumstances provided consistency in approach but no real change to the offender's actual re-offending behavior. In the circumstances outlined above some chaos in the sentencing of persistent and problematic theft offenders might just be as a last resort and therefore worth a try?

The academic debate regarding the deliberately vague Court of Appeal guidance on sentencing theft offenders increased during the 1990s. For Ashworth, Von Hirsch and many other leading academics there was strong support for national consistency and a more rigidly structured sentencing guidance approach in order to promote fairness. Later on, Aas made an academic appeal for less rigidly structured sentencing guidance and thus widened the debate again by examining sentencing globalization trends.[46] During the 1990s leading academics debated how to deliver a greater degree of guidance and structuring of sentencing levels by the Court of Appeal, particularly for the less serious forms of crime.

However, in leading the debate for more rigidly structured sentencing guidance Ashworth, Von Hirsch and many other leading academics may have gone too far in so

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[44] *R v Bailey (1988) 10 Cr App R (S) 231 per Stocker L.J. at p 233.*
[45] Gelsthorpe, L. Raynor, P. (1995). Quality and Effectiveness in Probation Officers' Reports to Sentencers'. *British Journal of Criminology, 35,* 188 – 200 at p 191 describe how probation officers positive and negative feedback in Court was highly influential on whether the custody threshold was met or not.
[46] Aas Franko, K. (2005). *Sentencing in the Age of Information: From Faust to Macintosh,* (First ed.). London: The Glasshouse Press.

strongly advocating that a lack of structure was a longstanding weakness to promoting sentencing fairness and clarity in England. The unique psychological sentencing problems that feature in theft offender cases are very complex, fluid and subtle. They require flexible case by case judicial application. Without a healthy respect for judicial independence to counter increasingly prescriptive re-structuring of their sentencing approach through various non-judicial guidance sources, the case by case individual approach of judges is limited. This in turn influences the balance in sentencing practice shifting it away from subjective human responses and towards a preference for objective structures. By allowing judges to creatively debate and compare their own sentencing approach with their senior judicial peers through case law precedent and to freely define their own judicial discretion, a balanced and fluid sense of what sentencing fairness means over time can emerge.

There are two notable dangers from a dominant non-judicial approach defining what sentencing fairness means and restructuring it to develop national consistency. Firstly, by progressively limiting wide discretionary practices regarding agreed ceilings and setting static extents for mitigating and aggravating factors, the danger of constraining judicial independence and free choice becomes stronger. Secondly, by giving preference to predictive and objective notions of sentencing fairness there is some risk of weakening the subjective attempts by our judges to turn around an offender's behaviour through their own common sense. This is a dangerous tipping point when the judiciary are no longer trusted enough by academics, politicians, the media, the public, as well as the theft offenders they sentence each day to retain ultimate control of what sentencing approach fairness means and apply it in a fluid, balanced and legally justified way.

By the early 1990s the relatively permissive influence of the Appeal Courts' guideline judgment precedents on judicial discretion were well established in sentencing practice. The judges at the Court of Appeal were determined to both recognize the value of and conserve the various careful discretionary choices of their legal peers further down the judicial hierarchy. Lord Chief Justice Taylor like his predecessor Lord Chief Justice

Lane preserved the status quo of judicial discretion through strong generalized statements;

> *"Comparing the facts of one case with the facts of another is not usually a particularly helpful exercise. The facts of criminal cases, vary so enormously that to argue from the facts of one to the facts of another is not a course which the Court encourages."*[47]

The ability to make independent and flexible sentencing sanction choices regarding theft offenders by judicial peers lower down the hierarchy was significantly encouraged by such supportive views. Judicial practice reflected the importance of Taylor LCJ's sentiments with other sentencing peers showing support by reaffirming the same views in other theft cases during the decade. However, Lord Justice Roch clearly affirmed how judicial discretion limits were always subject to firstly self justification and then secondly wider peer justification from the Appeal Court judges. The approach of the Appeal Court was summed by Roch LJ in *Johnson*[48] where he advocated a flexible structure to discretionary sentence length norms such that they could be challenged and redefined at any time through creative judicial justifications. He therefore stated the following:

> *"Sentences should be broadly in line with guideline cases, unless there are factors applicable to the particular case which require or enable the judge to depart from the normal level of sentence. In such special cases the judge should indicate clearly the factor or factors which in his judgment allow departure from the tariff set by this Court. What a judge must not do is to state that he is applying some personal tariff because he considers the accepted range of sentences to be too high or too low."*[49]

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[47] *A-G's Reference (No 19 of 1992) (1992) 14 Cr App R (S) 330 per Taylor LCJ at p 334.*
[48] *R v Johnson (1994) 15 Cr App R (S) 827*
[49] *R v Johnson (1994) 15 Cr App R (S) 827, per Roch LJ at p 830.*

Due to these pragmatic views, the art and skill of applying sentencing discretion appropriately was able to adapt and change as deemed necessary.[50]

Up the late 1980's the Court of Appeal was able to regulate overly harsh theft sentencing, but could not tackle the overly lenient sentence lengths given by some lower Court judges. This was remedied by the procedure laid out under section 36 of the Criminal Justice Act (1988) which created a special power for the executive appointed Attorney-General to refer to the Court of Appeal a sentence which was in his opinion unduly lenient. However, this procedure was so narrowly focused that in reality it was only available for the most serious offences. [51] The influence of this special power was not applicable to the majority of the petty theft sentencing decisions made. Furthermore, the Court of Appeal's influence was diluted by its own guidance focus on regulating the application of long custodial sentences for the most serious theft offence cases. This is why the more serious and highly recidivist theft cases have had far more comment regarding appropriate judicial discretion levels than the more commonly occurring petty theft offence cases.

In this sense, one can note a potential weakness in judicially defined sentence discretion level guidance dispensed by upper appellate court judges. The amount of sentencing discretion levels comment which appellate court judges can give is limited because they rarely have minor theft offence sentences referred to them. However, despite this the appellate court judges do have the advantage of assessing the overall sentence lengths given in numerous theft cases and adjusting the minimum and maximum sentence length margins accordingly. Such widely defined appellate court sentence length margins for theft can be seen as disparate and unhelpful in guiding the everyday

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[50] *R v John Gwillim-Jones 1 Cr. App. R. (S.) 6* is a more recent example that shows how a flexible structure to discretionary sentence length norms has worked well in practice and not resulted in sentencing chaos. In this minor theft case, Mr Justice Holman again reaffirmed the Court of Appeals' permissive approach of not defining theft sentence maximum ceilings despite the best attempts of defence counsel (Mr Mark Summers). Mr Summers wanted to extract a 12 month custodial ceiling for a persistent minor theft offender who was given three years custody. Instead the wide judicial discretion of the learned sentencing judge was supported and the sentence length he gave was deemed as appropriate in light of other persistent theft offender sentence lengths.

[51] Galligan, D. J. (1981). Guidelines and Just Deserts: A Critique of Recent Reform Movements in Sentencing. *Criminal Law Review*, 297 – 305 at p 302.

sentencing practices within the Magistrates Courts. However, the wide margins can also be seen as an inevitable and desirable consequence of the appellate court's deliberate sentencing guidance policy to retain broad discretion in order that well reasoned and justified sentencing for theft offences varying in seriousness can be re-developed by judges themselves. This allows the lower court judges the ability to try their best to tackle those petty theft offenders as they see fit before they become highly recidivist and therefore highly unresponsive to any sentence or custodial length given.

Ashworth and the academic majority have sought to challenge the effectiveness of the broad guidance provided within the Appellate Court sentencing case law precedents. Ashworth believes that not only can it be said that the more frequent the type of theft case, the less likely it is that there will be helpful guidance in the Court of Appeal's precedents. There is also little which is directly relevant to the theft sentencing practices in the Magistrates' Courts. [52] The answer to this debate ultimately depends on how much evolving theft sentencing discretion one wants and how one balances the need for both flexibility and certainty in overall sentencing policy.

The Lord Chancellor's Department issued national Magistrate Guidelines as early as 1974.[53] However, these were much more simplified and had a less onerous effect on judicial discretion when compared with the more prescriptive Magistrates' Association Guidelines issued in December 2006.[54] According to Ashworth, most lay Magistrates who were interviewed in Oxford commonly considered the Appellate Court's theft sentencing guidance decisions to be too remote. Such decisions were further negatively perceived as unstructured and seemingly irrelevant to the day to day sentencing of petty

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[52] Ashworth, A. (2000). *Sentencing & Criminal Justice* (Third ed.). London: Butterworths Limited at p 32.

[53] Lord Elwyn-Jones, (1974, Aug). *Handbook for newly-appointed Justices of the Peace* (First ed.). London:HMSO: Lord Chancellor's Department.

[54] The Magistrates' Association was established in 1920 following the suggestions of Alderman Wilkins JP. It represents the lay magistracy and is a voluntary charitable organization funded by membership subscriptions. Although voluntary, the association has grown to be a highly influential collective voice in highlighting the majority concerns of over 80% of the Lay Magistracy. The association offers members a collegiate connected environment within which sentencing practice advice, training and most importantly debate regarding judicial discretion can take place. It must be remembered however, that the views and arguments of other non-Magistrate Association lay Justices of the Peace are just as important.

theft offenders. Ashworth's Oxford Pilot Study (1984) on judicial reviews to sentencing practices was pioneering at the time and noted the following:

> *"Applying the Court of Appeal's sentencing guidance to minor case scenarios is at best only somewhat helpful and at worst borders on contempt. The root of these feelings seems to be that the court is thought to be out of touch with the everyday problems of sentencers, and so accustomed to dealing with lengthy prison sentences that it does not seem able to adjust its sights so as to deal realistically with less serious cases."*[55]

The confusion and concerns conveyed by lay Magistrates towards Court of Appeal guidance might have been resolved through collective training with their professional District and Crown Court peers during the 1980s. Ashworth and other leading academics have pointed out that:

> *"In particular the relatively unstructured approach to dealing with applications for leave to appeal against sentence is a significant concern. Within quite a margin, judges can subtly pursue their own policies undisturbed."*[56]

Furthermore, a legally trained and experienced Court clerk if asked for an opinion on sentencing choices available can introduce his own discretion in terms what guidance he or she highlights as being particularly relevant to the case at hand.[57] Ashworth's answer at the time to such unstructured judicial discretion was to help formulate and introduce national consistency guidelines across England.

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[55] Andrew Ashworth et al, *Sentencing in the Crown Court: Report of an Exploratory Study*, Occasional Paper no 10, Centre for Criminological Research, (1984) Oxford: Oxford University Press at p 48. His collaborative Oxford study also noted a number of local variations influencing judicial decision making choices. These were variations in the local influence of court clerk advice at the time; variations in the collegiate ethos of Magistrates based on their social contact with each other; and variations in the subjective notions of Magistrates on how to best uphold local community justice.

[56] Ashworth, A. (2000). *Sentencing & Criminal Justice* (Third ed.). London: Butterworths Limited at p 33. This concern is understandable as the leave to appeal process does place extensive responsibility on the discretion of English judges.

[57] Wasik, M. Turner, A. (1993). Sentencing Guidelines for the Magistrates Courts. *Criminal Law Review, 40*, 345 – 356 at p 350 further discuss the Court Clerk's influence.

3.) Further prescriptive structuring of judicial discretion through national sentencing guidelines:

During the late 1980s, sentencing reformists who were Members of Parliament, leading sentencing academics and members of the legal profession debated the merits of creating a national Sentencing Guidelines Council or continuing with Court of Appeal guidance case law.[58] Those in favor maintained that there were helpful gains that could be achieved in terms of national consistency, democratic accountability, proportionality, clarity and thereby greater fairness. [59] At the same time, the merits of creating a Sentencing Advisory Panel was advocated as a useful way of widening the debate on future sentencing policy in the United Kingdom. Those against these proposals, mainly in the upper echelons of the judiciary, maintained that sentence decision making policy should remain predominantly a judicial defined area.[60] They pointed to the long standing history of sentencing guidance which the Appellate Court had carefully developed. There was of course nothing new about the judiciary and executive opposing each other in relation to judicial discretion reform. History has for a long time recognized these divisions, although for the first time academic influence was being given a chance to shape sentencing policy more directly. [61]

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[58] Wasik, M. & Pease, K. (eds). (1987). *Sentencing Reform: Guidance or Guidelines?* (First ed.). Manchester: Manchester University Press.

[59] These academic sentencing principles were to have a significant influence on how the Criminal Justice Act (2003) was developed. For a deep analysis please further refer to:
-Ashworth, A. (2004a). Criminal Justice Act 2003: Part 1: Criminal Justice Reform - Principles, Human Rights and Public Protection. *Criminal Law Review* (February), 120 - 135.
-Ashworth, A. (2004b). Criminal Justice Act 2003: Part 2: Criminal Justice Reform - Principles, Human Rights and Public Protection. *Criminal Law Review* (July), 516 - 532.

[60] See in particular:
-Hines, Vivian. Gerald. (1984). *Judicial discretion in sentencing by judges and magistrates* (Second ed.). Chichester: Barry Rose Publishers Ltd.
-Hoffmaster, Barry. (1982). Understanding judicial discretion. *Law and Philosophy, 1 (1)* (April), 21 - 55.

[61] Dicey, A. V. (1885). Introduction to the study of the Law of the Constitution (First ed.). London: Macmillan and Co Limited, Chapter XIII, at pp 405 – 409 where he compares the historic English Common Law respect for judicial independence and statutory interpretation in order to balance Parliamentary sovereignty with the greater historic interference in Court affairs by the French monarchy and thereafter the French National Assembly. Dicey feels that English judicial discretion helps to both influence and modify the executive. However, Dicey's 'spirit of legality' could not have foreseen the subtle introduction of sentencing guidance sources in England that have gradually encroached on judicial decision making free choice in the name of consistency, proportionality and fairness. If the spirit of legality is a balance of liberties does this not require protection from judges who can make free and unconstrained choices?

By July 1999, the implementation of sections 80 and 81 of the Crime and Disorder Act (1998) began. The sections intended to improve the impact of mainstream academic sentencing debate so that it had a greater and more effective influence on sentencing practices in England.[62] This was realized in practical terms through the introduction of the Sentencing Advisory Panel which had an academic leadership and which regularly reported to the Sentencing Guidelines Council. It was intended that the Panel add an important new advisory aspect[63] to the sentencing guidance decision making process of the Court of Appeal. Sections 80 and 81 provided the following:

> *"Section 81 (2) - Whenever the court decides to frame or revise guidelines for a particular category of offence, the court shall notify the Sentencing Advisory Panel. The Panel may also decide of its own motion to propose guidelines for a certain category of offence, and must do so if directed by the Home Secretary. Section 80 (3) - The Panel's advice to the court will be published, and in response, the court is required only to consider issuing or revising guidelines. If*

[62] Roberts, Julian. V. (2002). Alchemy in Sentencing: an Analysis of Sentencing Reform Proposals in England and Wales. *Punishment and Society - The International Journal of Penology, 4*(4), 425 – 442 at p 426.

[63] This aspect was to provide objective advice and supportive information to the Court of Appeal to assist the Court when it formulated or revised sentencing guidelines. The Lord Chancellor in consultation with the Secretary of State and Lord Chief Justice selects the Sentencing Panel Members who all receive remuneration from the Home Office. How he comes to his eventual selections is not disclosed publicly. A cursory look at the Panel members reveals a general attempt at representative selection. This includes, members from the Judiciary, Magistracy, Academic community, Crown Prosecution Service, Medical Profession, Police, Probation/Prison Service, Public and Voluntary sectors. However, to call this selection truly representative and well balanced would difficult to substantiate if the diverse roles of the general public were taken in consideration. Particularly, the bias towards University of London and Oxford Academics and omission of active Defence Barrister/Solicitor Members is a shame because in ranking academic or legal practitioner output worth as appears to be the case here, the academic debate regarding sentencing regulation within the Panels' discussions can potentially be poorly represented. Representative democratic attempts will always face this particular criticism. The Panels' consultation processes in relation to sentencing guideline development are guided by Section 171, Subsections (1-4) of the Criminal Justice Act (2003). Most noteworthy, apart from executive sanctioned public remuneration possibly influencing the Panels' objectivity is the specific bias towards the involvement and or interference of the executive appointed Secretary of State and Lord Chancellor. To the Sentencing Advisory Panels' credit, most members of the Judiciary, Magistrates' Association, active Defence Barristers, Public and Voluntary sectors are *usually* asked for critical comment on the Sentencing Advisory Panels' proposed guidelines. However, nothing states that the wider judiciary or academic community *must* be consulted. Instead, it seems that the executives' political influence is over represented and dominant even at this consultation level.

it does so, it is not bound to adopt all or any of the Panel's proposals, but does have a statutory duty to take account of them and of other factors such as the need to promote consistency and public confidence.''[64]

Theft offences have attracted significant interest from the Sentencing Advisory Panel and Sentencing Guidelines Council since 2004.[65] The Sentencing Advisory Panel looked at how to guide sentencing discretion in relation to commonly occurring and highly recidivist non-dwelling theft offenders. On 24th August 2006, the Panel published its research findings regarding the factors which they believed most influenced judicial discretion. The consultation paper which was issued was intended to eventually produce *definitive* shop theft sentencing guidelines to help shape judicial discretion.

This word is important because in accordance with Section 170, subsections (1 - 9) of the Criminal Justice Act (2003) the Sentencing Guidelines Council has to process all guidelines with close executive consultation with the Secretary of State, Lord Chancellor and House of Commons Home Affairs Committee before any definitive guidelines are published. This is why this research argues it is *'executive led'* intervention because revisions to guidelines are so politically scrutinised. The

[64] Direct from sections 80 and 81 of the Crime and Disorder Act (1998) available online at www.opsi.gov.uk

[65] There have been 9 sentencing guidelines impacting theft sentencing in only 4 years, i.e.)
-Sentencing Guidelines Council (Dec 2004) New Sentences: Criminal Justice Act 2003 (pp. 1 - 31): Sentencing Guidelines Secretariat: London.
-Sentencing Guidelines Council (Dec 2004) Overarching Principles: Seriousness Guideline (pp. 1 - 14): Sentencing Guidelines Secretariat: London.
-Sentencing Guidelines Council (March 2005) Court of Appeal Guideline Judgments Case Compendium (Vol. Update 2 - June 2006, Update 3 - April 2007, Update 4 - July 2008, pp. 1 - 104): Sentencing Guidelines Secretariat: London.
-Sentencing Advisory Panel (2006) Consultation Paper on Theft from a Shop (pp. 1 - 47): London: HMSO.
-Sentencing Guidelines Council (July 2007) Reduction in Sentence for a Guilty Plea: Definitive Guideline - Revised 2007 (Vol. Original Version Dec 2004, pp. 1 - 10): Sentencing Guidelines Secretariat: London.
-Sentencing Advisory Panel (2008) Advice to the Sentencing Guidelines Council - Sentencing for Theft from a Shop. (Sentencing in Cases of Theft from Shops, Research report 3, originally published 24 August 2006, pp. 1 - 38): HMSO
-Sentencing Guidelines Council (Mar 2008) Theft and Burglary (non-dwelling): Consultation Guideline (pp. 1 - 31): Sentencing Guidelines Secretariat: London.
-Sentencing Guidelines Council (May 2008) Magistrates' Court Sentencing Guidelines (Vol. Update 1 (15 July 2008), pp. 1 - 201): Sentencing Guidelines Secretariat: London.
-Sentencing Guidelines Council (Dec 2008) Theft and Burglary in a building other than a dwelling - Definitive Guideline (pp. 1 - 21): Sentencing Guidelines Council: London.

interference in judiciary affairs argument is premised on Section 172 of the Criminal Justice Act (2003) which outlines the duty of all Courts that they **'must'** take into account definitive Sentencing Guidelines Council sentencing guidelines. This phraseology appears to be a direct executive led assault backed up by Sentencing Advisory Panel academics on free choice discretion for English Judges. [66]

In 2005, the Court of Appeal attempted to collate together the existing minor theft guidance in *Page.*[67] Firstly, the Court made the general point of identifying the offence as predominantly low harm, a point which was also recognized by the Panel. Secondly, the Court re-clarified the previous case law regarding aggravating sentencing factors where they believed the custody threshold may be reached. These were mainly violence, use of a minor to commit the theft, presence of an organized group or gang, inability and or unwillingness of offender to tackle their own drug addiction, as well as substantial similar previous convictions recognized under section 143 (1) of the Criminal Justice Act (2003).[68] The Court of Appeal made it clear that they wished to continue preserving the current levels of discretion for judges dealing with theft offenders in the lower courts and that custody remains an option. They also wished to reaffirm section 152 (2) of the Criminal Justice Act (2003). In their concluding comments, Lord Justice Rose put forward the following four principles as guidance for the sentencing of highly recidivist and problematic minor shop theft offenders:

> *"(i) It is a classic offence for which custody should be the sentence of last resort and will almost never be appropriate for a first offence. A community penalty may, in some cases, be appropriate on a plea by a first-time offender, even when other adults were involved and the offence was organized.*
> *(ii) When the offence or offences are attributable to drug addiction, a drug treatment and testing order will often be appropriate.*

[66] Please see further the appendix where section 172 is stated in full.
[67] *R v Page (2005) 2 Cr. App. R. (S.) 37.*
[68] Von Hirsch, A. Roberts, J. (2004). Legislating Sentencing Principles: The provisions of the Criminal Justice Act 2003 relating to sentencing purposes and the role of previous convictions. *Criminal Law Review* (July/Aug), (516 - 532) (639 - 652).

(iii) A short custodial term (not more than one month) may be appropriate for a defendant who persistently offends on a minor scale. If that persistence also involves preparation of equipment by the defendant to facilitate the offence, two months may be called for.

(iv) Even when a defendant has to be sentenced for a large number of such offences, or where he or she has a history of persistent similar offending on a significant scale, the comparative lack of seriousness of the offence and the need for proportionality between the sentence and the particular offence will, on a plea of guilty, rarely require a total sentence of more than 2 years and will often merit no more than 12 to 18 months. Nothing we say is intended to affect the level of sentence appropriate for shoplifting by organized gangs. When this occurs repeatedly or on a large scale, sentences of the order of four years may well be appropriate, even on a plea of guilty. If violence is used to a shopkeeper, after theft, so a charge of robbery is inapt, a sentence in excess of four years is likely to be appropriate."[69]

This discursive sentencing advice given by Lord Justice Rose is the most specific yet from the Court of Appeal regarding how judicial decision making should approach and be proportionate towards highly recidivist minor theft offenders.[70]

In November 2006, the Magistrates' Association, in response to the Panel, supported the Court of Appeal's sentencing guidance in *Page* and warned against the over analysis of theft sentencing policy and practice. They also warned against the adoption of specifically worded guidelines for specific offences that in any way limited the pragmatic sentence choices of magistrates.[71] If required, general guidelines with ranges of options were considered the most helpful in resolving the current problem of

[69] *R v Page (2005) 2 Cr. App. R. (S.) 37 per Lord Justice Rose at pp 223 – 224.* Please note for succinctness, some sentencing guidance has been omitted as well as all the theft case sentencing precedent authorities that Lord Justice Rose eloquently used to further demonstrate and support his sentencing guidance.

[70] Von Hirsch, A. Ashworth, A. (2005 July). *Proportionate Sentencing - Exploring the Principles* (First ed.). Oxford: Oxford University Press.

[71] Farmer, Paul. (2006). Sentencing: aggravating and mitigating factors: not a mathematical exercise. *Magistrates' Courts Practice, 10* (6), 20 – 32 at p 24.

persistent theft offenders. The strong resistance from the Magistrates' Association regarding any restriction or interference to their current levels of judicial discretion in theft offence cases seems to suggest much discontentment had built up behind the scenes.[72] This is directed not only at the Panel's academic research scope, where the Magistrates' Association suggested the link between drug addiction and shop theft offending should be further analyzed, but also at any attempts by the executive through the Sentencing Guidelines Council to vicariously interfere with their sentencing discretion at such a creative time when new decision making choices are either in operation or being developed. In essence, the continual sentencing policy reforms that the executive seeks to introduce and test for success requires open discretion not directive discretion.

In particular, the Magistrates' Association drew attention towards the reactive nature of the sentencing process itself whereby the offence type, offending history and offender profile are within wide ranges that have to be carefully considered and balanced. In order to achieve a fair balance, the Magistrates' Association argued for a much more broad sentencing approach in order that judges themselves can decide on the best way to treat individual offenders and thereby reduce their offending. In order to achieve these sentencing purposes discretionary creativity is seen as an essential principle. This is not a surprising reaction given the history of difficulties uncovered in regulating the sentencing discretion of the judiciary both generally and more specifically in theft law. However, the executive and academic led debate will it seems continue in the future to attempt to dominate theft sentencing policy and practice. This is despite the current and likely

[72] The media commentary when repeated over time starts to gain veracity, i.e.)
-Gibb, F. (2006, 25 Aug). Shoplifters to avoid jail under new guidelines. *The Times,* p. 22.
-Ford, Richard. (2007a, 8 Jan). Judicial discretion comes up against political judgment. *The Times,* pp. 23 - 24.
-Ford, Richard. (2007b, 8 Jan). Top judges revolt over reform of sentencing. *The Times,* p. 22.
-Gibb, F. (2007, 9 Mar). Sentencing guidelines flawed, says chief judge. *The Times,* p. 22.
-Ford, R. Gibb, F. (2007, 24 Dec). Spot fines and cautions make criminal law a farce, says judge. *The Times,* pp. 22 - 23.
-Ford, R. (2008, 24 Nov). No sentencing guidance can be comprehensive. *The Times,* pp. 23 - 24.
-Ford, R. (2008, 27 Nov). 'Summary justice' soars as courts bypassed. *The Times,* pp. 24 - 25.

future judicial resistance to theft sentencing policy and discretionary decision making practice change.[73]

The judiciary's strengths are that they are the conservative sentencing discretion constant that brings consistency to the ever changing demands of a publicly elected executive.[74] The recent historical developments charted within this research suggest that the Diceyan separation of powers debate continues to be very important. Looking at the past provides perspective as to why we have chosen the paths in sentencing policy we have and how we have arrived at the current sentencing climate today.[75] The debate between public bodies such as the Sentencing Advisory Panel, the Sentencing Guidelines Council (now Sentencing Council), the Sentencing Commission[76] and the wider English judiciary, in a perfect world would remain balanced. However, there appears to have been increasing influence on discretionary sentencing approaches from the executive and legislative backed Sentencing Guidelines Council according to perceptions recorded within this research.

4.) The new Sentencing Council: Signs of change?

In April 2010, the Sentencing Guidelines Council was formally replaced by the Sentencing Council. This change had been previously debated and was supported by New Labour. This new body will function under the elected Conservative and Liberal Democrat coalition government of 2010. Whilst the structured guidance of the SGC

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[73] Flintham, A. (2008). *Press statement re: Magistrates and custodial sentences*, 22/2/08. London: Magistrates Association referred to the Lord Chancellors' previous 05/12/07 statement regarding the importance of respecting independent judicial discretion when reaching sentencing decisions for both trial Judges and Magistrates. She adds in very strong language: "That is and must remain, the case."

[74] Roberts, Julian. V. (2008a). Aggravating and mitigating factors at sentencing: towards greater consistency of application. *Criminal Law Review, 4*, 264 - 276.

[75] -Wasik, M. (2004). Going around in circles? - Reflections on fifty years of change in sentencing. *Criminal Law Review* (April), 253 - 265.
-Wasik, M. (2008). Sentencing guidelines in England and Wales - state of the art? *Criminal Law Review, 4*, 253 - 263.

[76] -Sentencing Commission Working Group, (2008 July). Sentencing Commission Working Group - A Summary of Responses to the Sentencing Commission Working Group's Consultation Paper. Ministry of Justice, (pp. 1 - 11): HMSO: Judicial Communications Office.
-Sentencing Commission Working Group, (2008 March 31). Sentencing Commission Working Group Consultation Paper: A Structured Sentencing Framework and Sentencing Commission. Ministry of Justice, (pp. 1 - 70): HMSO: Judicial Communications Office.

guidelines was deemed useful by some judicial interviewees in this research there was also some judicial concern that their independence and discretion was being undermined. The use of 'must' under section 172 of the Criminal Justice Act (2003) can be restrictive by reducing the impact of other sentencing guidance sources. By reducing the mandatory impact of sentencing guidelines to perhaps 'have regard to' or 'may consider' there is much more room for free choice discretion to operate and judicial independence to be respected. This is a crucial new development and reflects a number of power balance themes in this research. For Ashworth, there is now concern that democratic accountability will be reduced with a judicial majority of 8 to 6 non-judicial appointments to the new Sentencing Council. There is also concern that wording of the Coroners and Justice Act (2009) will allow judges to sentence from the lowest to the highest categories without being constrained by categories or bands of sentencing. It has been reported of Ashworth that;

> *"The final wording of the 2009 act is pitifully loose. It dilutes the impact … and substantially weakens any objective of increasing transparency and consistency of approach."*[77]

The new Sentencing Council may attract renewed judicial confidence and faith. However, as we are once again in a 'bedding in period' it is too early to tell. It is noteworthy, that many judicial interviewees from this study predicted that they would retain their discretionary sentence decision making free choice come what may. As a Ministry of Justice Spokesperson said;

> *"It is fundamental to our criminal justice system that decisions on sentencing in individual court cases must be a matter for the independent judiciary. The Sentencing Council will ensure greater consistency by enabling the courts to*

[77] Hill, A. (2010, April) Judges given free rein by 'pitifully loose' sentencing law, The Guardian, available online at: http://www.guardian.co.uk/uk/2010/apr/05/judges-sentencing-andrew-ashworth [accessed April 2010]

> *approach sentencing in similar cases from a common starting point, and will improve the public's understanding of the process."*[78]

All it seems to have taken was a shift in perceptions for Government policy makers to re-evaluate how to regulate the sentencing approach. There remains many more exciting opportunities for us all to re-examine how best to regulate judicial discretion debate. The value of academics capturing judicial perceptions for themselves in the future is significant. Not only should our understanding of judicial discretion be continually refreshed, but future academics can help to bridge gaps in knowledge. One gap in knowledge is how to promote greater cooperation in an increasingly globalized world. If future academics can gather judicial perceptions across the world on their sentencing approach this can lead to more informed Domestic, European and International sentencing approach integration development. The debate about sentencing globalization and indeed what choices we actually have to shape it will of course continue.

[78] Ibid.

Chapter 2: Recent Historical Developments towards Judicial Discretion and Theft Sentencing within Denmark:

1.) Judicial and Government cooperation over judicial discretion reform:

From the 1890's onwards, Denmark witnessed the introduction of a comprehensive welfare state model which was largely as a result of the long standing political consensus between both conservative and liberal factions over the preceding 30 years. The united political and judicial dissatisfaction with the 1866 Criminal Code culminated in three separate executive led attempts to re-draft in 1912, 1917, and 1923 respectively. This led to the final publication of the present Criminal Code of 1930 which eventually came into legal force on 1 January 1933.[79]

The rehabilitative sentencing choices available to judges when dealing with theft offenders were significantly expanded by the reforming Criminal Code *'straffeloven'* of 1930. The code retained the 1866 section one statutory guiding principle of *'nullem crimen sine lege',* but sought to establish two additional sentencing policy directions. Firstly the 1930 Criminal Code attempted to broaden the range of different sanctions available for theft offences whilst retaining wide discretion over how these sanctions were to be applied. Secondly it sought to improve the effectiveness of sentencing decisions by guiding judges to apply the new sanction options in conjunction with subjective factors such as the psychological and social profile of the theft offender. [80] Judges dealing with mentally disordered theft offenders under the 1930 Criminal Code

[79] Waaben, Knud. (1958). *The Danish Criminal Code* (First ed.). Copenhagen: G.E.C. Gads Publishing, further discusses within his introduction section about the significant developments from 1905 onwards which led to the Criminal Code of 1930.

[80] Christiansen, K.O. & Gram Jensen, S. (1972) Crime in Denmark: A Statistical History, *The Journal of Criminal Law, Criminology, and Police Science*, March, Vol. 63, No. 1, 82 – 92 provide a detailed analysis of the criminal statistics for police registered crimes from 1841 to 1968.

were now able to recognize their limited responsibility and apply special indeterminate psychiatric treatment requirements.[81]

By 1973, criticisms regarding the utility of the special prevention based sanction methods supported by the 1930 Criminal Code had reached a pivotal moment. Politicians, practicing criminal lawyers and the wider public had become unified by their mutual dislike of preventative treatment sentences.[82] In particular, there was dislike about the application of indefinite incarceration periods.[83] The idealized notion of what constituted complete subjective offender reform was unclear. There was also concern surrounding the fair release of theft offenders only when they were considered to be fully reformed. This led to the abolition of most of the special preventative treatment sanctions introduced by the Criminal Code (1930). The 1973 changes to the Criminal Code (1930) meant that judges were no longer able to primarily address and place the particular needs of the individual theft offender first. The Danish judiciary had pre-sensed the growing public dissatisfaction with special preventative treatments and understood the unique stresses upon the penal system which such sentencing policies causes long before 1973. They therefore chose to respond by rarely applying these sanction options to theft offenders.[84] Meanwhile the general section 80 rules which provided judges with wide reaching theft sentencing development and application powers remained unchanged.

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[81] Aungle, P.G. (1959). The Care and Treatment of Psychopathic Offenders in Norway, Sweden and Denmark, *Journal of Mental Science, 105, 428 – 439* further discusses the influence of the Danish Code of 1930 on Danish penal policy and the treatment approach towards mentally disordered offenders.

[82] Tamm, D. (2002). *Danish Law in a European Perspective* (Second ed.). Copenhagen: Forlaget Thomson, Chapter 21, at p 484 notes that inspite of the standardized time periods given by sentencing Judges, a prisoner receiving preventative treatment still did not know exactly when he would be released as he could be detained longer by prison committees. This caused serious counter productive psychological pressure to develop.

[83] Lars Bo Langsted, Vagn Greve, Peter Garde. (2004). *Criminal Law Denmark* (Second ed.). Copenhagen: DJOF Publishing, Chapter 4, Section 39.

[84] Waaben, Knud. (1982). *Danish Law - A General Survey* (First ed.). Copenhagen: G.E.C. Gads Publishing, Chapter XIX, at p 362 highlights how some of the indeterminate measures had virtually disappeared in court practice even before 1973. For Waaben, the lasting impact of the period of specialized preventative treatment sentence options which ended in 1973 was the re-development of new and more effective institutional regimes and treatment patterns within the correctional system.

2.) Legislative preservation of wide judicial discretion within sentencing case law:

In the years after 1973, how sections 56, 62, 80, 81, 82, 276 of the Criminal Code[85] were applied to theft sentencing decisions was left to the interpretation of the Danish Courts. The light touch legislative regulation of the Danish sentencing approach was unlike the increasingly prescriptive legislative changes made to the regulation of the English sentencing approach. The current Danish approach to sentencing regulation has been summarized as follows;

> *"The Danish Courts play an important role in interpreting the legal text but do not serve as a lawmaking source within the criminal law as in the common law countries. Moreover court decisions are not precedents in any formal, binding way. In reality decisions made by the higher courts serve as guidelines for the lower courts, which follow prior decisions made by the higher courts in order not to see their own decisions reversed by appeal. And sentencing is in fact case law."*[86]

In England, the Court of Appeal theft sentencing guidance precedents and the Sentencing Guidelines Council theft sentencing guidelines seek to provide greater consistency by narrowing the punishment types and margins. In Denmark, Supreme Court theft sentencing precedents, Code sentencing guidance and Prosecutor sentencing guidelines leave more room for judicial interpretation. They therefore allow greater scope for flexible sentencing practices because the punishment margins and types provided have been deliberately left broad within legislation so that the judge's free choice to exercise his or her discretion is respected. For theft, both the sentencing

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[85] Jensen, M. F. Greve. V. Høyer, G. Spencer, M. (2003). *The Danish Criminal Code & The Danish Corrections Act* (Second ed.). Copenhagen: DJOF Publishing have developed a comprehensive English language translation.

[86] Lars Bo Langsted, Vagn Greve, Peter Garde. (2004). *Criminal Law Denmark* (Second ed.). Copenhagen: DJOF Publishing, Chapter 4, Section 49.

choices and ranges are extensive from day fines to six years custody that the prescribed maximum theft sentence is rarely reached by the Danish judges.[87]

The main statute based relevant considerations the Danish judiciary use when deciding how to apply their discretion to a theft case is within section 80 of the Code. Section 80 states that;

> *"(1) In determining the sentence, the court shall, under due consideration of legal consistency in sentencing, take account of the seriousness of the crime and of the information concerning the offender.*
> *(2) In considering the severity of the crime, account shall be taken of the damage caused by the crime, of the danger of the crime and of the offence of the crime. Furthermore, account shall be taken of what the offender did or should have perceived to be doing. In considering information about the offender, his general personal and social characteristics, his situation before and after the crime as well as his motivations for the crime, shall be taken into consideration."*[88]

Subsection one starts by introducing Danish judges to the general objective of uniform and fair sentencing responses with the two areas of focus when making sentence decisions, the theft crime and the theft offender. The general drafting in section 80 after defining the main sentencing aims, then lists fairly wide sentencing considerations that can be expanded upon by the judges themselves as they deem necessary.

Free choice discretion is maintained not only because the considerations are fairly wide, but also because judges are crucially not given any prescribed way to assess these considerations. This includes making their own assessments of the naturally complex area of theft offence seriousness and the effect of the theft offender's unique profile on

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[87] Flemming, Balvig. (2005 Feb). When Law and Order Returned to Denmark. *Journal of Scandinavian Studies in Criminology and Crime, 5* (2), 167 – 187 at p 171 notes that as a result of popular punitive political policy the maximum sentencing limit for theft was increased by amendment to section 286 of the Danish Criminal Code from four to six years when aggravated by extreme violence and weapon usage.
[88] As according to Wandall, R. H. (2006). Equality by numbers or words: A comparative study of sentencing structures in Minnesota and in Denmark. *Criminal Law Forum, 17* (March No. 1), 1 – 41 at p 7 who helpfully translates the original Danish into English.

their resulting sentence. Judicial considerations of theft offence seriousness under section 80 incorporate analysis of the theft offence type and then wider analysis of the potential harm and risk posed by the theft type and the actual damaging affect of the theft type. The general drafting of subsection two seems to be suggesting the harm and risk to society more than the offender himself as this is dealt with in the second sentence. At this point, the sentencing judge is asked to assess the subjective mind '*mens rea'* of the theft offender at the time of the offence and the offender's past, present and future psychological and wider social profile.[89] The human profile also includes both the physical affect of the theft offence commission on the life of the offender and the psychological affect of why he decided to commit the theft. How to consider and balance all these decision making elements together is entirely up to the Danish judges interpretation of Higher Court theft sentencing case law.[90]

The requirement within section 80 to balance objective offence gravity and subjective offender attributes is flexible and permissive because of how it is worded. Section 80 requests that judges 'shall consider' various general sentencing factors. Aggravating and mitigating factors are then more specifically listed down in sections 81 and 82 which judges should 'normally consider'. This gives free choice over which factors to consider or not.[91] In comparison, the prescriptive non-exhaustive lists of factors within the English sentencing guidelines indicate what 'must'[92] be considered. The ability to deviate from these pre-selected prescriptive lists of offence specific sentencing factors is more strictly regulated.[93] English Judges must carefully justify their sentence choice reasoning based on other non listed mitigating and aggravating factors in

[89] Lars Bo Langsted, Vagn Greve, Peter Garde. (2004). *Criminal Law Denmark* (Second ed.). Copenhagen: DJOF Publishing, Part I, Chapter 7, Section 243 note that *mens rea* is a focus for High Court judicial guidance in a significant amount of theft sentencing case law.
[90] Wandall, R. H. (2006). Equality by numbers or words: A comparative study of sentencing structures in Minnesota and in Denmark. *Criminal Law Forum, 17* (March No. 1), 1 – 41 at p 7 who makes the same point as me and understands its significance. This is that Danish sentencing courts are not instructed on *how* to balance their considerations. The only instruction is that determining the sentence must be done with due consideration of legal consistency.
[91] Greve, Vagn. (2002). *Straffene* (Second ed.). Copenhagen: Jurist- og Okonomforbundets Forlag at pp 243 – 244 notes the lack of general rules within Danish law to define what is to be aggravating. This is because the maximum sentencing levels are very rarely touched upon in sentencing practice.
[92] Section 172 of the Criminal Justice Act (2003).
[93] Section 174 of the Criminal Justice Act (2003).

open Court. In this way deviance from the Sentencing Guidelines Council theft guidelines is not encouraged. The legislative support and detailed guidance can at times instruct how a sentence decision should be constructed. An example of this instructive approach within a guideline is the automatic 1/3 reduction in sentence length for a promptly given guilty plea.[94]

A brief separation between the approach of the Government and the Judiciary on the influence of section 80 on theft sentencing occurred when it was adjusted by a Standing Committee in 1973.[95] At the time, the influence of theft offender antecedents on judicial considerations of section 80 seemed to be driving higher sentences because such offenders were highly recidivist. To reduce theft sentences and thereby encourage greater sentencing leniency the Standing Committee deliberately removed offender antecedents. The response of the judiciary was to continue to sentence theft offenders and increase their punishments according to their antecedents as they deemed appropriate.[96]

In theft sentencing practice, objective offence seriousness has usually been assessed in terms of the value of the stolen goods taken by theft offenders and the degree of harm caused to the theft victim.[97] Subjective theft offender considerations are usually assessed in terms of recognized mental disorders, drug and alcohol addictions, antecedents and family support structures. In addition, general rules on what is

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[94] Sentencing Guidelines Council (July 2007). Reduction in Sentence for a Guilty Plea: Definitive Guideline - Revised 2007 (Vol. Original Version Dec 2004, pp. 1 - 10): Sentencing Guidelines Secretariat: London.

[95] Penal Code, No. 319, June 13, Denmark, (1973).

[96] Wandall, R. H. (2006). Equality by numbers or words: A comparative study of sentencing structures in Minnesota and in Denmark. Criminal Law Forum, 17 (March No. 1), 1 – 41 at p 7 who notes that the Danish judiciary felt they had been given formal authority to do this anyway due to the effect of Section 81(1) 1 of the Penal Code. The section allows for previous antecedents to be considered provided the defendant was 18 and convicted in Denmark within a period of 5 years. Further support for the judicial response according to Wandall can be seen in Betaenkning nr. 1424 om straffastsaettelse og strafferammer I, Straffelovrådet, Chapter 9, (2002).

[97] Lars Bo Langsted, Vagn Greve, Peter Garde. (2004). *Criminal Law Denmark* (Second ed.). Copenhagen: DJOF Publishing, Part I, Chapter 7, Section 244 importantly note that in sentencing practice objective offence gravity is the most influential part of section 80. This is not to say that subjective offender attributes are not important. However, within the case law the comparison of similar offence seriousness attributes provides the most proportionate and fair match between the crime committed and the eventual sentence given.

mitigating and reduces a sentence can be found in sections 84 and 85.[98] All these considerations have to be balanced according to the ultimate discretion of Danish judges in order to meet the general sentencing aim of consistency which was added to the code in 2004.[99] Danish judges have thereby retained their traditionally wide judicial discretionary approach towards the sentencing decision making process and gradually established their own punishment margin norms. Consistent sentencing norms are not just interpreted by Danish judges. It is also monitored by a variety of stakeholders, i.e.) prosecutors, defense lawyers, theft offenders, specific victims of the theft, the wider Danish public, the media, the independent Danish Court Administration and various sentencing policy lobby groups. As a result of this diverse scrutiny it is perhaps unsurprising that Danish judges have chosen to remain within the widely defined theft sentencing ranges within the code.[100]

The Domstolsstyrelsen (Court Administration) created 1 July (1999) is an independent arm of the executive led Justitsministeriet (Ministry of Justice). Ultimate control of the Domstolsstyrelsen rests with a separate Board of Governors and a Director and not the Minister for Justice. As the Danish Court Administration structure online further outlines;

> *"The board of governors is the chief executive and generally liable for the activities of the Danish Court Administration. The director, who is appointed and may be discharged by the board of governors, is in charge of the day-to-day management. The director is not required to hold a law degree. The composition of the Danish Court Administration's board of governors is provided by the*

[98] Lars Bo Langsted, Vagn Greve, Peter Garde. (2004). *Criminal Law Denmark* (Second ed.). Copenhagen: DJOF Publishing, Part I, Chapter 7, Section 251 detail 9 mitigating factors broadly defined within the Danish Criminal Code which are: self defence/necessity, young age under 18, provocation/duress, genuine mistake of law, position of dependence in family or work relationship, voluntary cooperation with authority, voluntary compensation of victim, reduction of harm and full confession provision.

[99] Penal Code No. 218, March 31, Denmark, (2004).

[100] Betaenkning nr. 1424 om straffastsaettelse og strafferammer III. Bilag: Statistik undersøgelse af domspraksis, Straffelovrådet, (2002) gives statistical support for imposed theft sentences generally conforming to the code's theft sentencing ranges despite the Danish judiciary's free choice over how such theft sentences are to be applied. The statistics also demonstrate that judicial sentencing consistency can be achieved with the minimum of executive led policy intervention.

> *Danish Court Administration Act. The board of governors has 11 members, eight of whom are court representatives, one is an attorney and two have special management and social insights."* [101]

This judicial support structure protects against the possibility of popular punitive politicians having a strong influence on the theft sentencing approaches of District Court Judges because judicial training is solely administered by the independent Domstolsstyrelsen.

In comparison, the English Court administration structure provided by Her Majesty's Courts Service (HMCS) is not independent because it is partly executive led through the Lord Chancellor. As the English Court Administration structure online further outlines;

> *"HMCS which is an agency within the Ministry of Justice, manages the system of support for the carrying on of the business of the courts, including infrastructure and resources. HMCS provides the support necessary to enable the judiciary and magistracy to exercise their judicial functions independently. All staff in HMCS owe a joint duty to the Lord Chancellor and the Lord Chief Justice for the efficient and effective operation of the courts."*[102]

Ultimate control of HMCS rests with the Lord Chancellor who is himself appointed by the executive and is a member of the Cabinet and the Lord Chief Justice (Head of the Judiciary) who is appointed by an independent Non Departmental Public Body (NDPB), namely the Judicial Appointments Commission (JAC). Created under section 61 of the Constitutional Reform Act (2005), all 15 diverse members of the Judicial Appointments Commission are ultimately funded by the Ministry of Justice

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[101] Domstolsstyrelsen. (2006, 26 Dec). The Danish Court Administration - *http://www.domstol.dk/om/otherlanguages/english/thedanishjudicialsystem/courtadministration/Pages/default.aspx* [accessed Jan 2009].

[102] H.M.C.S. (2008: April). Her Majesty's Courts Service Framework Document (pp. 1 - 36): http://www.official-documents.gov.uk/document/cm73/7350/7350.pdf [accessed Jan 2009] at p 7, section 1.2.

through grant aids. Importantly, the recommendations the JAC make for appointment of Judges can be rejected by the Lord Chancellor who only has to provide his reasons back to the JAC. Both the JAC funding arrangements and the Lord Chancellor's ultimate power over the JAC, endangers the positive work of the JAC so far in trying to protect judicial independence in England. The influence of the Lord Chancellor over the JAC and thereby the selection of the Lord Chief Justice shows how the English judiciary's independence can be potentially politically influenced.[103]

Specifically in relation to HMCS management structures, both the Lord Chancellor and the Lord Chief Justice pass day to day operations to a HMCS Board, but retain ultimate control over this board, which is very different to the more independent Danish judicial support structure. This is officially acknowledged by HMCS online where it is stated;

> *"The Board comprises an independent non-executive Chair, three representatives of the judiciary, a representative of the Department, the Chief Executive, the three other HMCS executives, and two non executives. The Lord Chancellor and the Lord Chief Justice or their delegates approve the appointment of all Board members, save those holding ex officio positions."*[104]

This means there is also a potential danger of the influence of politics on Magistrates' judicial training administered by H.M.C.S. whose Board reports to the Lord Chief Justice and Lord Chancellor. What is important to determine further is the impact on judicial discretion from being regulated the English way with political lines blurred compared to the Danish way with a clearer separation of Executive, Legislative and Judicial arms of the State under the amended Danish Constitution *(Grundloven)* of (1953).

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[103] To explore this more please refer to the following:
Department for Constitutional Affairs (2006 - 24 Oct). Judicial Appointments Commission - Framework Document (pp. 1 - 46): DCA London available at:
http://www.judicialappointments.gov.uk/docs/jac_framework_document.pdf [accessed Jan 2009] and more generally at: http://www.judicialappointments.gov.uk/about/about.htm [accessed Jan 2009]

[104] H.M.C.S. (2008: April). Her Majesty's Courts Service Framework Document (pp. 1 - 36): http://www.official-documents.gov.uk/document/cm73/7350/7350.pdf [accessed Jan 2009] at p 13, section 5.5.

Danish judges derive further legislative support for their traditionally wide theft sentencing discretion through other sentencing advice sections of the code. Section 56 suspended sentence advice does not direct judges on either how or when to apply such sentences to theft offenders. This means that suspended sentences can be applied as the judge deems appropriate. In addition, other than adhering to the general sentencing consistency policy, how to apply section 58 combination, section 62 community and 74a youth sentences are left open to the interpretation of judges.[105] However, to view the discretion of Danish judges as mainly regulated by formal statutory provisions within the Danish Criminal Code or the amended Danish Constitution *'Grundloven'* of (1953) and supervised by the Danish Court Administration created 1 July 1999 would not accurately reflect the true sentencing discretion power balance. In legal practice, the theft sentencing case law guidance supplied by judges at the Supreme Court and the two High Courts is highly influential in fleshing out the Danish Criminal Code.[106]

Why the Danish judiciary and government have continued to operate so respectfully towards each other is a very interesting question to pose. Over time, their approach seems to be a product of socio-legal norms whereby Danish judges appear to place legitimacy for their decision making on their High Court peers and predecessors. Legislative intervention has not sought to radically change this judge led interpretative approach.[107] This may have led to increased judicial contentment, but is this permissive approach in itself the best approach? Certainly it is different and the Danish Government appear to have chosen to regulate judge led theft sentencing practices in a much less direct way compared to the English Government.[108]

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[105] Smith, E. Jochimsen, J. Kistrup, M. Lund-Poulsen, J. (2008). *Straffeprocessen* (Second ed.). Copenhagen: Forlaget Thomson provide a further general analysis of these sections.

[106] Bergholtz, Gunnar. (2007). Some Thoughts on Judges' Decision-making. *Scandinavian Studies in Law - Procedural Law - Court Administrations, 51*(1), 77 – 89 further discusses the influence of the Danish Court Administration on the decision making of Danish Judges through the Danish Court Reform Act (2006). Notably this legislation reduced the Danish District Courts from 82 to 24 with virtually all cases now tried by lower Court judicial panels in the first instance.

[107] Røn, Jens. (2007). *Politi - og domstolreformen* (First ed.). Copenhagen: Jurist - og økonomforbundets forlag generally concludes that radical change to judicial reform is unlikely due to continued Danish coalition government.

[108] Waaben, K. (2001). *Strafferettens Almindelige Del II. Sanktionlaeren* (Fifth ed.),

In Denmark, part of the appeal process is that the theft sentence decisions of District Court judges may firstly be statutorily objected to on impropriety grounds by the prosecutor and or the convicted theft offender and passed up for review to the High Courts.[109] Secondly, the sentencing decisions of High Court judges may be statutorily objected to on proportionality grounds should the seriousness of the theft offence not be adequately reflected in the sentence choice and length given.[110]

Both the two High Courts and Supreme Court have over time produced specific judicially defined guidance for theft cases appealed from the District Courts.[111] Their procedures ensure sentencing margin norms are maintained by a fourfold approach. Firstly, High and Supreme Court theft sentencing precedents remind District Court judges of the general sentencing aims within section 80 namely consistency and offence seriousness. Secondly, aggravating and mitigating factors within section 81 and 82 are reaffirmed and then how they normally effect sentencing decisions is discussed. This legal discussion and guidance is predominantly there to help and thus non-binding phraseology is adopted. Thirdly, theft guidance cases discuss appropriate punishment ranges in relation to the specific theft case facts. Fourthly, judge led theft sentencing

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Copenhagen: Thomson Gadjura, pp 98 – 104 at p 100 as originally translated by Rasmus Wandall expands on this point by arguing further that one cannot say that the individual judge has too much liberty in sentencing theft cases. In Denmark, a small country with liberal access to appeals, it is highly predictable that any judicial doubts regarding theft sentencing levels will find significant clarification through extensively provided appellate court advice and practice.

[109] Administration of Justice Act, No. 910, September 27, 2005 (Denmark), Sections 962 – 963 (1) nr. 2 where the Danish *'upassende'* translated to English means 'improper'.

[110] Administration of Justice Act, No. 910, September 27, 2005 (Denmark), Sections 940 – 941, 945, stk. 1, nr. 3, where the Danish *'åbenbart misforhold'* translated to English means 'clear disproportion'.

[111] There are a number of case examples from Tidsskrift for Kriminalret *[TfK]* reporting the Eastern and Western High Court theft sentencing appeals. They range from serious meaning months in custody to simple meaning days in custody or community penalty or a fine:

-Planned theft from shops and key State services like hospitals is particularly frowned upon by judges who dealt with it harshly through 6 months custody, i.e.) *OE2002.S.3317.02.*

-In one particularly shocking shop theft case involving an incident of violence in which an offender 'bit off a finger' or in Danish, 'bid i finger ikke henført' of a shop keeper stopping him leaving his premises, the theft offender was punished with 4 months immediate imprisonment, i.e.) *V2005.S-1757-05.* This serves as guidance to other sentencing judges regarding the effect of physical violence as an aggravating factor in the sentencing of other normally petty theft offenders.

-Repeated theft from motor vehicles and shops typically receives 3 months custody, i.e.) *OE2002.S.3013.01*

-For repeat shop theft the use of custody is less common, but typically ranges from 60 days, i.e.) *OE1999.S.3649.99.* to 30 days, i.e.) *OE2005.S.3896.04.*

guidance explores norms for when various sanctions are both inappropriate and appropriate to apply to the theft scenario.[112]

3.) Chief Prosecutor's Theft offence guidelines: Evolution possibilities?

Theft sentencing practice is influenced by the Chief Prosecutor's Theft offence Guidelines and regular updated Theft offence Circulars.[113] Both Danish Prosecutors and the English Crown Prosecutors work closely with their respective local police forces before a theft case comes to Court. However in Denmark and unlike in England, the Prosecutor at the sentencing stage provides highly influential advice and guidance to the District Judge regarding the most appropriate sanction norm in light of the theft case facts concerned.[114] The Chief Prosecutor's support and guidance has been significantly expanded since the 1990s due to legislative encouragement.[115] The resultant reports produced have ensured up to date theft sentencing statistics are well known by the Danish judiciary. The reports have also isolated and creatively analysed various aggravating and

[112] For further detailed analysis see generally:
-Greve, V. Jensen, A. Dahl-Jensen, P. Toftegaard-Nielsen, G. (2008). *Kommenteret straffelov. Special del. 9. omarbejdede udgave.* Copenhagen: Jurist- og Økonomforbundets Forlag.
-Greve, V. Jensen, A. Toftegaard Nielsen, G. (2005). *Kommenteret straffelov - Almindelig del. 8. omargbejdede udgave*. Copenhagen: Jurist- og Økonomforbundets Forlag.

[113] de Groot-van Leeuwen, L. E. Rombouts, W. (eds). (2010). *Separation of Powers in Theory and Practice - An International Perspective* (First ed.), Chapter 8, Hammerslev, O. Boye Koch, P. & Gøtze, M. *Independence of the Danish Judiciary.* Netherlands: Wolf Legal Publishers further note that judges have continually re-interpreted these sources of sentencing guidance in order to maintain their symbolic independence.

[114] An example of an informative message regarding section 285 of the Penal Code, simple theft and the fine amount norm advice given by the Chief Prosecutor are found in Rigsadvokaten [Director of Public Prosecutions], Meddelelse nr. 9/2005, 15th November 2005, J.nr. RA-2005-609-0054, 'Strafpåstanden i sager om overtrædelse af straffeloven' [Sentencing Guidance in relation to the Penal Code] at p 86 where amounts up to 8.000 kr. are recommended as the fine amount norm.

[115] Wahlgren, P. (ed.), (2007). The Danish Courts - an Organisation in Development. *Scandinavian Studies in Law - Procedural Law - Court Administrations, 51*(1), 581 – 590 generally notes that in tune with repeated prosecutorial concerns, this has finally culminated in legislative reforms to the Danish police as prosecutors and wider District Court structures through the Danish Court Reform Act No. 538, June 8, (2006). As a result, prosecutions involving jury trials were transferred from the High Court to the District Courts. 82 District Courts were amalgamated into 24 District Courts with an artificial maximum of 8 judges appointed for each of the 24 new District Courts. Numerous judges with their invaluable experience in local areas were lost as a result of these changes. Furthermore such reforms can be linked with the general section 80 Penal Code drive towards legal consistency in sentencing, a principle initially identified by Danish Prosecutors and then later formally acted upon through the Danish Ministry of Justice. Will the current Danish Prosecutors guidelines be more formally interpreted in the future by the Danish Ministry and will this formality serve to limit Danish judicial discretion in sentencing theft offenders?

mitigating factors within sections 81 and 82.[116] The Danish judiciary and prosecutors can benefit from these new academic insights,[117] although even sentencing academics realise the limits[118] of their own research in understanding the sentencing approach, let alone regulating it. [119]

The future development of Chief Prosecutor guidelines is uncertain. However, there are three possible future sentencing guidance developments that could impact Denmark. Firstly, the introduction of national consistency based offence specific sentencing guidelines. Secondly, the current development of Chief Prosecutor guidelines may be expanded and formalised through legislative support. Thirdly, the Danish Directorate of Public Prosecutions (*Rigsadvokaten*)[120] may choose to further develop their sentencing case law database (*Anklager*).[121] The debate and development continues.

[116] An example of an aggravating factors effect on theft sentencing practices which has been analysed by the Chief Prosecutor can be seen in Rigsadvokaten [Director of Public Prosecutions], RA j.nr. 2004-120-0016, June 2005, Straffene I voldssager efter ændringen af straffelovens section 244 – 246 [Sentences in Violence Cases Pursuant to the changes to sections 244 – 246]. The sentencing of violent theft offenders was touched upon in this study and read by Prosecutors and the Danish judiciary thus impacting judicial discretion in sentencing practice.

[117] Hammerslev, Ole. (2008). The Development of the Danish Legal Profession. *Scandinavian Studies in Law - Law and Society, 53*(1), 283 – 302 concludes similarly at p 302.

[118] Hedderman, C. & Gelsthorpe. L. (1997). *Understanding the sentencing of women - Home Office Research Study 170* (pp. 1-96): Home Office: London at p 55 stress that sentence decision making fairness and equality derives within ensuring consistency of approach rather than in endlessly trying to tinker with sentencing outcomes to make them more uniform. However, they do not address or fully justify what the balance of sentencing sources influencing the sentencing approach should therefore be.

[119] It is very interesting to note that Wandall, R. H. (2006). Equality by numbers or words: A comparative study of sentencing structures in Minnesota and in Denmark. Criminal Law Forum, 17 (March No. 1), 1 – 41 in his conclusions at pp 40 - 41 recognizes that different sentencing regimes require different solutions. This is of course a very pragmatic and fair point to make. The fact that England has a less permissive approach may be explained in the higher crime rate and different public concerns when compared to the Danish public. However, the case for suggesting that Denmark should create a more aggregate and categorical approach like in Minnesota, USA in structuring individualized discretion over sentencing equality issues and which sentencing model is best is not made. The problem with this stance is that numerical guidelines may well be advanced in the future both in Denmark and England. Firmly addressing why applying numerical guidelines are not the best solution in different jurisdictions is an important consideration for future comparative sentencing research.

[120] http://www.rigsadvokaten.dk [accessed April 2010]

[121] http://www.anklager.dk [accessed April 2010]

Chapter 3: The conclusions of socio-legal research regarding Danish judicial discretion.

In Denmark, there has historically been somewhat less socio-legal research on judicial discretion than is the case in England.[122] However, what that research has shown is that Danish District Judges are sensitive to the influence of both official and unofficial theft sentencing guidance structures for which their judicial superiors are largely responsible for developing.[123] Danish judges justify their decisions based upon their own subjective principles which largely conform to the traditional Conservative values of their peers and the expectations of wider Danish society. [124] This seems to be a common trait in other legal jurisdictions across the world including England, but the degrees of conformity vary.[125]

The sentencing decision making processes of judges in Denmark have been predominantly quantitatively analysed within the Danish sentencing research conducted. The main focus of the studies was to explore the sentencing factors which were influencing sentencing practices rather than looking at judicial guidance regimes and the extent of constraint on judicial discretionary choices in sentencing practice. A secondary

[122] As Wandall, R. H. (2008). Decisions to Imprison - Court Decision-Making Inside and Outside the Law (First ed.). Aldershot: Ashgate Publishing Limited notes in his introduction at p 2, we know only a small amount about the social impacts on sentencing decision making in England. However, in Denmark we know *'close to nothing'.*

[123] Goldschmidt, V. (1957). Retlig Adfærd. En analyse af retsmyndigheders adfærd med eksempler særlig fra den kriminelle retspleje i Grønland: Vol I, Bilag:Vol II København: Bianco Lunos Bogtrykkeri A/S, notes at p 46, the significant impact of the Danish judiciary when interpreting legal and administrative rules in Greenland. Through qualitative interviews, common attitudes of judges in Greenland towards the administration of criminal justice authority were grouped together between 1948 – 50. The results were later used in the development of the criminal code for Greenland (1954).

[124] Particularly for the Danish perspective, see Wandall, R.H. (2004) *Sentencing to Imprisonment. A Socio-Legal Study of Decisions to Incarcerate in Danish County Courts,* Faculty of Law, University of Copenhagen, who qualitatively and quantitatively analysed courtroom practices and particularly how human interactions there influenced the sentence decision-making process.

[125] For further analysis of the impact of conformity and other related socio-cultural factors on sentencing practices internationally look at Tata, C. & Hutton, N. (2002). *Sentencing and Society: International Perspectives,* (First ed.). Aldershot: Ashgate Publishing Limited. Chapter Twenty Eight provides noteworthy conclusions on international sentencing reform by arguing the case for a 'blend' of objective consistent rules and subjective case by case discretion.

focus has been on understanding the regional differences in sentencing approach norms across Denmark.

Beginning in the 1950s, W.E. von Eyben[126] quantitatively analysed the general impact of different sanction options available in criminal cases and the harshness of the sentence choices made by District and High Court Judges. Both District and High Court sentencing statistics from courts all over Denmark were analysed. This did not yield a significant amount of information and led to a wide qualitative interview survey of District Court Judges' and High Court Judges' opinions. This proved to be much more revealing and supports the qualitative approach adopted by this research. The most noteworthy conclusions of the research were three-fold. Firstly, the sentencing choices of the two judge types were most heavily influenced by the seriousness of the crime committed and the previous antecedents of the defendant.[127] Secondly, the influence of other mitigating and aggravating factors were not easy to distinguish from the case file statistics analysed as having any significant impact on sentence decisions.[128] Thirdly, in the qualitative interviews both judge types highlighted more subjective offender specific factors that were more subtly influencing their decisions such as the offenders' remorse or confession, socio-economic circumstances[129] and age. The interviews revealed wide spread regional variations in Denmark, both in the sentencing norms generally and more specifically in the different sentencing choices being made by individual judges.

However, von Eyben's wide sample choices in terms of numerous cases, offence types and court areas across Denmark somewhat hindered his ability to make specific conclusions regarding the general sentencing decision making trends he had identified. His ambitious qualitative approach with six artificially constructed sentencing case

[126] von Eyben, W. E. (1950). Strafudmåling - Lovens Rammer og Dommerens Udfyldning (First ed.). Copenhagen: G.E.C. Gads Forlag who was a pioneering Danish socio-legal researcher in both Sentencing and European law.
[127] von Eyben, W. E. (1950). Strafudmåling - Lovens Rammer og Dommerens Udfyldning (First ed.). Copenhagen: G.E.C. Gads Forlag at p 210.
[128] von Eyben, W. E. (1950). Strafudmåling - Lovens Rammer og Dommerens Udfyldning (First ed.). Copenhagen: G.E.C. Gads Forlag at p 224.
[129] This would include giving the judges further information on whether the offender was the main family provider and the impact of a custodial sentence on any dependents.

scenarios each with up to sixteen sub-variations was both time consuming and logistically complex to present to judges. However, his enthusiasm and optimistic early approaches are to be commended particularly in relation to choosing different crime types of varying severity such as violent and property crimes and noting the different discretionary approaches of individual judges in selecting custody or not and the length of the custody period imposed. In relation to theft offence discretion, von Eyben noted that using constructed scenarios of a recidivist or first time theft offender,[130] judicial discretion shown in choice extents differed widely.[131] However, this included the sixteen sub-variations which could make the theft offence case scenario more or less serious and which complicates his quantitative analysis of the discretion disparity observed. Despite these limitations, the wide extent of the variations observed in the similar theft scenarios posed pointed to a sentencing climate within Denmark that allowed for significant judicial discretionary freedoms. This was despite the formal top down regulatory attempts by the Western and Eastern High Courts and ultimately the Supreme Court.[132]

A number of quantitative studies followed which attempted to further explain the regional sentencing variations and judicial choice disparities first noted by von Eyben within Denmark. Moe's research methodology adopted a focus sample of Supreme Court Judges.[133] He looked at their differing subjective judgments when involved in the same appellate cases from 1958 to 1969 and designed two types of binary decision forms as an

[130] The theft and burglary scenarios were quite limited in terms of the amount of information they gave to the judges. This led to the danger that they were less realistic than real sentencing cases where submissions regarding the offender and the offence would have significant impact. The age of the theft offender was varied from youth to old age and he was a male with or without previous antecedents for theft. Indeed, von Eyben wanted and justified the theft scenario he had constructed as being deliberately simple so that he could then more easily vary his chosen factors such as the age, antecedents and offence seriousness level.
[131] For recidivist theft by a 33 year old male offender, judges' sentences ranged from a lenient 80 days suspended custody to a harsh 18 months immediate custody. For first time burglary by a 33 year old male offender, judges' sentences ranged from a lenient 60 days suspended custody to a harsh 8 months immediate custody. Despite the simplistic facts given, von Eyben interpreted his findings and argued that wide judicial discretion led to a wide and inconsistent custody threshold band.
[132] Similar problems and eventual conclusions regarding widespread regional court area sentencing variations and judge specific sentencing choice differences were noted by Ingstrup, O. (1964). 'Bidrag til belysning af dommerindividualitetens betydning.' Juristen, 1(3), 318 - 320. Ingstrup compared two Supreme Court judges' decisions in appellate sentencing amendment cases over a year and a half period. The subjective discretionary sentencing standards of the two judges differed over time despite the Supreme Court's sentencing guidance on the violent criminal appeal cases which the research focussed upon.
[133] Moe, M. (1970). 'Milde og strenge højesteretsdomme.' Nordisk Tidsskrift for Kriminalvidenskab, 1(2), 164 - 179.

analytical vehicle to achieve this. Different judges were asked to decide upon whether to apply a custodial sentence or whether to suspend a drivers' licence or not within a number of general criminal and more specific road traffic offence appeals. The Supreme Court Judges selected were placed by Moe in either lenient or harsh groups based on their previous sanction choice appeal decisions. Sanction choice patterns within these two groups were then analysed for any congruence. Moe discovered varying subjective sanction severity choice levels between each of the appellate judges who had to eventually decide the same appeal case as a group. Furthermore, in support of the continued wide discretion of the Danish judiciary from 1979 to 1996, the same results were found by Saabye in relation to Supreme Court Judges' often divergent sentence justification speeches on suspending or imposing custodial sentences.[134]

By the early 1980s, quantitative socio-legal research into sentencing discretion practices was being revisited. Vestergaard quantitatively examined judicial decision outcomes in 2902 general criminal, 1538 general property and 819 specific theft offence types.[135] He noted that differing offence types and seriousness levels did not correspond in a statistically predictive and thereby easy to understand manner with decisions to impose custodial sentences. One important aspect of judicial assessments of theft offence seriousness in Denmark is the financial amount of the goods that are stolen. Judicial discretion comes into play as each sentencing panel of one legally qualified judge and two lay judges must decide where the custody threshold lies depending on all the complex offence and offender factors before them. For stolen goods valuing over DKK 30,000 Vestergaard noted there was a strong possibility of custody being imposed. However, taking only one factor albeit important to explain a complex sentencing decision often provides illusory and misleading results. Instead, decisions to impose custodial sentences could be commonly linked and influenced by subjective factors such

[134] Saabye, M. (2000). Milde og strenge højesteretsdommere., University of Copenhagen, Copenhagen further concluded that the selected 8 appellate court judges seemingly prided themselves on their ability to disagree with each other but yet they still eventually came to a mutually agreed or majority based decision when acting as a group in the same appeal cases.

[135] Vestergaard, J. (1982a). Sanktionsundersøgelsen. - Design og Heuristik (First ed.). Copenhagen: Kriminalistisk Institut.

as the defendants' previous antecedents or their nationality. [136] In addition, procedural factors such as the defendant appealing against sentence to the High Court, or the type of judiciary conducting the trial with either lay or legally qualified District Judges could be commonly linked with decisions to impose custodial sentences. This research will be critically comparing lay and legally qualified Danish District Judges and English Magistrates. This will reveal the differing opinions if any of the type of judiciary on theft decision making discretion and the wider impact of the Danish and English sentencing guidance regimes. The impact of subjective theft offender factors such as nationality and previous antecedents will be further explored within the qualitative interviews of this research.

From the late 1980s onwards, Kyvsgaard sought several times to advance Danish socio-legal research by looking at the application of penal sanctions[137] and the most effective ways to use of community service[138] within Denmark. In 2003, through a quantitative methodological approach, she widely examined discretionary sentencing decisions from all over Denmark that imposed either suspended or immediate custody or community service.[139] In this way, she was attempting to reveal the most influential

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[136] As Vestergaard, J. (1982a). Sanktionsundersøgelsen. - Design og Heuristik (First ed.). Copenhagen: Kriminalistisk Institut at p 45 further noted in the small number of foreign nationality theft offender cases he looked at. Where there was a high value of stolen goods, but without previous antecedents judged by lay or legally qualified judges alike this could be commonly linked with why a custodial decision was *not* made. What this may demonstrate is how strongly persuasive the previous antecedents of theft offenders are in Danish judicial discretionary decisions. This may especially be the case for theft offenders who are very often highly recidivist in their offending patterns and behaviours. Whether the theft is domestic to Denmark or may partially originate outside Danish jurisdictional borders or is linked to other drug trafficking offences may also have an impact in terms of a public policy usage of custody as a deterrence to foreign theft offenders.

[137] For further information in this area see:
-Kyvsgaard, B. (1989). Og fængslet ta'r de sidste. Om kriminalitet, straf og levevilkår. (First ed.). Copenhagen: Jurist- og Økonomforbundets Forlag.
-Kyvsgaard, B. (1998). 'Penal Sanctions and the Use of Imprisonment in Denmark.' Overcrowded Times, 9(6), 9 - 10.

[138] For further information in this area see:
-Kyvsgaard, B. (1999). 'Samfundstjeneste i empirisk belysning.' Juristen, 4, 142 – 154 who notes at p 152, the strong mitigating impact of a defendants' full confession on threshold decisions to impose a custodial sentence or not.
-Kyvsgaard, B. (2001). 'Samfundssanktioner og samfundstiltag i Denmark.' Nordisk Tidsskrift for Kriminalvidenskab, 88(2), 94 - 110.
-Kyvsgaard, B. (2002). Rapport om samfundstjeneste.: Justitsministeriet - Copenhagen.

[139] Kyvsgaard, B. (2003b). 'Forholdet mellem straffe for personfarlige forbrydelser og for formueforbrydelse.' Juristen, 5, 161 - 170.

factors on sentencing outcomes rather than examining factors influencing the sentencing approach.

The focal year chosen was 1996. The sample consisted of a mixture of 1472 criminal cases that involved duress, violence, theft, deception and fraud. The offence types were kept deliberately specific so that Kyvsgaard could explore the relation between punishments for person-threatened crimes and for crimes involving some form of illegal economic gain or benefit. By analyzing the causal relationships between the above case factors and the eventual choices made by sentencers between community and custodial sentences a number of interesting conclusions were revealed.

Firstly, the sentencing outcome decisions being made between community and custodial punishments were most strongly influenced by the offence characteristics, the offenders' profile and the offenders' procedural choices. Thus the factors ranged from the offence type, the offence facts including multiple similar type offences, previous defendant antecedents and when and to what degree the defendant admitted guilt or not for the crimes charged.

Secondly, the research concluded that offender specific factors such as gender, age and individual or groups of defendants had no significant influence on the community – custody threshold sentencing decisions. This research however, must take into account the limited applicability of Kyvsgaard's research aims, quantitative methodology and conclusions. This qualitative research seeks to investigate further beyond these identified factors by critically analysing and comparing the wider influence of differing judicial cultures, judicial profiles, roles and regional variations. However, due to the small sample, the data collected in this qualitative research only reveals some perceptions. Whilst these perceptions matter they must also be interpreted with great caution, particularly because their comparison across jurisdictions is complex.

Despite the limitations of the specific sample chosen, Kyvsgaard's results were helpful in further supporting the conclusions of previous Danish researchers exploring the

factors influencing judicial discretion. The most significant factors identified were tripartite in form and included the offence facts, the offenders' subjective profile and the procedural choices that the defendants' made.[140]

From 2001 to 2002, a socio-legal study comparing the legal decision making powers of Danish judges and other professional groups was conducted by Hammerslev.[141] Danish High Court Judges were qualitatively interviewed to determine how they were interacting with the Courts Administration and other professional groups within society. Hammerslev results revealed that other professional groups have sought to replace these judges as legal decision makers in some areas.[142] Whilst Danish judges have increasingly developed specialised legal decision making expertise this had led to a growing reliance on the support of the Court Administration and the guidance of the wider academic community.

Through the creative use of free choice discretion, Danish High Court judges have been able to continue flexibly interpreting legislation and case law to resolve legal disputes in their own distinct and independent way. This judge led sentencing approach has enhanced the relevance of judicial precedence and empowered judges as the primary legal decision makers, despite the encroachment of other secondary professional viewpoints. Hammerslev's research can be distinguished from previous socio-legal research in Denmark because perceptions of how best to apply the law between judges, politicians and expert witnesses were compared. This provided an in-depth socio-legal understanding of how judicial specialisation has helped judges to justify their continuing ultimate control over legal decision making in areas where there has been a pressure to pass on control to other professions. The Danish judiciary have it seems shown a

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[140] Kyvsgaard, B. (2003a). The Criminal Career: The Danish Longitudinal Study (First ed.). Cambridge: Cambridge University Press utilized much wider quantitative methodological techniques in her longitudinal 13 year study of the criminal careers of 45,000 Danish offenders aged from 15 to 100 years old. In relation to advising the Danish Ministry of Justice on judicial discretion guidance policy, her findings noted the importance of expanding and encouraging the use of more rehabilitative sanction options by Danish Judges particularly for highly recidivist crimes such as theft.

[141] Hammerslev, O. (2003). *Danish Judges in the 20th Century: A Socio-legal Study* (First ed.). Copenhagen: Djoef Publishing, which was published as an outcome of his doctoral thesis in sociology.

[142] This includes psychiatric/psychological assessments of offender risk and increasing use of specific legislation to influence the process of legal decision making.

willingness to adapt in order to maintain the high significance of their own legal knowledge and skill levels.

In 2004, Wandall[143] both quantitatively and qualitatively explored sentencing decisions to impose custody. He analysed legal and extra legal factors relating to the seriousness of the crime and the likelihood of custody being imposed.[144] His sample focus was based on the years 2001 - 2002 and included 227 residential burglary cases and 273 violence cases in 6 regionally spread Danish District Courts.[145]

The results of Wandall's quantitative analysis of three metropolitan and three rural court areas revealed significant regional variations between the propensities of courts' to issue custodial sentences for residential burglaries only.[146] For violence cases the regional variations observed were too slight to be properly statistically supported.[147]

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[143] Wandall, R. H. (2004). Sentencing to Imprisonment - A Socio-Legal Study of Decisions to Incarcerate in Criminal Cases in Danish County Courts. (PhD thesis) University of Copenhagen, Copenhagen.

[144] For the residential burglary cases the general more objective seriousness factors analysed consisted of the stolen property amount, the number of offences committed either singly or in a group and the specific offence fact of where the offence(s) took place.

[145] The 6 District Courts were: Copenhagen, Svendborg, Esbjerg, (metropolitan) Ballerup, Næstved, Horsens, (rural).

[146] For residential burglary, Næstved District Court judges were more than twice as likely to issue a custodial sentence than their judicial counterparts at Ballerup District Court. For violence, Svendborg District Court judges were only 20 per cent more likely to issue a custodial sentence than their judicial counterparts at Horsens District Court. These specific court area comparisons mirrored the overall statistical extent of variation conclusions that in residential burglary the difference between court areas was significant, whereas for violence cases the difference between courts areas was not significant. This research's choice of theft offences as an analytical vehicle is further justified by Wandall's findings. For theft cases involving residential burglary the likelihood of receiving a custodial sentence was ordered so that Copenhagen District Court was found to be higher than in Esbjerg District Court, then Ballerup District Court, then Svendborg District Court, then Horsens District Court, then Næstved District Court. What is interesting to note is not only the extents of the regional variations for residential burglary sentencing outcomes, but the harshness of the metropolitan court areas when compared to the more rural court areas selected which display more judicial discretionary lenience. Perhaps the higher incidence of theft offences generally in metropolitan areas compared to rural areas conditions sentencers to become more harsh in their use of their discretion than their rural counterparts? This research will examine this point further and attempt to reveal and critical analyse the theft sentencing decision making processes themselves and the wider impact of various guidance structures on judicial discretion. This research will also compare the extent of the urban-rural divide in both England and Denmark in relation to general theft decision making processes.

[147] This lack of statistical support could be due to methodological limitations such as the actual offence type selected, the small scale 6 sample court areas selected or the low numbers of violence case outcomes analysed in comparison to the national picture. In addition, the quantitative analysis could have looked into the wider impact of changes in sentencing outcomes over time.

The secondary focus of Wandall's research consisted of qualitatively analysing both the formal and informal court room communications between prosecutors, defence attorneys, judges and court support staff. The aim was to further explore their perceptions on reasons why custody was eventually selected. This meant that Wandall's focus was broadly spread between all the main court room actors to gain a holistic understanding of the court room processes only. This research's focus is much wider than this with the Judge and his or her subjective decision making processes as the first focus and the impact of wider sentencing guidance sources on their discretion as the secondary focus. This focus is justified because it is always the Judge who makes the final decision on the sanction choice.[148]

For the qualitative part of his research, Wandall initially spent a 14 week period directly observing the main court room actors at Roskilde District Court[149] between 2001 and 2002. A mixture of 46 criminal cases were observed of which 24 directly involved theft of varying types with the remaining 22 cases mainly concerning violence.[150] Out of the 46 criminal trials, 24 were section 922 full confessional hearings and 22 were full lay assessor trial hearings.[151] This was followed up by clarifying guided interviews[152] based on the initial 5 weeks of observations with 7 District Court Judges, 3 Prosecutors and 3 Defence Lawyers.[153]

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[148] Understanding the extent of this judicial choice can best be realised by asking the judges themselves.
[149] Roskilde District Court is placed within a metropolitan environment that provided a high frequency and diversity of on average 3000 plus criminal cases from which decision making processes could be properly observed. The District Judges' profiles at the time were 8 professional full time Judges and 7 lay part time supporting Judges. The judicial gender mix was equally spread and the average judicial age was between 40 and 50 years old.
[150] Wandall himself categorises the crime categories he selected as 14 property, 22 violent and 10 mixed property/violent crimes.
[151] Wandall was privileged to be invited to directly observe 14 lay assessors in their own chambers after they left the courtroom setting to decide upon the appropriate sanction choice.
[152] The interviews were conducted in a formal setting, usually judicial chambers or on one occasion in an academic office with approximate duration of around 50 minutes. All discussions were informally introduced, confidential marked as anonymous, tape recorded, sensitively debriefed and later transcribed in the legal idiom for further critical analysis.
[153] The selection of these individuals was justified on the pragmatic basis of the daily amount of times each courtroom actor was directly observed by the researcher which was logged daily. Their selection also was dependent on their subjective willingness to be interviewed which is also an important consideration for this research.

The general conclusions drawn from the 13 qualitative interviews with various courtroom actors were five fold. Firstly, firm decisions to apply custody strongly took into account the wider offence facts and the degree of serious impact which the offence had.[154] In relation to residential burglary cases, most of the interviewees described theft seriousness norms.[155] These norms were then used to justify an appropriate sentencing starting point. Secondly, the previous similar antecedents particularly of highly recidivist theft offenders predictably induced a high chance of a custodial sentence selection as a judicial response. Thirdly, the subjective profile of the theft defendant was crucially important to both Prosecutors and Defence lawyers in their attempts to mitigate and aggravate the eventual sentence selection outcome. However, most importantly the theft defendant's profile could be subjectively interpreted by Danish District Judges in order to justify the more serious custodial sentence selections.[156] Fourthly, the young age of the theft offender had a particularly strong mitigating impact on decisions to choose custody. Fifthly, the importance of District court room efficiency was found to be high. Thus, where appropriate, quickly finalising Summary cases first could drive judicial decision makers towards making custodial sentences particularly where custody had been selected before, the offender recidivism rate was high for similar offences and a full confession had been made.

More specifically, conclusions were provided regarding the offence specific factors[157] which defined the nature and seriousness of residential burglary. Both

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[154] Wandall, R. H. (2008). Decisions to Imprison - Court Decision-Making Inside and Outside the Law (First ed.). Aldershot: Ashgate Publishing Limited, Chapter 7, at p 84 concludes that his interviewees saw theft crimes as less serious than violence crimes because physical and psychological harm to fellow human beings was involved.

[155] The more influential dwelling theft seriousness norms were the high frequency of similar theft counts ascribed to each defendant and the high value of the stolen property.

[156] Wandall, R. H. (2008). Decisions to Imprison - Court Decision-Making Inside and Outside the Law (First ed.). Aldershot: Ashgate Publishing Limited, Chapter 6 at p 81 noted that the majority of District Court judges, defense lawyers and prosecutors interviewed felt morally obliged to sensitively understand and deal with the subjective problems afflicting defendants before them. Other judges and prosecutors felt it was important to denounce the defendant and offence facts in open court in an attempt to dissuade the defendant and wider public from further re-offending behavior. This deliberate form of open sentencing punitiveness is however open to abuse as it is popular with both the public and thereby with politicians too.

[157] The most influential theft offence specific factors were found to be the number of theft counts per individual theft offender and the value of the stolen goods taken by each theft offender.

interviewees and Wandall's own courtroom practice observations revealed subjectively argued fluid indistinct categories for where theft offence sentencing starting points should be. This suggests that the Danish District Courtroom environment is permissive in allowing judges their own discretionary space to breathe. Further support can be derived from the differing constructions given by District Judges when subjectively predicting the link between the offenders' socio-economic profile and future recidivism risk. Wandall highlights how the selection of a suitable sanction is the product of a series of logical linkages.[158] However, Wandall did not look deeper at what is behind these constructions in the minds of individual judges. This research will attempt to delve deeper. It will ask judges to explore their judicial role and personal development. This judicial introspection will involve a prompted discussion of morality, religious beliefs, cultural upbringing, educational background, self confidence and motivation levels.

[158] For Wandall, R. H. (2008). Decisions to Imprison - Court Decision-Making Inside and Outside the Law (First ed.). Aldershot: Ashgate Publishing Limited, Chapter 7, at p 96 this is identified as a low socio-economic stability with a high crime risk future.

Chapter 4: The conclusions of socio-legal research regarding English judicial discretion.

The socio-legal research enquiry into English judicial discretion and the theft sentencing approach of judges in the lower Courts is varied and extensive. The main focus of this chapter like the previous chapter is therefore to examine what other academics have discovered about judicial discretion and the sentencing approach post the Second World War. The Royal Commission on Justices of the Peace 1946 – 1948 was an early indicator that the social and political composition of the lay Magistracy and the nature of local community sentencing would attract significant socio-legal researcher interest.[159] For some researchers the sheer diversity of complex sentencing factors influencing judicial discretion to various extents provided interesting inter-connections. In addition over time regional differences in sentencing approaches were increasingly explored as more academics became persuaded by national consistency arguments.

Notably, in 1962, Hood published the results of his quantitative analysis of Magistrates' sentencing which focussed on general offence types. He found some regional differences in their sentencing which suggested a disparate local dynamic to how their judicial discretion was being shaped.[160] More inconsistent findings were also

[159] Burney, E. (1979). *Magistrate, Court and Community*. London: Heinemann Publishing a Justice of the Peace herself noted some 30 years later the continuing imperfections in social and political representation within the lay Magistracy. However, after the Second World War the voluntary activity in sentencing of the local community was considered as very important by successive Governments in order to encourage greater community cohesiveness in a time of significant social mobility and change.
Dignan, J. Wynne, A. (1997). A Microcosm of the Local Community? Reflections on the Composition of the Magistracy in a Petty Sessional Division in the North Midlands. *British Journal of Criminology, 37*(2), 184 – 197 generally note that by the late 1990s the social and political composition of the lay Magistracy in a small North Midlands Court area had on an internal administrative level been taken seriously. They conducted qualitative interviews with a bench of Magistrates from the North Midlands in order to gain their perspectives on future sentencing practice and socio-political composition. They also critically examined the existing literature on how best to represent the local public sentiment in lower Court sentencing practices. They concluded that if faith in lay participation is to be improved, engagement between Magistrates, political parties, police, probation and the local public need to be included in future policy development.

[160] Hood, R. (1962). Sentencing in Magistrates' Courts (First ed.). London: Tavistock noted that the local legal community defined the level of sentencing discretion in relation to offence seriousness, i.e.) the meaning of aggravating and mitigating factors.

reported concerning the relationship between the social class of Magistrates' and their sentencing. Again, in 1972, Hood quantitatively compared Magistrates' sentencing, but this time with a more specific focus on motoring offences and again found some regional variations. [161] He further noted that older lay Magistrates from rural areas tended to be more punitive than their urban counterparts.[162]

The impact of early socio-legal research on the sentencing practices of judges in the lower Courts was to raise the profile of the academic debate about how best to deal with 1) regional disparities in the sentencing approach, 2) promoting wide community representation and involvement in sentencing through the lay Magistracy, 3) better assisting and advising the sentence decision making process.[163] The growing and predominantly negative academic perceptions suggested reform of some kind would be required. The predominant academic reform path suggested by a number of English socio-legal researchers was to tackle sentence approach inconsistency across regions. [164] To ensure greater sentencing approach consistency, Magistrate Association Guidelines

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[161] Hood, R. (1972). Sentencing the Motoring Offender (First ed.). London: Heinemann posed hypothetical motoring offences to Magistrates in interviews to get a sense of discretionary sentence ranges. At the time, judicial discretion was wide and many academics were calling for this to be curtailed and better regulated because of concerns about consistency and proportionality.

[162] This may reflect local concerns which judges are oath bound to represent independently.

[163] Mott, J. (1977). Decision Making and Social Inquiry Reports in One Juvenile Court. *British Journal of Social Work, 14*, 361 – 378 was an early supporter of more comprehensive offender information to assist the sentencing of young offenders.

[164] See further the following socio-legal studies:

-Tarling, R. (1979). Sentencing Practice in Magistrates' Courts - Home Office Research Study No. 56: London: HMSO.

-Parker, H. Sumner. M. Jarvis. G. (1989). *Unmasking the Magistrates: The 'Custody or Not' Decision in Sentencing Young Offenders* (First ed.). Milton Keynes: Open University Press.

-Tarling, R. (2006). 'Sentencing Practice In Magistrates' Courts Revisited'. *The Howard Journal of Criminal Justice*, 45(1), 29 - 41.

Like Hood (1972), Tarling and Parker et al also argued that this is due to continued subjective judicial discretion. However the question this research poses is does the subjectivity within the English sentencing approach still require reform? If it is changed what do we replace it with? Perhaps, new sentencing legislation, national or local guidelines, judicial training or normative sentencing grids? Furthermore, Parker et al at p 116 specifically argue that a judge's unique beliefs and assessment of offenders and offence events are at the heart of all subjective discretionary choices made. It is therefore unsurprising in their view that attempts to understand quantitative sentencing patterns and statistics across various regions of the UK is an analytical minefield. The researchers appeared to *dislike* that judges appear to be the only individuals who understand sentencing discretionary practices. Someone of course has to make a sentencing decision, this is the judges given task for which they are responsible and have considerable experience in judicial sentencing choice flexibility and creativity. This could be reason enough to justify judges being supported in their own sentencing approach beliefs. Otherwise what is the point of them being given the difficult task of sentencing choice making in the first place?

were introduced in August, 1974 supported by the Lord Chancellor's Department. In conjunction both academic and political interest continued to increase during the 1970's.[165] They became much more directly involved in the debate on how to regulate judicial discretion particularly when the crime rates alarmingly rose sharply from the 1980's onwards.[166]

By the 1980s, some socio-legal researchers[167] were attempting to delve more deeply into how specific sentencing factors (mitigating and aggravating) affected the judicial decision making approach. For other socio-legal researchers the sentencing options available in Courts, i.e.) alternatives to custody were of significant interest.[168] For Ashworth et al, it was hoped that by gaining knowledge on how specific sentencing factors were being perceived by judges, that this would aid the academic understanding of why there were regional sentencing variations across England.

The researchers' approach was to qualitatively interview groups of judges from the Crown Courts using example sentencing scenarios. The specific factors revealed to be influencing the sentencing approach ranged from Court based procedures to much

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[165] Walsh, D. (1978). *Shoplifting - Controlling a Major Crime* (First ed.). London: The Macmillan Press Ltd generally noted in his quantitative enquiry that shop theft was significantly increasing during the 1970's in line with drug possession and violence offences.

[166] The Criminal Appeal Act (1907) set up sentencing approach regulation as Court of Appeal territory. However, this was gradually rested away from judicial control by politicians in their attempts to respond to growing public concerns regarding rising crime rates. By the 1970s there was an emerging influence from popular punitive politics on the regulation of the sentencing approach. Academic interest in judicial discretion and its impact on the rising prison population was also on the increase, i.e.) Hough, M. et al. (2003) *The Decision to Imprison: Key Findings*, London: Prison Reform Trust suggests that the *doubling* of the prison population from 36,000 to 62,000 between 1991 – 2003 was largely due to a judicial preference for short terms of custody especially in the lower Courts. Within a parsimonious Magistrates' Court culture towards custody usage Rumgay, J. (1995). Custodial decision making in a Magistrates' Court, *The British Journal of Criminology*, 35(2), 201 – 217 generally noted that immediate situational factors intervening in particular cases appeared to disrupt the general decision making process, provoking decisions to impose custody, i.e.) aggressive offender court room behavior which reduced the perceived chances of rehabilitation and future reform.

[167] Ashworth, A. Genders, E. Mansfield, G. Peay, J. Player E. (1984). *Sentencing in the Crown Court: Report of an Exploratory Study* (No. 10 Occasional Paper). Oxford: Centre for Criminological Research, University of Oxford.

[168] See further:

-Morgan, N. (1983). Non-Custodial Penal Sanctions in England and Wales: A New Utopia? *The Howard Journal of Criminal Justice*, 22, (1-3), 148 – 167.

-Vass, A. Weston, A. (1990) Probation Day Centres as an Alternative to Custody – A 'Trojan Horse' Examined, *The British Journal of Criminology*, 30, (2), 189 – 206.

wider social pressures. The Court based procedures meant looking at how judges assessed the important facts in a given case, the offence itself, the actual court room behaviour of a given defendant, reactions to pleas in mitigation, pre-sentence reports and Court of Appeal guidance structures. Wider issues meant looking at the impact of public opinion and judicial decision making self awareness. The analysis of the Court of Appeal guidance structures and their effectiveness was very revealing and prompted a conclusion whereby national consistency driven sentencing guidelines and judicial training were supported. This was in light of the lack of knowledge which many Crown Court judges displayed about their counterparts sentencing practices.[169] The Court of Appeal's guidance case law was later to be re-defined into national guidelines partly as a result of their suggested implementation by the Oxford researchers. However, as a pilot study the Oxford researchers' scope was limited to the Oxford area and those interviewed did not adequately reflect all of the various echelons of the Crown Court judiciary due to access limitations.

Kapardis and Farrington conducted an experimental qualitative study of Magistrates' sentencing approaches towards offence seriousness.[170] A sentencing severity scale was initially developed with the support of 23 Magistrates. Theft case examples to sentence were then given to 168 Magistrates, split into 56 decision making panels of three. The offender factors that influenced judicial discretion the most and increased sentence severity were previous antecedents, male gender and high social class. Interestingly, the offenders age, racial background, plea and theft offence factors such as theft offence prevalence and degree of planning did not significantly increase sentence severity. In comparing group sentencing severity with individual sentencing decisions, panels of three were more severe. These results may well reflect the relative emphasis on

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[169] Ashworth, A. Genders, E. Mansfield, G. Peay, J. Player E. (1984). *Sentencing in the Crown Court: Report of an Exploratory Study* (No. 10 Occasional Paper). Oxford: Centre for Criminological Research, University of Oxford at p 20 describe this as dangerous tendency whereby judges show *'false consensus bias'* and assume their views coincide with their judicial peers and the wider public sentiment. It is also recognized by Fitzmaurice, C. Pease, K. (1986) The *Psychology of Judicial Sentencing,* Manchester University Press, Manchester at p 19 that social psychological research has repeatedly recognized that people tend to generalize falsely from their own views to a belief in consensus.

[170] Kapardis, A. Farrington D.P. (1981 - June). An experimental study of sentencing by Magistrates, *Law and Human Behavior,* 5, (2-3), 107 – 121.

various offender and theft offence factors within English sentencing guidance regimes in the 1980s.[171] In terms of this research, the relative emphasis on these various offender and theft offence factors within the current sentencing guidance mix *may* show a different influence to either a higher or lower severity level. This qualitative research gathers up to date subjective judicial perceptions of the relative severity levels of various offender and theft offence factors. This research compares individual professional District judges and lay Magistrate sitting as groups of three in panels. It further adds to knowledge by comparing Danish and English judges whose working practice norms are very different.

At the same time, Bond and Lemon had conducted a longitudinal study of the impact of training on newly appointed Magistrates.[172] A small group of Magistrates were randomly selected and split into two groups. One group completed their mandatory training whilst the other group deferred their training for one year. A third control group of non Magistrates with no experience at all was also formed. A qualitative interview guide was formed in which a number of case fact examples were provided to be sentenced. The non-trained Magistrates and the control group were more focussed on deterrence and punishment as sentencing aims rather than rehabilitation and future reform. Their sentence severity levels were higher and they were generally less sympathetic than their trained counterparts. This research explores the implications on current working practice norms of more training and most important the content of this training. It also goes further in exploring lay and professional judicial perceptions of their own leniency and severity over the course of their sentencing careers.

In 1981, Shapland qualitatively examined the structure and content of pleas in mitigation through Crown Court room observations of violence cases and follow up

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[171] This certainly seems to be the case when comparing these results to recent research on the relative sentence severity levels of offender age, health and previous antecedents, i.e.) Mueller-Johnson, K.U. Dhami, M.K. (2010). Effects of Offenders' Age and Health on Sentencing Decisions, *The Journal of Social Psychology, (*Jan – Feb) 150, (1), 77 – 97 found a increasing severity connection between age and previous antecedents unlike the 1980's researchers. For both violence and child sexual abuse case examples similar leniency was attributed for young age and low or no previous (similar/relevant) convictions. In addition for both offence categories the impact of poor health was significantly mitigating.

[172] Bond, R.A. Lemon, N.F. (1981 - June). Training, experience, and Magistrates' sentencing philosophies – A longitudinal study, *Law and Human Behavior,* 5, (2-3), 123 – 139.

interviews with Defence counsel.[173] She noted that Defence counsel would detach their client from the offence by firstly diminishing their clients' responsibility and secondly diminishing the impact of any wrongdoing. Throughout the trial testing the strength of evidence, the use of legal defences and the deliberate softening of damaging case facts were all tools of persuasion used by Defence counsel. What is more interesting however is the impact of these tools of persuasion of judges and their sentencing approach. Shapland noted that highly skilled and persuasive Defence counsel impacted offender perceptions which in turn changed their body language and demeanour in Court. In turn, offender beliefs and perceptions could impact judicial discretion at the sentencing approach stage. This research will further examine the extent of judicial trust in this specific procedural process of sentencing as well as other trial procedure influences.[174] It will also examine in greater detail how offender body language and demeanour in Court throughout the trial process influences judicial trust and support at the sentencing stage.[175]

The influence of Court of Appeal case law sentencing principles on Magistrates' sentencing behaviour were qualitatively examined by Henham.[176] 165 Magistrates were interviewed through questionnaires. The research attempted to reveal whether there was a relationship between Appellate Court case law principles and the Magistrates' social background, i.e.) gender, socio-economic, education and party political affiliation. The impact on the sentencing approach from Appellate Court case law principles was found to be minimal. There was also no significant relationship found between Appellate Court case law principles and the Magistrates' social background. These results suggest that the influence of the Appellate Court itself was waning in the lower Courts, but crucially professional judges and other sentencing guidance sources were not consulted. In terms

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[173] Shapland, Joanna. (1981). *Between Conviction and Sentence* (First ed.). London: Routledge noted that mitigation pleas were not just about content and structure. They were about timing, strong body language, tone, pitch and opportunism.
[174] Hines, Vivian. Gerald. (1982). *Judicial discretion in sentencing by judges and magistrates* (First ed.). Chichester: Barry Rose Publishers Ltd further examines the impact of legislative sentencing procedures.
[175] Shapland, Joanna. (1987). *'Who Controls Sentencing: Influences on the Sentencer'* (First ed.). Oxford: Centre for Socio-Legal Studies at p 82 suggested that defendant beliefs, expectations and body language required further exploration through qualitative research.
[176] Henham, Ralph (1990). *Sentencing Principles and Magistrates' Sentencing Behaviour* (First ed.). Aldershot: Ashgate Publishing - Avebury.

of this research, the relative influence of a number of general sentencing aims will be compared as well as the relative importance of all sentencing guidance sources. In this sense, by also comparing Denmark and England a much wider regulatory impact picture will be revealed.

Brown qualitatively interviewed Magistrates in six court areas in Northern England in order to understand how juvenile offender backgrounds were reported by Probation in pre-sentence reports and then interpreted in Court.[177] She focussed on the subjective nature of discretion towards juvenile offenders and the potential dangers of misinterpretation that this creates. In particular how family, education and class could be easily misjudged into patronising and sometimes false youth behavioural norms. Such problematic subjective assumptions based on pre-sentence reports led to the conclusion that the inevitable complexity of social enquiry requires a minimalist and non-intrusive discretionary approach. However, one could also argue that if knowledge of offenders is to be most effectively used then it needs to be more deeply and expertly defined. As an area of debate in sentencing, this research can further explore how pre-sentence reports are currently defined by lower Court judges, their utility and relative importance.

In 1992, Hood and Cordovill published their quantitative analysis of the influence of racial background as a sentencing equality consideration in the Crown Courts. [178] Based on research carried out at the end of the 1980s on five Crown Courts in the West Midlands, the researchers found that a higher proportion of African-Caribbean than South Asian or White offenders were being sentenced to custody.[179] The question was whether different offence categories and previous antecedents or alternatively other sentencing factors could account for these differences. It was ascertained that, given these two controls, African-Caribbean defendants were generally still up to 23% more likely to be sentenced to custody.

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[177] Brown, S. (1991). *Magistrates at Work.* Milton Keynes: Open University Press.
[178] Hood, R. Cordovill. G. (1992). *Race and Sentencing* (First ed.). Oxford: Oxford University Press.
[179] There were wider variations noted depending on the offence category, i.e.) Drug offences were most often linked to African-Caribbean offenders whilst Violence offences were most often linked to White offenders and Road Traffic offences to South Asian offenders.

The researchers could be criticised for not controlling the influence of all sentencing variables. However, all research studies are arguably compromised by pragmatic researcher decisions to focus on the comparison of specific sentencing approach factors given that there are so many potential offender and offence based variables. Later race and sentencing research has revealed that trust and fairness in the Criminal Justice System and by proxy judicial discretion is still an ongoing concern especially from the perspective of African-Caribbean and South Asian defendants.[180] The future solution to negative personal perceptions on ethnicity within the public and judiciary appears to be through cultural sensitivity re-education where appropriate.[181] This research does not attempt to directly assess the impact of racial background on the sentencing approach, but rather deliberately chooses a more subtle approach. Thus cultural background which can be widely construed as including racial, religious or ethnic assessments is examined within the qualitative interview guide. [182]

The socio-legal understanding of gender in sentencing was extensively examined by Hedderman and Gelsthorpe.[183] The researchers quantitatively examined statistical data from 1991 on the number of female and male offenders sentenced by specific offence categories (theft, drug and violent crime). They noted that fewer women were being incarcerated than men and wanted to examine why. A qualitative interview survey

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[180] Hood, R. Shute, S. Seemungal, F. (2003) Ethnic Minorities in the Criminal Courts: Perceptions of Fairness and Equality of Treatment, London: Lord Chancellor's Department Research Series No. 2/03, London: Lord Chancellor's Department available online at: http://www.dca.gov.uk/research/2003/2-03es.htm [accessed Dec 2008].

[181] Smith, Dominic. (2007 - Aug) Confidence in the Criminal Justice System – What lies beneath?, Ministry of Justice Research Series 7/07, London:Ministry of Justice, pp 1 – 24 available online at: http://www.justice.gov.uk/publications/docs/criminal-justice-system-report.pdf [accessed Dec 2008] generally notes at pp 18 – 23 the regional variations in the levels of public trust in the Criminal Justice System. The public primarily define the Criminal Justice System as the police and the courts. The research hinted at a link between public confidence/trust and visual justice or direct positive involvement. Any public misperceptions and personal fears on a local or national level *can* be changed through thorough information gathering (police, courts, probation, prison service) and wide dissemination to all within the local community.

[182] Racial background is a contentious area for any judge to assess. Indeed, very few judges would feel comfortable discussing their specific views on race and sentencing due the danger of social divisiveness and illegality, i.e.) Article 6 Right to Fair Trial. In this sense, it was felt that wider cultural sensitivity to differences in the English and Danish multi-cultural society were more relevant to the sentencing training and approach of English and Danish lower Court judges.

[183] Hedderman, C. Gelsthorpe, L. (1997). Understanding the sentencing of women - Home Office Research Study 170 (pp. 1-96): Home Office: London.

of 200 Magistrates was therefore also conducted in 1995 in order to understand why the sentencing approach towards male and female offenders differed. Results showed that judges were more lenient towards female offenders compared to male offenders in all offence categories. The reasons given for this within interviews were that women were sentenced less frequently. The women were seen as more vulnerable, troubled and therefore more easily led astray by males. Such gender perceptions are re-tested by this research, but crucially within a current statistical background whereby female violent crime has shown an increase since 1991.

By the late 1990s, Mackie and Flood-Page had produced an extensive analysis of sentencing practices in both Magistrates' and Crown Courts across England and Wales.[184] The researchers quantitatively surveyed 3,000 sentencing outcome statistics from 25 Magistrates' Courts and 2,000 sentencing outcomes from 18 Crown Courts across England and Wales in 1995. They then qualitatively interviewed 126 Magistrates. The researchers' qualitative survey covered offender and offence sentencing factors and sanction choice perceptions influencing the sentencing approach. They were looking for disparate sentencing practices that could suggest potential inconsistency and unfairness. The results of this study were an important marker justifying future government support for national sentencing guidelines in order to promote consistent sentencing approaches towards various criminal offences. The researchers made the following two important conclusions:

> *"Firstly, where the case is being heard does have a significant influence on the likelihood of custody in borderline cases, and on the length of any custodial sentence.*
> *Secondly, there are big differences in the way non-custodial options are used, which in turn is affected by variations in policy and practice between probation areas in the United Kingdom."*[185]

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[184] Mackie, A. Flood-Page, C. (1998). Sentencing Practice: an examination of decisions in magistrates' courts and the Crown Court in the mid-1990's. - Home Office Research Study 180 (pp. 1 - 146): Home Office: London.

[185] A. Mackie & C. Flood-Page. (1998). *Sentencing Practice: an examination of decisions in Magistrates'*

In the future, they further concluded that the Probation Service and Magistrates should forge closer working relationships. They supported the use of fines and victim compensation in order to reduce recidivism and increase revenue. Suspended sentence usage was in their view too restricted. Finally, they argued that sentencing disparities between Courts were unfair and required a national consistency structured solution.[186]

In 2001, Henham published the results of his previous empirical investigations (quantitative statistical comparisons and qualitative interviews and court room observations) into the application of sentencing discounts for guilty pleas given in the Crown and Magistrates' Courts of Nottingham and Leicester.[187] His principal focus was on how section 48 of the Criminal Justice and Public Order Act (1994)[188] was being judicially interpreted, i.e.) when a guilty plea is given and how judges link their discount level to the case facts and offender profile. This involved a detailed analysis of the significance of sentencing case law on guilty pleas from the Court of Appeal. For Henham, the need for greater transparency as to how guilty pleas were being taken into account was required. More structured sentencing guidance for judges was recommended to aid national consistency, equal treatment and compliance with Article 6 of the European Convention of Human Rights. In this sense, Henham was showing

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Courts and the Crown Court in the mid-1990's. - Home Office Research Study 180 (pp. 1 - 146): Home Office: London at p 128.

[186] The solution implemented in July 1999 was national consistency driven Sentencing Guidelines Council Guidelines with legislative backing through sections 172 and 174 of the Criminal Justice Act (2003). However, at the time there were interesting alternative models for supporting discretionary decision making through computer based sentencing information systems i.e.)

-Tata, C. (1998). The Application of Judicial Intelligence and 'Rules' to Systems Supporting Discretionary Judicial Decision-Making, *Artificial Intelligence and Law*, 6 (2-4), June, 203 – 230.

Tata, Cyrus. (1998). 'Neutrality', 'Choice', and 'Ownership' in the Construction, Use and Adaption of Judicial Decision Support Systems. *International Journal of Law and IT, 6* (March), 104 - 123.

[187] Henham, Ralph. J. (2001). *Sentence Discounts and the Criminal Process* (First ed.). Dartmouth: Ashgate, which was a further expansion on Henham, R. (1999). Bargain Justice or Justice Denied? – Sentencing Discounts and the Criminal Process *Modern Law Review*, 62, 515 – 538.

[188] Section 48 directly states that: "(1) In determining what sentence to pass on an offender who has pleaded guilty to an offence in proceeding before that or another court, a court shall take into account –
(a) the stage in the proceedings for the offence at which the offender indicated his intention to plead guilty, and
(b) the circumstances in which this indication was given.
(2) If as a result of taking into account any matter referred to in subsection (1) above, the court imposes a punishment on the offender which is less severe than the punishment it would otherwise have imposed, it shall state in open court that it has done so."

agreement with a number of other sentencing scholars who support national consistency as a means to develop wider sentencing approach integration and fairness.[189]

It is important to note recent comparative socio-legal research looking at the sentencing approach, which has shown international jurisdictional[190] as well as domestic regional differences.[191] In 2003, Davies and Tyrer qualitatively reviewed judicial faith in the application of community/custody penalties and the importance of pre-sentence reports by the Probation Service when sentencing of domestic burglars in England and Wales. They noted judges' faith levels varied between different localities.[192] In 2004, Davies, Takala and Tyrer then further compared the English, Welsh and Finnish judicial perceptions when sentencing burglars. The researchers placed 108 High Court judges from 12 Court areas into focus groups of 8 judges. They were asked to sentence 5 burglary case scenarios with reference to relevant sentencing aims, offence seriousness and sanction choice. Whilst the sentencing aims and offence seriousness were ranked similarly, there were more lenient sanction choices made by the Finnish judges. The sentencing system, (procedures and guidance regimes) judicial culture (judicial perceptions of offence facts and offender background) and criminal justice interdependencies (police, probation, prison service cooperation and trust levels) all played a part in explaining the jurisdictional differences.

In comparing jurisdictional differences, Davies suggests a three pronged understanding of the challenges facing future comparative socio-legal scholars. Firstly, gathering and comparing cross-jurisdictional data requires linguistic competency and

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[189] Of course, the concept of fairness can be seen as a mixture of the objective consensus and subjective perspective based on personality, sentencing experiences and intuition.

[190] Davies, M. Takala, J.P. Tyrer, J. (2004). Sentencing Burglars and Explaining the Differences Between Jurisdictions - Implications for Convergence. *British Journal of Criminology*, 44 (1), 741 – 758.

[191] Davies, M. Tyrer, J. (2003). "Filling In The Gaps" - A Study of Judicial Culture: Views of Judges in England and Wales on sentencing domestic burglars contrasted with the recommendations of the Sentencing Advisory Panel and the Court of Appeal Guidelines. *Criminal Law Review* (April), 243 - 265.

[192] Roach-Anleu, Sharyn. & Mack, Kathy. (2005). Magistrates' Everyday Work and Emotional Labour. *Journal of Law and Society, 32*(4), 590 – 614 further considered the impact of judicial faith as part of the emotional labour invested by 40 Australian Magistrates' through their day to day sentencing approach. Thus jurisdiction and regional differences as a focus was replaced by human personality differences. They noted a tentative link between female judges and their placement of the importance of empathy levels in their sentencing approach when compared to their male counterparts.

insider system knowledge. [193] Secondly, he recognises and examines the importance of developing a sensitive methodology that compares jurisdictions both at the macro and micro levels.[194] Thirdly, he argues that our philosophical conceptions of fluid societal trends such as globalisation, harmonisation and convergence should be carefully explored.

In 2006, Tombs and Jagger critically examined Scottish sentencers' decisions to choose custody.[195] They concluded that there was a retributive offender specific focus occurring within Scottish sentencing approaches which was disproportionate to the offence committed, particularly when sentencing 'borderline' offenders. Although seen as severe, the researchers noted that sentencers in their approaches to a variety of offence types normalized custody use and denied responsibility thereafter. This Scottish sentencer mindset of denial of responsibility was critically linked with increases in the usage of custody in Scotland. Although sentencer 'common sense' approaches were questioned the researchers interestingly argued for judicial training to be expanded in the future hope of offender reform rather than opting for national consistency sentencing guidelines within Scotland.

By 2007, further comparative socio-legal research into borderline decision making factors in England and Scotland had consolidated previous knowledge gains and was attempting to reveal further jurisdictional influences on judges.[196] The methodological approach adopted was qualitative through in-depth interviews with sentencers in both jurisdictions. The researchers hoped to gain a unique insight into the mind of sentencers and the complex issues surrounding borderline sentencing. The sample comprised of 48 District Judges in England and 35 equivalent Sheriffs in Scotland

[193] Davies, M. (2004). Sending More People to Prison that Gaddafy's Libya. – An alternative to a League Table Approach to Understanding Sentencing Trends and Differences between Jurisdictions, *British Journal of Criminology*, 6, (2), 1 – 27, available online at: http://www.britsoccrim.org/volume6/002.pdf [accessed Dec 2008] at p 2.
[194] Ibid at p 11 in table 5.
[195] Tombs, J. Jagger, E. (2006). Denying Responsibility: Sentencers' Accounts of their Decisions to Imprison. British Journal of Criminology, 46 (1), 803 – 821.
[196] Millie, A. Tombs, J. Hough, M. (2007). Borderline sentencing: A comparison of sentencers' decision making in England and Wales, and Scotland. Criminology and Criminal Justice, 7(3), 243 – 267.

who crucially were able to choose their own borderline cases to discuss within a one on one interview. This meant that there was no specific offence type focus. Quantitative questionnaires were also analysed from a further 80 Magistrates placed in focus groups in England which complemented the sample. The usage of Home Office and Scottish Executive sentencing statistics were sensibly incorporated when the respective differences in prison populations and usage of different sentencing options were analysed. Significantly, the researchers benefited from good access to and cooperation by the judiciary from all echelons in both jurisdictions.

What the researchers were able to reveal and conclude was significant in relation to the focus on why adult prison populations in England were much higher than in Scotland. Firstly, the researchers felt that judicial decisions to increasingly use custody were shaped by upward legislative drives,[197] court procedural changes and a decline in the judicial faith towards fines which were according to the judicial interviewees the result of a more violent society where their usage was quickly exhausted.[198] Secondly, a wide range of offence seriousness factors influencing custody cusp decision making were investigated. The researchers noted that the specific borderline between community and custodial options and their qualitative distinction was very similar in England and Scotland.[199] This was despite the fact that there were no highly prescriptive guidance sources within Scotland in the form of sentencing guidelines like in England.

In 2008, the Scottish Government published proposals for a Scottish Sentencing Council and Scottish Sentencing Guidelines.[200] This received a negative response from the Scottish judiciary who saw it as a threat to their judicial independence and power. It

[197] This would include Criminal Justice Act (1993) mandatory minimum sentence lengths for various offences such as drug and road traffic offences.
[198] Young, W. (2010). The effects of imprisonment on offending: a judge's perspective. *Criminal Law Review, 1*, 3 – 18 who is President of the Court of Appeal in New Zealand interestingly notes that in his own jurisdiction the level of judicial cynicism towards custody has gradually increased over his sentencing career.
[199] Millie, A. Tombs, J. Hough, M. (2007). Borderline sentencing: A comparison of sentencers' decision making in England and Wales, and Scotland. Criminology and Criminal Justice, 7(3), 243 – 267 within their conclusions at p 265.
[200] Scottish Government (2008). Sentencing Guidelines and a Scottish Sentencing Council – Consultation and Proposals, pp 1- 35, Blackwell Publishing: Edinburgh available online at: http://www.scotland.gov.uk/Resource/Doc/236809/0064977.pdf [accessed Jan 2009].

has not as yet been implemented.[201] The researchers further noted some early effects of having national sentencing guidelines within England. The English sentencing guidelines predominantly seemed to affect the more lenient judges who were drawn up to standard norm, whilst the more harsh judges were relatively unaffected. The problem of guidelines negatively impacting judicial discretion and independence was commonly noted by both English and Scottish judicial interviewees. Not only were they viewed as a restriction on their ability to make independent discretionary sentencing choices, but more notably judicial responsibility for sentencing was considered to be undermined by judicial reliance on guideline usage. It could be further argued that in applying pre-selected consistency levels and norms, judicial responsibilities have been reduced too far. Thus instead of judges pro-actively defining their own discretionary limits, this important aspect of judicial free choice becomes a mere extension of Government direction though sentencing policy. This significantly undermines the key constitutional balancing, interpretative and protective role of the Court of Appeal. This research will re-examine the judicial degree of choice debate. In so doing it will attempt to understand why judges are fighting back against those who would challenge their constitutional independence and whether they have succeeded.

In relation to borderline sentencing in England and Scotland, the researchers noted that custody community cusp decisions occurred most often in the Courts of first instance. This is further justifies why this research has focussed on Courts of first instance. The researchers should be commended for their proactive efforts in comparing the similarities and differences and highlighting the positive and negative aspects of borderline sentencing issues in the two selected jurisdictions. However, in offering solutions to the appropriate extent or mix of judicial discretion and how England can learn from Scotland, the researchers' conclusions were at times a little tentative.

The researchers noted that in England and Scotland the particular mix of case facts presented had a powerful affect on the custody tipping point. Thus the impact of

[201] Editorial (2009, May 12). Top Scottish judges attack new sentencing plans, Herald and Times Group: Glasgow, available online at: http://www.heraldscotland.com/top-scottish-judges-attack-new-sentencing-plans-1.909848 [accessed May 2009].

judicial discretion was being revealed and analysed. The researchers' analysis showed that the influence of subjective aggravating and mitigating factors in England and Scotland was the most important. The researchers noted that the most influential factors on the discretionary choices of English Magistrates were offending histories,[202] previous responses to sentencing options[203] and the wider offence circumstances.[204] The impact of formal guidance sources in the form of Magistrate Association and Sentencing Guidelines Council guidelines and even appellate court case sentencing guidance structures were not listed under the factors considered in the borderline cases analysed.[205] The researchers further noted the importance of mitigating probation led pre-sentence reports and aggravating victim impact statements as 'other' borderline sentencing factors. However, while this is very revealing it does beg further academic analysis as to why this is the case.

In 2007, Jacobson and Hough importantly expanded academic understanding of personal offender mitigation in England.[206] Court room observations of 132 cases were followed up by qualitative interviews with 40 judges conducted across five Crown Courts. Open ended questions on personal mitigating factors were followed judicial analysis of three sentencing scenarios. Personal mitigation was considered a major factor in the offender evading a custodial sentence in just under a third of the 127 cases observed. Judicial analysis of the three sentencing scenarios revealed some shared consensus on the importance of the personal mitigation outlined in the case. For other judicial interviewees the discretion debate on the extent of mitigation varied.

Jacobson and Hough concluded in favor of more consistency and structure for how personal mitigation is assessed by Crown Court judges through SGC Guidelines. However, crucially the researchers recognized the importance of an individualized approach to sentencing which allows personal mitigation (broad in its very nature) to play

[202] Unrelated and different previous convictions and past/present good behaviour and character examples.
[203] Offender remorse, self help attempts both physically and psychologically, future hope of personality reform, self awareness of being a societal problem and efforts to cooperate with the court.
[204] Family dynamics, partner support, economic stability in terms of work and having a fixed abode.
[205] The sample of borderline cases analyzed was 108 cases for Scotland and 311 for England and Wales.
[206] Jacobson, J. & Hough, M. (2007 Sept). Mitigation: the role of personal factors in sentencing (pp. 1 - 80). London: Institute for Criminal Policy Research, Kings College London & The Prison Reform Trust.

a full part.[207] Interestingly, the researchers noted the value of objectively structured personal mitigation whilst also retaining the subjective judicial discretion that brings humanity to the sentencing approach. The researchers came very close to respecting the above balance, but were still concerned that 'there was plenty of room for idiosyncratic decisions on personal mitigation.' They felt that it *'seems* wrong for judges to apply conflicting principles in their decisions about mitigation.'[208]

For Millie, Tombs and Hough the preference shown by the English and Scottish judges that they interviewed towards a primary focus on human behavioural factors such as who is before them, the offender's relationship with the offence and the offender's previous responses to sentencing options when making borderline sentencing decisions suggested the high extent to which judges rely on their own subjective analysis. Only judges themselves can answer as to why this is the case by providing their own legal and psychological reasoning behind choosing certain human behavioural factors.[209]

The drive for consistency in sentencing through a structured approach continues to be supported by most sentencing academics in the UK. However, where academic viewpoints vary is on the content and extent of prescription within the structured guidelines available to judges. In addition, there is much academic debate to be had on the level of attention judges actually should give to sentencing guidelines, i.e.) the balancing of structured guidelines with other sources of sentencing guidance available. In 2008, Roberts in his conclusions advocated the academic majority view of the need for even greater clarity and prescriptive detail in the current SGC guidelines in the UK in order to promote and ensure future uniformity and consistency in sentencing outcomes.[210] Indeed, as Roberts noted judges have the free choice of whether to utilize the SGC guidelines provided to help them in making appropriate sentencing decisions and can always deviate from the current Executive led provided SGC guidelines by justifying

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[207] Ibid at p vii.
[208] Ibid at p x.
[209] Sporer, S. & Goodman-Delahunty, J. (2009). Disparities in sentencing decisions. Margit E. Oswald, Steffen Bieneck and Jörg Hupfeld-Heinemann (Eds.), *Social Psychology of Punishment and Crime* (pp. 379 - 401). London: John Wiley & Sons Ltd also favor the subjective judicial focus.
[210] Roberts, J. V. (2008). Aggravating and mitigating factors at sentencing: towards greater consistency of application. Criminal Law Review, 4, 264 – 276 at p 276.

their own decisions in open court. However, the actual effect on conformist and non-conformist sentencers within the Magistrate Courts of facing such comprehensive SGC guidelines and then attempting to justify their own sentence choices is currently hard to decipher because they are a recent introduction. Can our judges retain their free choice in exercising their subjective discretion within the current heavily politically controlled and monitored climate? This research looks to uncover the answer to such questions and identify the future challenges in regulating theft sentencing practices.

In this sense, this research does not assume that more sentencing fairness is always borne out of a consistent sentencing approach focus.[211] These values merely form part of the debate, but they should not dominate it. Instead, the understanding of sentencing practices is seen much more pragmatically through the eyes of judges whose self analysis and shared consensus of how they handle the complexity of sentencing choices day to day is a judicial vision of how fairness may be achieved by those who actually sentence. In 2008, Wasik concluded that the extent of the constraining effect of the SGC guidelines in the future is yet to be fully understood.[212]

The future in England and the wider European Union could well be similar to the full judicial control by a federal USA style Sentencing Commission and the limited discretion and weakened judicial independence provided by sentencing grids.[213] In the end, this may be the true danger of pushing so hard for the noble goal of national and perhaps in the future more international consistency in analyzing and applying appropriate sentences for theft offenders. Not only can the judiciary be overly controlled

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[211] Donoghue, J.C. (2007). The use of antisocial behaviour orders (ASBOS) in Britain: unpacking the primacy of legal procedure(s) and judicial discretion. (PhD Thesis) University of Stirling: Scotland, available online at: http://dspace.stir.ac.uk/dspace/handle/1893/364 [accessed Jan 2009]. A comparison of ASBO application through procedural rules and judicial discretion between England, Scotland and Wales was quantitatively and qualitatively conducted. An online survey questionnaire gathered English, Welsh and Scottish solicitors' views followed by semi-structured interviews with Scottish Sheriffs in the lower Scottish Courts. The research concluded that in order to ensure greater consistency, stringency and accuracy in approach to ASBO cases, future socio-legal research 'must' further analyze the influence from substantive judicial practices and formal procedural rules.

[212] Wasik, M. (2008). Sentencing guidelines in England and Wales - state of the art? Criminal Law Review, 4, 253 – 263 at p 263.

[213] As noted in the USA by Huber, G. Gordon, S. (2007). Directing retribution: on the political control of the lower court judges. Journal of Law, Economics & Organization, 23(2), 386 - 420.

by the executive of the day and be at the mercy of political policy whims such as popular punitive sentencing outcomes as seen in the USA; but also the balance of the three arms of government can be inadvertently subverted by an academic fraternity who are complicit in justifying and strengthening political attempts to more tightly regulate the English judiciary. The danger of viewing consistency as the most important value is that judicial freedom of choice in sentencing practices can gradually become too limited. The desire for significant uniformity in sentencing approaches, without an empowered and independent judiciary, could possibly lead to future limited discretion Minnesota Sentencing Grids being introduced into the UK and Denmark. Perhaps by this stage, all English and Danish professional judges may well also be voted into office too.

Millie, Tombs and Hough further observed a number of societal pressures on decision making from the judges whom they interviewed. This research will further consider these societal pressures from the Danish and English contexts. Firstly, the judicial interviewees commented on the influence of popular punitive politics as a deliberate policy to win votes by appearing hard on offenders and increasing prison numbers. [214] The researchers particularly noted in their conclusions some interesting perceptions repeated by many of the Scottish judges. Namely that Scottish Government sentencing policy and later legislation seemed to be too specifically drafted, was a mere snapshot in time and was therefore too inflexible for the complex purposes of doing justice.[215]

A second societal pressure noted by the three researchers on sentencing decision making because it was frequently mentioned especially by the English judiciary were frequent Government and Judiciary conflicts. In England, it was noted that the judicial interviewees commonly complained of too many conflicts between government departments and members in the upper echelons of the judiciary. Judges found this

[214] The use of popular punitive sentencing in order for judges to gain public votes has been long established in the USA as noted by Ashworth A. (2001) in Tonry, M. & Frase, R. (eds) (2001). *Sentencing and Sanctions in Western Countries* (First ed.). Oxford: Oxford University Press at pp 62 – 91. See also Newburn, T. (2002). 'Atlantic Crossings: "Policy Transfer" and Crime Control in the USA and Britain'. *Punishment and Society - The International Journal of Penology*, 4 (2) 165 - 194.

[215] Millie, A. Tombs, J. Hough, M. (2007). Borderline sentencing: A comparison of sentencers' decision making in England and Wales, and Scotland. Criminology and Criminal Justice, 7(3), 243 – 267 at p 266.

continual conflict over sentencing policy directions both confusing and counter-productive.

In comparing England and Denmark, this research needs to address if there are similar government versus judicial conflicts there and what effect if any they are having on judicial discretion in practice. A lack of such conflicts helps keep judges focused on their primary task of making fair sentencing decisions. In addition, the degree of influence of the Appellate Courts in both Denmark and England in clarifying these contradictory conflicts needs to be assessed by this research. Specifically, in Denmark the Criminal Code has not radically changed since 1933 and its general provisions have seemingly stood the test of time. This difference in legislative drafting approach needs to be compared and analysed further.

The pressures of the media and the public were highlighted by the researchers. In particular, how the media can encourage those judges they perceive as lenient to be less so by repeatedly criticising their sentence choices. The researchers noted that the media could amplify *selected* views of the public which could be unhelpful. This was due to popular justice not always reflecting consistent and fair justice. Popular punitive sentiments reflected by the media were noted as influencing sentencing policy drives, specific offence type guidelines and theft case appellate guidance. This is again where the influence of societal and cultural conformity on judicial discretion is an important comparative issue between England and Denmark. Comparing the coping strategies of judges reveals the effectiveness of this research's chosen guidance regimes in insulating discretionary decision making choice freedom from attack. If there is little protection within a guidance regime, the reasons why need to be investigated and analysed to understand why a discretionary balance is not being achieved. In particular, the researchers could have provided more examples of positive impacts on discretion as well as the many negative impacts described.

In light of this, this research will aim to provide a broader range of influences when analysing the judicial discretion debate. The feedback of individual judges in

Denmark and England on how best to address the inevitable pressures facing their decision making freedoms is likely to yield interesting and also important subjective opinions. In assessing the extents to which discretionary freedoms in sentencing help or hinder justice it is helpful to be open minded and respectful to the solutions that are suggested. Comparison is not about making crude assumptions about either jurisdiction in search of the *perfect* sentencing discretionary balance.[216] This is highly likely to be illusory and wholly unrealistic. It is more about providing solutions which seek to better understand the various complex mixes of influences on decision making choices in Denmark and England. One can then attempt to solve how England's current guidance regime can best promote the interests of justice by learning from the effects of the Danish approach and vice versa. The lessons learnt from this comparison can then be put in practice to better support and help both English and Danish lower Court judges in doing the very complex and difficult legal tasks which they have been offered and chosen to accept.

The comparative conclusions made by Millie, Tombs and Hough provide interesting further discussion points and merit an expanded analysis within this comparative research. In particular, the higher custody usage by the Magistrates' Court judiciary in England was linked, in the main to the use of complex sentencing guidelines and, to a lesser extent, Court of Appeal guideline judgements. In Denmark, the reasons why custody usage by the District Court judiciary is lower needs to be analysed by looking at the impact of the various sources of sentencing guidance there. The researchers argued that *lenient* judges were being manipulated by the English guidelines up to higher sentence starting norms because the sentence starting points were originally lower based upon the sources of sentencing guidance in the past. The researchers also argued that *harsher* English judges were relatively unaffected by sources of guidance in England citing two sources of support.

[216] Even at the European Court of Justice, the degree of sentencing discretion judges in domestic jurisdictions have used has not been a source of criticism under Article 6 – Right to Fair Trial case referrals. Instead, discretionary sentencing making choices have been preserved and only procedural or evidential discretionary decisions are closely analysed and commented upon.

Firstly, the Coulsfield Inquiry concluded that in controlling how English judges view and issue custodial sentences within threshold cases in England a general approach within the prevailing sentencing guidance is needed. [217] This is because personal mitigation which is a very persuasive factor in such threshold cases requires flexible judicial discretion which specific sentencing guidance can hinder. If it is required this is a strong argument in favor of wide judicial discretion particularly in threshold cases. The researchers draw upon the Coulsfield Inquiry by looking for a 'shared understanding' of the best approach to borderline sentencing.[218] This comparative socio-legal research can similarly contribute by formulating a 'shared understanding' between Denmark and England on theft sentencing approaches and thereby expanding upon the growing international judicial discretion debate.

Secondly, the three researchers note how influential American academics provide wider support for their arguments. Both Tonry[219] and Alschuler[220] provide support for the researchers' arguments by warning against the USA sentencing grid with its limited discretion approach. Not only is there much greater political manipulation of sentencing approaches within the USA, but in addition the very limited subjective discretion leaves their elected judiciary with no real sentencing choice powers with which to fight against it.

The terms *lenient* and *harsh* require further clarification as to their precise meaning. If they can simply be viewed as descriptions of two very opposite judicial discretionary choice approaches the further question to be asked is what sentencing outcome norms we base these differences against. Quantitative statistics for theft offence categories and the sentence outcomes chosen nationally are available in both England and Denmark. There are also regional theft offence sentence choice statistics that can

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[217] Esmee Fairbairn Foundation, (2004). *Crime, Courts and Confidence: Report of an Independent Inquiry into Alternatives to Prison (the Coulsfield Inquiry).* Home Office (pp. 1-104): London : The Stationery Office at p 27.
[218] Ibid at p 4.
[219] Tonry, M. (1993). The Failure of the U.S. Sentencing Commission's Guidelines'. Journal of Research in Crime and Delinquency, 39(2), 131 – 149.
[220] Alschuler, A. (1991). The Failure of Sentencing Guidelines: A plea for less aggregation. University of Chicago Law Review, 58, 901 – 951

possibly highlight a harsh or more lenient locality in both England and Denmark. However, individual judge decision making processes in theft cases are too complex to be understood in any great depth through quantitative statistical analysis. Therefore, getting any closer to first locating and then understanding the above mentioned approaches is very difficult.

This research must therefore be careful to address who is defining a sentence choice approach as lenient or harsh and their wider motives for these subjective definitions, whether this be from the government, public, media or even my own academic perspective. The primary objective of this research is to gain a critical comparative understanding of theft offence sentencing discretionary decision choices. To do this it must appreciate and respect the complex judicial thought processes involved and be sensitive to the impact of various sources of sentencing guidance upon these processes. This socio-legal research is unfortunately not able to gain a psychological insight into the minds of the Danish and English judges interviewed by the use of standardised objective psychological testing. Instead this qualitative interview based socio-legal research needs to play to its design strengths and understand the limits to which its sample can address such complex questions. This research can only ascertain the level of difference between lenient or harsh sentencing approaches, if any, by asking the judges their opinions and perceptions on this. Some judges may be more open than others in talking about their own lenience or harshness during their interviews.

The researchers noted that the Scottish Executive's desire to dominate the guidance regime has historically been less when compared to England's Executive. This has meant Scottish judges have retained discretionary powers to choose sanction options as they see fit. The researchers also concluded that Scottish judges have shown a desire to pursue more lenient rehabilitative punishment options largely in line with Scottish Executive sentencing policy drives. An interesting question to further explore would be

whether, if Scottish sentencers departed from their Government's sentencing policy drives, this difference and clash would be accepted or not?[221]

In England, the researchers noted that the opposite trend had taken place with English judges under more pressure from ever more directive and prescriptive legislation which they felt to be overly restrictive on their independence and case by case discretion. The researchers specifically noted the subtle changes in language used for sanction options by the Criminal Justice and Court Services Act (2000) and the Criminal Justice Act (2003) in England. The example of sanction option re-branding used by the researchers was community service orders becoming community punishment orders. The researchers chose not to speculate on the long term impact of the consistency advice of the Sentencing Guidelines Council in England.

The English executive's belief under New Labour that it was justified in terms of fairness to control the levels of consistency and proportionality within English sentencing through complex sentencing guidelines formulated with selective academic support could well lose more and more favour in the future. The belief is only part of a wider debate about judicial discretion and its future regulation. Judges are fallible human beings and therefore when they exercise their subjective discretion they are most aware of their own logical linkages. If judges are no longer trusted to use all of their human decision making senses then the whole rationale for having human beings performing complex sentencing tasks is at best undermined or at worst disregarded. As the erudite Roscoe Pound hints at, human sentencing calls for the product of hands due to its very imperfect regulatory human behaviour target. To tie these hands undermines the best judicial minds that we have because they no longer *feel* they can exercise their discretionary extents freely.

Finally, in conclusion, this research should be placed in its proper context some 10 years past the introduction of national consistency guidelines under the Sentencing Guidelines Council. This research only covers the 'bedding in period' and thus it cannot

[221] In Denmark and England the ongoing controversy over current terrorism laws could test both Supreme Courts' abilities to balance Government public protection versus Civil liberties.

uncover the long term impact with any significant certainty. This places some limits on the extent to which it can judge the impact of SGC guidelines and their recent loss of political favour. However, this comparative socio-legal research although small does fill a gap in knowledge due to the current dearth in comparative judicial discretion research enquiries. This is perhaps surprising given the progressive movement towards European integration of sentencing approaches and the wider international trend towards globalisation. It can further define the impact of national consistency guidelines on the thinking of the English lower Court judiciary. It can also reveal the extent of Danish judicial receptiveness towards the introduction of national sentencing guidelines in Denmark.

Methodology:

1.) Development of the background research:

The research began with a general interest in lower Court judges as the traditional gatekeepers to the Criminal Justice System and how their sentencing discretion was being regulated. Early on it was noted that the lower Court professional District Judges and lay Magistrates predominantly sentence theft offences.[222] The total number of offenders sentenced for theft in the Magistrates' Courts between 1996 and 2006 was on average 50,000 more than any other offence type. This makes theft sentencing a common issue for English lower Court judges. The possible theft sentencing outcomes range between fines, community penalties, suspended sentences and custody. This combined with the variety of theft offence case facts and the added complexity of ascertaining the elements of theft provides a suitable testing ground for exploring judicial perceptions towards their sentencing discretion.

Judicial discretion in theft sentencing became of focal interest as it seems to be at the heart of the lower Court sentencing decision making process. A general literature review of sentencing law and judicial discretion in English lower Courts was conducted. This revealed significant amounts of historical, socio-legal, criminological and psychological research with a mix of quantitative and qualitative approaches that had attempted to gain a better understanding of judicial discretion in England. From the general literature review it was clear that many other academics had analyzed the sentencing approach and judicial discretion in England. A comparison jurisdiction was

[222] Ministry of Justice (2008, Nov 27) *Sentencing Statistics, 2007 for England and Wales. – Ministry of Justice Statistics Bulletin,* National Statistics, pp 1 – 215 conclusively supports this fact in Chapter One. Statistics were sought from National Statistics via email directly in Dec 2006, which allowed this fact to be relied upon so early on in the research. Specifically at p 9, Table 1.1 the statistics show that the total sentenced in the Magistrates' Courts between 1997 and 2007 for all offences was 1,333,246. Specifically at p 12, Table 1.3 the statistics show offenders sentenced by offence group and outcome in the Magistrates' Courts between 1996 and 2006. Available online at: http://www.justice.gov.uk/about/docs/sentencing-statistics-2007.pdf [accessed Nov 2008]

therefore sought that had some historical socio-legal connections to England.[223] More importantly the comparison jurisdiction required recent connections to England through the European Union that would likely tie the legal development of the two nations in the future. The comparison jurisdiction also needed a similar lower Court judicial composition, i.e.) professional and lay judges and if possible an emphasis on case law precedent.

Denmark was chosen because it fulfilled these needs. It was considered to be accessible both geographically and linguistically, i.e.) high quality spoken English is common within Denmark. The Danish lower Court judicial composition was also similar enough to England to facilitate a comparison, i.e.) both jurisdictions have professional District judges and lay judges selected from the local community. However, there are significant differences in working practices when sentencing theft in England and Denmark. In Denmark, mixed panels of three judges, i.e.) one professional and two lay judges sit together. In England, lay panels of three lay judges sit together, whilst the professional judge sits alone. In Denmark, lay judges serve 4 year terms before seeking renewal, whilst in England a lay judge will serve indefinitely.

Both Denmark and the UK joined the European Union and ratified the European Convention of Human Rights, Rome (1950) which led to the same 3rd September 1953 entry into force date. Both jurisdictions are subject to future political and legal developments that could lead to increasing European Union integration. This could well impact their respective legal cultures and society. More recently and specifically relevant to the English and Danish judiciaries is the development of the European Network of Councils for the Judiciary (ENCJ, 2004). The ENCJ has striven to integrate Court administrations across the European Union, (ENCJ Charter, 2004: 1 – 18). The ENCJ Charter is based upon judicial integration agreements made as a result of Articles 2 and 6 of the Maastricht Treaty (1992).[224]

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[223] The Viking era brought trade and commerce and elements of the Danelaw to England. This would later become incorporated into the common law established in the 12th Century under King Henry II.

[224] The European Network of Councils for the Judiciary (2004, May 20) and the ENCJ CHARTER pp 1 – 16 is based upon judicial integration agreements made within The Maastricht Treaty (1992) Articles 2 & 6.

The general literature review revealed a rich historical analysis of judicial discretion in England by other scholars.[225] By researching the recent Danish history of judicial regulation the most relevant past regulatory choices and changes in both jurisdictions were revealed. The Danish literature review process was greatly enhanced due to the translation of Danish text into English with the help and support of four native Danish language translators in Denmark via email.[226] The researcher's supported efforts provided a valuable past context from which to understand the present operation of judicial discretion. It also helped the researcher in defining his conclusions on where future regulation of judicial discretion should go. The historical analysis showed how the regulation of Danish and English judicial discretion reflected a similar and long running power struggle between the executive (monarch/cabinet), legislature (parliament) and judiciary. The evolution of judicial discretion from high constraint to limited constraint and then back to increasing constraint in both England and Denmark reflects how wider society has continually evolved its view of judges and also how judges themselves have interpreted and perceived wider society.

Theft offence sentencing as a focus when comparing Danish and English judicial perceptions of their discretion was due to three reasons. Firstly, English and Danish legislative definitions of theft share a reasonably similar understanding of appropriation and property, i.e.) section 1 (1) of the Theft Act (1968) and section 276 of the Straffeloven (Danish Penal Code). [227] Both jurisdictions rely upon case law precedent to further define the boundaries of appropriation and property. Both England and Denmark also share a reasonably similar burden of proof for criminal cases, i.e.) beyond all

[225] It is important to understand why a focus on secondary historical sources was chosen over primary historical sources. Firstly, the intention behind the historical analysis was to develop an understanding of the current academic historical debate surrounding judicial discretion and theft sentencing practices in England and Denmark. Secondly, if primary historical sources had been analysed this would have extended the PhD's overall length and taken the research's focus away from the qualitative interviews of Danish and English judges which was to follow.

[226] In addition to this, online support was used from – www.translation-guide.com and www.babylon.com/translation and book translation support was used from - Frandsen, Helle. (2006). *Dansk-Engelsk Juridisk Ordbog* (Second Edition ed.). Copenhagen: Gyldendalske Boghandel, Nordisk Forlag A/S.

[227] See further section 276 of Danish Penal Code (Danish to English translation) and section 1 (1) of Theft Act (1968) in the appendix.

reasonable doubt (*'in dubio pro reo')* that the defendant is guilty. However, the English Theft Act (1968) does add two distinct elements of offender intention, i.e.) dishonesty and permanent deprivation. These elements are not contained within section 276 of the Straffeloven. Instead section 276 focuses more simply on the purpose of obtaining an unlawful gain through appropriation which does not have the consent of the possessor. Secondly, theft is the most common offence category dealt with by Danish and English lower Court judges. All theft offences in Denmark initially go through the 24 Danish District Courts and may go up to the 2 High Courts on appeal, In England, theft is triable either way and can therefore be dealt with either in a summary trial in the Magistrates' Court or be sent up to the Crown Court on indictment. To use a less common offence category that is sentenced in the lower Courts risked being unrepresentative. Thirdly, more socially contentious and thereby media attractive sexual and violent offences were considered to be significantly rarer case types which would not reflect the everyday sentencing tasks of English and Danish lower Court judges. Such high seriousness offences were considered to be more fitting to an upper Court comparison.

The initial comparison of the sentencing powers of the lower Court judiciary in England and Denmark revealed a number of important similarities and differences. In England, under section 7 of the Theft Act (1968) the maximum custodial sentence for theft is limited to 7 years. The wider debate about a proposed increase in custodial sentencing powers from 6 to 12 months continues. It seems unlikely, given the large State deficit and high prison population in England currently that any increase in Magistrates' sentencing powers will occur.[228] At present, section 78 of the Powers of Criminal Courts (Sentencing) Act (2000) restricts Magistrates to imposing a maximum of 6 months custody in respect of any one offence.[229] Whilst section 133 (2) stipulates that for two or more triable either way offences which would include theft offences, custody

[228] Gibb, T. (2009, March 20) More power for JPs raises fear of prison overcrowding crisis, *The Times*, p 1- 2, available online at: http://business.timesonline.co.uk/tol/business/law/article5941754.ece [accessed Dec 2009].
[229] This is detailed further online at: http://www.legislation.gov.uk/ukpga/2000/6/section/78#commentary-c1295517 [accessed Dec 2009].

should not exceed 12 months in aggregate.[230] According to section 132, the minimum term of custody in the Magistrates' Court is 5 days.[231] The maximum fine which may be imposed at the Magistrates' Court is £5,000 under section 17 of the Criminal Justice Act (1991).[232] Whilst section 23 of the same Act stipulates that the maximum period of imprisonment the Magistrates' Court may impose for default in paying a fine is 3 months.[233] English theft offenders sentenced to community penalties are limited to specific durations and requirements depending on the type used which is monitored by the Probation Service. A similar approach towards the sentencing of theft offenders has been adopted by Danish lower Court judges, which is reliant on the close support of the Kriminalforsogen.

In Denmark, the sentencing powers of the lower Court judiciary are prescribed by broad ranges within the Danish Criminal Code which go well beyond the sentencing limitations placed upon the English lower Court judiciary. For property offences (including theft) chapters 276 – 290 define the type of sentences applicable (fine, community, custody) and the maximum powers of District Court judges in applying them. Professional and lay District judges have free discretion within panels to decide what the actual sentence will be within the broadly prescribed ranges. District judges can suspend their actual sentence choices and place conditions on the offender. Under the principle of parsimony, the actual sentence given should be at the lower end of the range and equally balance all aggravating and mitigating factors. Aggregate theft offences (2 or more) should not attract a sentence beyond the prescribed maximum within the Criminal Code. The penalty range for all theft offences is from a fine (lowest theoretically 0.25 DKK under section 287 to a maximum 60 day fines or lump sum fine of an indeterminate amount calculated by the sentencing panel based upon the offender's socio-economic circumstances and offence seriousness under section 51) to a maximum custodial

[230] This is detailed further online at: http://www.legislation.gov.uk/ukpga/1980/43/section/133 [accessed Dec 2009].
[231] This is detailed further online at: http://www.legislation.gov.uk/ukpga/1980/43/section/132 [accessed Dec 2009].
[232] This is detailed further online at: http://www.legislation.gov.uk/ukpga/1991/53/section/17 [accessed Dec 2009].
[233] This is detailed further online at: http://www.legislation.gov.uk/ukpga/1991/53/section/23 [accessed Dec 2009].

sentence of 6 years for aggravated/grave theft under section 286. Juries are required for those aggravated/grave theft cases in which the maximum penalty is likely to be greater than 4 years imprisonment. In such instances, the case hearing is transferred to either the Western or Eastern High Courts. Ordinary theft without aggravation and with a low stolen goods amount is predominantly heard in the lower District Courts. The range for ordinary theft is from a fine, to community penalty, to lenient 7 – 30 days custody, to 1.5 years custody under section 285. Despite this ordinary theft range distinction it still means that Danish District judges have more extensive custodial sentencing powers than their English judicial counterparts, i.e.) additional 12 months custody.

A more specific literature review was then conducted to identify recent conclusions from socio-legal scholars who had conducted quantitative[234] and qualitative research on Danish and English judicial discretion. This knowledge gathering process helped the researcher to establish the current scholarly limits to existing knowledge on the judicial discretion in England and Denmark. The scholarly limits were that the perceptions of English and Danish lower Court judges on their discretion had not been compared before. Theft sentencing perceptions commonly applied in English and Danish lower Courts had not been compared before. There was therefore a significant opportunity to gather new data. This ranged from the wide variety of factors influencing the sentencing approach through to judicial perceptions of their levels of discretion and its future regulation. There were also specific questions which socio-legal scholars looking at either Denmark or England had not asked of their lower Court judges, i.e.) inherent concerns when sentencing. [235]

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[234] These studies had yielding limited information about the sentencing approach, but had documented sentencing outcomes accurately. See Chapters 3 and 4 for the full analysis.

[235] The Qualitative Interview Guide is placed within the appendices. A gap in knowledge which had not been asked of judges in England or Denmark in any great depth was:

"6.) To what extent do you feel influenced by your own inherent concerns?

A) your own moral and ethical standards
B) your personal religious beliefs
C) your cultural background
D) your legal and non-legal education
E) your levels of experience and self confidence in making reasoned/justifiable decisions
F) the importance you attach to your civil duties as a sentencer."

The researcher identified that a new dialogue could be produced by making qualitative comparisons between the sentencing approaches of Danish and English judges. It was also clear, particularly from the historical literature review, that a cycle of re-occurring issues should be tested which impacted judicial discretion. Together with the gaps in knowledge identified within the conclusions of other socio-legal scholars looking at England or Denmark a qualitative interview guide was developed.[236] The literature review was an ongoing process from October 2006 to June 2010 because the Criminal Justice Systems of England and Denmark were constantly evolving. The complex qualitative data produced between 2008 and 2009 revealed a snapshot of Danish and English judicial perceptions towards their sentencing discretion. By gaining new data and comparing the results, new directions for the future regulation of judicial discretion were revealed. This formed the basis of the indicative conclusions produced.

2.) Development of the PhD research elements:

The PhD research elements were based on a structured interview guide that could flexibly question and encourage deep judicial thought.[237] Both Danish and English legal cultures have professional and lay judges in the lower Courts who sentence a high volume of theft offenders regularly. Out of this large potential pool of judges, full time legally qualified professional judges were distinguished from part time lay judges from a non-legal background.[238] In order to have a manageable sample size for a sole researcher a focus on 12 English judges (6 professional, 6 lay) and 12 Danish judges (6 professional, 6 lay) was chosen.

The 24 judges came from 12 Court areas of geographical spread which served either predominantly urban or rural communities, (3 urban and 3 rural areas in England

[236] The initial development of the qualitative interview guide was supported by 3 lay Magistrates and 1 professional judge in England. None of the 4 lower Court English judges were later interviewed. In addition to the supervisory team of 2 English academics and 1 Danish academic, helpful guidance on the qualitative interview guide development was kindly provided by 2 senior Danish academics at the University of Copenhagen.

[237] See appendix for the two structured interview guide versions for interviewees and interviewer.

[238] It is important that *'experienced'* judges who have served on their local bench for some time are given priority as they are most acutely aware of how their judicial discretion had been impacted over time.

and 3 urban and 3 rural areas in Denmark.) The sample selected[239] from each rural or urban area, the most experienced theft judges and those who were most interested in the research questions within the qualitative interview guide. Interestingly, 5 of the 6 English lay judges who volunteered to be interviewed were regular Chair persons within sentencing panels. This small sample of volunteers revealed professional and lay judicial perceptions to the questions posed. It also revealed wider regional judicial perceptions across England and Denmark. In turn, this enabled the research to explore how Danish and English lower Court sentencing communities have adapted and responded to increasingly centralized, national sentence guidance regimes seeking to regulate their sentencing decision making approach.

3.) Qualitative research limitations and their resolution:

Firstly, there was the potential problem of ambiguity in the language used for the questions and how they may be consistently and accurately explained to the judge (interviewee). Fortunately, Danish and English judges share a high level of English language proficiency. Thus it was possible for English to be used as the language for the questions posed. The questions themselves included ambiguous terminology, i.e.) 'popular punitive politics' and 'economic efficiency'. These terms required a clear and consistent explanation by the interviewer.[240]

[239] This was done by indirectly asking judges in each area selected to *'volunteer out of interest'* to be a part of this PhD research. The Court administration (Chief Justices Clerks - England) (Retspresidents – Denmark) were the first point of contact for the researcher. They facilitated the initial contact with judges that they worked with and supported by informally seeking potential judicial interviewees who may wish to contribute to the research as described in an introductory researcher email. They then passed on the detailed qualitative interview guide to these judges. These judges then decided if they wished to contribute or not. Once an interested professional judge and lay judge from a specific locality was found they were asked to make contact with the researcher. The researcher then arranged a convenient meeting date and time at the Court.

[240] The selection of questions requires as much skill as the explanation of their precise meaning during interviews. This is why a researcher needs to know the roots of their enquiry inside and out, i.e.) see further - Foddy, W. (1993). *Constructing Questions for Interviews* (First ed.). Cambridge: Cambridge University Press and Campion, M. A., Campion, J.E., & Hudson, J.P., Jr. (1994). Structured Interviewing: A Note on Incremental Validity and Alternative Question Types. *Journal of Applied Psychology, 79*(1), 998 - 1002.

It was noted that some Danish judges could have felt more nervous and unsure about the English language questions posed. The researcher was sensitive to this and asked each interviewee to ask about any questions they were felt unsure of. In ensuring the Danish judges understood the meaning behind each question posed the interviewer prepared and where necessary provided alternative similar meaning adjectives that could further explain what was being asked. This flexible vocabulary strategy worked well and ensured that the questions posed were clearly and consistently understood before any answers were given. The questions posed included deliberately controversial and leading statements, i.e.) 'executive led' theft guidelines. This required proper explanation as to why this was being said of national sentencing guidelines. It made a controversial argument, namely that the Sentencing Guidelines Council Guidelines were predominantly shaped by the current Government's criminal justice policy drives and not the Judiciary themselves. The judicial reaction to this was tested again when they were asked to interpret the influence of popular punitive politics.[241]

Secondly, the judges were asked in relation to the sentencing guidance source mix, whether they had noticed any significant changes over time. This was from when they first started to sentencing to the present day. In testing the reminiscences of judges in relation to their past sentencing approach and the past mix of sentencing guidance sources, the information gathered had two limitations. Firstly, it depended on the length of sentencing experience that a judge had to draw upon. The length of time on the bench for both the Danish and English judges on average spanned over a decade. Secondly, it depended on the subjective memories of the interviewees remaining accurate and reliable over time.[242] However, in allowing judges to freely reminisce there was a rare opportunity to gather new data on judicial recollections of their past career development.

Thirdly, another specific question asked the interviewees to conclude on how different guidance sources were currently influencing their sentencing approach. This

[241] The judicial opinions, beliefs and feelings in relation to this particular issue of who controls sentencing approach guidance direction was considered to be of high importance and worth testing very thoroughly.
[242] The average Danish interviewee sentencing experience was 12.1 years compared to 15.3 years for their English counterparts.

was a repetition of and seeking of clarification of response in relation to the guidance source example list that had just been posed and discussed. However, in asking judges to repeatedly explain why they had concluded in the way they had risked interviewee's becoming defensive in their justifications to the interviewer.[243] To overcome this, where a judicial answer was the same as stated before, this was noticed by the interviewer and the interviewee was asked if they had something additional to add. This ensured that interview time was constructively spent revealing new data. To this end, if a question was answered before being asked in a response to a previous question, this meant that a question could be counted as answered provided the interviewee agreed.

Fourthly, the interviewees were asked to explore very personal aspects of their lives and its possible influence on their sentencing approach, i.e.) their own inherent concerns. This presented potential ethical problems as judges were prompted to explore their own moral standards, personal religious beliefs, cultural background, education, self confidence and work place motivation levels. If an interviewee was showing discomfort through their body language or responses to any prompts posed, it was important for the interviewer to pick up on this. If not, the interviewer risked offending the interviewee or gathering limited and unreliable information. There was a risk that the interviewee could refuse permission to record such personal aspects of their lives. Fortunately, this did not happen. The concluding remarks final section of the qualitative interview guide allowed for a recorded debrief of each interviewee, i.e.) future preferences and any other comments. However, this did not fully mitigate the possible loss of data after the interview had finished and recording had stopped, when some judges spontaneously chose to further discuss various issues of concern in relation to their sentencing approach.[244]

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[243] The use of why as a question also infers a cause-effect relationship that may not truly exist according to McNamara, C. (1999). General Guidelines for conducting interviews: http://www.managementhelp.org/evaluatn/intrview.htm.

[244] It is recommended that notes are taken to evade this potential problem. However, in taking notes during interviews which was done as a safeguard against the recording failing there is a potential negative impact if interviewees see that everything is still being recorded despite the recorder being turned off. See further Parker, I. (2005). Qualitative Psychology: Introducing Radical Research (First ed.). Maidenhead: Open University Press at p 236.

Fifthly, the transcription of the recorded interviews by the interviewer was highly time consuming and complicated. This was due to the high volume and complexity of the data collected, i.e.) 30 hours of judicial discussions. It was also due to the need for additional researcher analysis of the data as it was being typed up so that important thoughts were not lost and so that repeated interviewee responses could be highlighted. The results could be unfairly biased, if the researcher within the transcriptions does not clearly separate this secondary analysis from the interviewees' primary ad-verbatim commentary through different color coding, spacing and text style variations. Transcribing errors such as mishearing, fatigue and carelessness were all potential risks which the researcher had to contend with and safeguard against through patient and diligent work.[245]

Sixthly, the qualitative interviews logistically were conducted individually in order to limit the biases of group conformity in sentencing approaches of individual judges. All interviews were conducted in the Judges' own Chambers which provides a formal, yet also familiar and appropriately private setting. After the interviews, follow up clarification was attempted via email.[246] The SGC offence seriousness guideline (2004) and section 80 of the Straffeloven were shown to English sentencers and opinions sought on their utility. Due to the significant amount of information generated by the qualitative interview guide and lack of response from 21 judges (9 English, 12 Danish), the email follow up questionnaire results were omitted.[247]

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[245] For more commentary on potential transcribing errors please see Poland, B. (1995 - Sep). Transcription quality as an aspect of rigor in qualitative research. *Qualitative Inquiry*, 1, 290 – 310 at p 294.

[246] Only three lay English judges responded to this. These judges showed support for the SGC seriousness guideline, whilst section 80 of the Straffeloven was considered to be too wide as a source of potential guidance on offence seriousness in England. If anything, the failure of this follow up questionnaire demonstrates the following:

1) The repetition of questions in the email follow up was unnecessary as the Qualitative Interview Guide was comprehensive enough,

2) Follow up email questionnaires are too impersonal to gather judicial perceptions regarding their sentencing approach. Interviewed judges willingly gave up on average 1.5 hours of their time despite their busy work schedules. The email follow up questionnaire is available for further inspection in the appendix.

[247] The additional information gathered here was considered to be too unrepresentative and was not used in the PhD results analysis or the conclusions.

4.) Regional comparison overview:

Wisbech Magistrates' Court - Hjørring District Court (Rural)
Worcester Magistrates' Court - Holbæk District Court (Rural)
Totnes Magistrates' Court - Svendborg District Court (Rural)
Liverpool Magistrates' Court - København District Court (Urban)
Southampton Magistrates' Court - Århus District Court (Urban)
Kingston upon Hull Magistrates' Court - Odense District Court (Urban)[248]

There are 24 District Courts and 2 High Courts in Denmark who deal with theft cases. This corresponds to 652 Magistrates Courts and 77 Crown Courts in England and Wales who deal with theft cases. There are 25 sub-areas within 6 main regions in England. This corresponds to 21 sub-areas within 6 main regions within Denmark.[249]

5.) Quantitative comparison of rural and urban Court areas in England and Denmark:

The court region comparison adopts a quantitative approach. It identifies the distinguishing features of each selected region in England and Denmark in terms of rural (town) or urban (city) development by gathering publicly available Government statistics. This data is compared to provide a controlled and factual basis on which to understand

[248] Please see the appendix for the marked locations on maps for the selected regional District and Magistrates' Courts in England and Denmark. For a wider analysis of the advantages and disadvantages of qualitative and quantitative research methods see:
-Kleining, G. Witt, H. (2001 - Feb). Discovery as basic methodology of Qualitative and Quantitative Research. Forum: Qualitative Social Research, 2(1). Institute for Qualitative Research, Freie Universität Berlin available online at http://www.qualitative-research.net/index.php/fqs/article/view/977/2131 This article provides a detailed understanding and further justification for the research path pursued, i.e.) an open, active exploratory research process.
-Reason, P. Rowan, J (Eds.) (1981). Human Enquiry: A Sourcebook in New Paradigm Research. Chichester: John Wiley & Son Inc.
-A further simplified online report comparing qualitative and quantitative management research submitted to Lesley Keates at the Department of Management and Information Technology at the University of Wales, Lampeter on 16/01/03 can be found at: http://www.lamp.ac.uk/mit/pdf/report6.pdf

[249] This information is correct as of 1 January 2008. Further more detailed and up to date information on Magistrates' Court and District Court (retskreds) structure is kept online for England at: www.hmcourts-service.gov.uk and for Denmark at: www.domstol.dk

the socio-demographic mixes within each selected region. This qualitative PhD research is primarily concerned with comparing judicial perceptions (the how's and why's) regarding their sentencing approach to theft offenders and not quantitative comparisons of fact. However, quantitative statistics have some utility in providing a brief comparative overview of the officially recorded statistics. This can answer a factual question such as whether an area has a low population (rural) or a high population (urban). This is what the urban and rural distinction was based upon, i.e.) does population density have any impact on judicial perceptions of their sentencing approach to theft offenders?

There was further statistical information available. However the extent of provision of this further statistical information varied across regional areas. Regional statistics were available in both England and Denmark. They provided information on:

1) General Population statistics.
2) The ethnicity spread statistics.
3) The age spread statistics.
4) The gender spread statistics.
5) The unemployment statistics.
6) The theft offence categories and conviction statistics.
7) The level of crime by offence category.
8) The annual incomes of a regional population. [250]

This research attempted to capture variations between rural and urban regions by population density within Denmark or England. However, it was acknowledged by the sole researcher that with such a small sample size and limited regional selections this was highly ambitious and more suited to the efforts of a larger research team. Due to this, the data produced was considered to be only a minority snapshot of the majority judicial

[250] This list was drafted by the researcher after having analyzed the statistical data that is publicly available on official Danish local Kommune and English local Government websites. In addition to this, data was collected in England from the Office for National Statistics – www.ons.gov.uk and the UK National Statistics Database – www.statistics.gov.uk which includes the last 2001 CENSUS survey. In Denmark, additional data was collected from Statistikbanken. (2007, Oct) - www.statbank.dk.

perceptions out there. This limits what conclusions can be drawn from this research, but does not detract from the effort and value of gaining new data and being the first to attempt to compare English and Danish judicial perceptions.

Whilst the above list of distinguishing features help to separate and identify what rural and urban Court areas are. There are a number of further limitations which need to be recognized and mitigated. Firstly, statistics show specific static facts as compiled by officials within the government. Statistics are produced as a service to the public. They are not flexible enough to validly reflect changing community perceptions. However, they can provide some factual context to the rural and urban labels used within this research. The attempt to try to represent regional variations across Denmark and England by comparing the above statistics was based upon the official UK government (Office for National Statistics) approach. This entails a population density (census) comparison between regions in order to define what rural and urban Court service areas are. However, the difficulty in comparing population statistics in England and Denmark was the typically much larger population sizes in English rural and urban areas. As an example of the problem faced, the Census (2001) population of Greater London was around 7.1 million. For the entire country of Denmark the 2001 population according to Statistics Denmark online database was around 5.3 million.[251]

[251] For more details on the official UK government approach see http://www.statistics.gov.uk/geography/lac.asp [accessed Feb 2008] which uses the following distinctions: "There are six urban/rural classifications, which are defined as follows:
-Major Urban: districts with either 100,000 people or 50 percent of their population in urban areas with a population of more than 750,000.
-Large Urban: districts with either 50,000 people or 50 percent of their population in one of 17 urban areas with a population between 250,000 and 750,000.
-Other Urban: districts with fewer than 37,000 people or less than 26 percent of their population in rural settlements and larger market towns.
-Significant Rural: districts with more than 37,000 people or more than 26 percent of their population in rural settlements and larger market towns.
-Rural-50: districts with at least 50 percent but less than 80 percent of their population in rural settlements and larger market towns.
-Rural-80: districts with at least 80 percent of their population in rural settlements and larger market towns." It should, however be noted that these statistical distinctions regarding local authority areas is based on the Census (2001) population estimates conducted by the Office for National Statistics. A useful online introductory guide to rural and urban classification can be found at: http://www.statistics.gov.uk/geography/downloads/Rural_Urban_Introductory_Guidev2.pdf

6.) Ethical research considerations:

Each individual interviewee's permission was first sought by means of a formal letter of introduction. The letter contained the broad areas of investigation and was sent to the 12 selected Magistrates' Courts directly. In England, this involved liaising with staff working for Her Majesty's Courts Service. In Denmark, the equivalent staff liaised with worked for the Domstolsstyrelsen (Court Administration). In England, the Justices' Clerk liaised with those judges who were receptive to being interviewed. In Denmark, the Retspræsident (Court President) liaised with those judges who were receptive and comfortable with being interviewed in English. Both Her Majesty's Courts Service in England and Domstolsstyrelsen (Court Administration) in Denmark and the eventually selected lower Court judges were provided with copies of the ethics policy of Southampton Solent University.[252]

The interviews were conducted in English only which is commonly understood by both English and Danish judges. This does mean that only Danish judges with good English language skills could be used. However, in pursuing this approach the practical problem of the interviewer's English background and Danish linguistic limitations were addressed. By avoiding transcribing oral Danish interviewee responses from Danish to English, the complex linguistic problems of interpreting foreign language differences between English Magistrates and Danish District Judges were addressed. It is replaced with as level a playing field as possible whereby oral English language responses from Danish and English interviewees are compared. The research prompts had to be delivered sensitively and with clarity so as to ensure full judicial comprehension and understanding had occurred. This was due to the differing linguistic and cultural backgrounds of all the judicial interviewees.

All interviews were conducted in the Judges' own chambers which provided a formal, yet also familiar and appropriately private setting. The research question and

[252] Available online at: http://blade2-5.solent.ac.uk/DocMan8/rns?RNSExact=PPG/ASQS/AH/1234569791

research prompts had to be delivered sensitively and with clarity so as to ensure full judicial comprehension and understanding. This meant that before a response from each interviewee was gathered the question being tested was read by the interviewee. After reading the question the interviewee then repeated its meaning back to the interviewer. This was to ensure that what the interviewer intended the meaning of the question to be was clear to the interviewee.

All interviews were audio recorded for accuracy and later idiomatically transcribed for further critical comparative analysis. Prior permission was sought from each interviewee and the interview recording process was properly explained to them. The interview transcripts contain personal information which must be stored in strict accordance with the Data Protection Act (1998), the Freedom of Information Act (2000) and Southampton Solent University's Ethics Policy.

7.) Qualitative interview analysis of English and Danish judicial perceptions:

The research prompt guidance approach had to be sufficiently clear and unambiguous. The traveling interviewer therefore acted as the constructive partner to the interviewee explaining the various themes in a consistent, but flexible way. The interviewers' unique subjective influence meant that the interview approach was creative and dynamic. Human conversations do not concern themselves with distinctive knowledge boundaries. Due to this, the interviewer required a high level of competence and needed to be highly knowledgeable about the deeper meanings behind the interview questions. The literature review process and training in qualitative research methods through a post graduate diploma helped to overcome these high research skill demands. [253] Through acquired learning a competent and confident interviewer is able to reassure and relax interviewees and ensure productive knowledge gathering is happening.[254]

[253] The literature review process provided the specialist knowledge in addition to teaching at undergraduate level in sentencing law and other educational achievements of the researcher, i.e.) LLB, LLM and Barrister training. Skills in qualitative and quantitative research were attained by completing the post graduate diploma in research methods and management at Southampton Solent University in 2008.

[254] Kvale, S. (1996). InterViews - An Introduction to Qualitative Research Interviewing (First ed.). London: Sage Publications Ltd explores these methodological themes further in Chapter one. It is the researchers

Being sensitive and understanding of the different legal cultures which Danish and English judges operate within is crucial. The interviewer is there to quietly approach and guide the interviewee as they explore the themes behind the research prompts put to them. The interviewees were encouraged to formulate an unconstrained dialogue with the interviewer. This revealed their subjective conceptions of their own theft sentencing practices and how this interacts with wider guidance sources. Any potential bias from the interviewer's own opinions was thereby kept to a minimum. In doing this, this research tries to ensure greater validity and reliability.

The qualitative research prompt approach attempts to reveal unique subjective social constructions of sentencing practice reality by minimally guiding and mainly listening. In this way, the interview process itself is not oppressive in nature. Instead it is designed to encourage spontaneous responses from interviewees. There is no desire to predict or control the behavior of the interviewees as a positivist objective approach would wish. The direction and flow of the interview is primarily concerned with getting at the true picture of judicial discretion in theft sentencing practices now and the subjective impact of sentencing laws, regulations and guidance sources. It does this by looking at human experiences, subjective communicative meanings, historical, social and cultural constructs, language, and the subjectively revealed psychology of each interviewee.

The qualitative interview guide introduces five general themes. Firstly, the impact of the specific executive desire for consistency in theft sentencing approaches on both Danish District Judges and English Magistrates is explored. Secondly, the impact of the current sentence guidance sources in England and Denmark on judicial interpretations of theft offence seriousness is explored. The themes here address offence specific factors, offender specific factors and procedural specific factors. Thirdly, the international debate for and against wide judicial discretion is discussed. Fourthly, the

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belief that interpersonal skills and cultural sensitivity are inherently learned factors that also support a good interviewer.

subjective sensitivity of interviewees to various societal influences is explored. These societal influences include popular punitive politics, the media, economic efficiency, judicial culture specific influences and local public concerns. Inherent concerns consist of the interviewees own moral beliefs, religious and cultural background, gender, age, education, levels of sentencing experience, self confidence, motivation and overall morale. Fifthly, the research prompts allow for free discussion on anything else the interviewee would like to add to the conversation in conclusion. Complete discursive freedom regarding the themes highlighted above and wider revealed themes are not just merely allowed for, they are in fact actively and positively encouraged throughout.[255]

As qualitative researchers will know, there is no standard method for analyzing the complex semantics produced by *ad verbatim*[256] interviews. Instead there is a close relationship of trust and mutual respect between the interviewer and interviewees. Ultimately it is the interviewer's own skills of analysis which are extensively relied upon;

> *"The quality of the analysis rests upon his or her craftsmanship, knowledge of the research topic, sensitivity for the medium he or she is working with – language – and mastery of analytical tools available for analyzing the meanings expressed in language."*[257]

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[255] Please see further the qualitative interview guide within the appendix.

[256] It is important to note that the interviewer typed out the interviews himself on an *ad verbatim* basis. Although this was inevitably time consuming it allowed for a deep interviewer subjective analysis of the interviewees' meanings and language throughout the transcription process. In addition, the interviewer sometimes added his own separate thoughts and investigations into what was being identified by interviewees and why for later analysis. Colour coding made sure that what judges mentioned and what the researcher added in response to them during the transcription process strictly remained separate.

[257] Kvale, S. (1996). InterViews - An Introduction to Qualitative Research Interviewing (First ed.). London: Sage Publications Ltd, Chapter 9 at p 103. My own background in teaching and training at the English Bar directly affected the quality of the interviews. My knowledge and understanding of theft law and sentencing practices was important. My ability to sensitively explain and understanding the judicial answers given to legal principles and socio-legal issues, particularly to Danish District Judges speaking in non-native English was very important. In this vein, I was extremely patient, positively motivating and always displayed the highest standards of etiquette. Judges needed to feel comfortable around me and I believe that they did so. Why? Judges were given the platform to air their opinions freely. This was relished by all the judges as it was their first opportunity to do so, spending in most cases way over the 45 minutes time I had expected judges to give me and had planned for. The average interview lasted 1.5 hours. This was very pleasing to the interviewer who had worried initially about his own abilities to interview all the judges who had volunteered to see him, often after a very busy Court day.

The interviewer's skills of analysis of meanings expressed in language is further tested by the comparative dynamic, i.e.) comparing the opinions of Danish and English lower Court judges. This means that any cultural interpretations made will inevitably have an English perspective because the interviewer is a native to the English language and culture. The interviewer is required to very sensitively interpret the ad verbatim transcribes. Why? This is because although Danish and English judges, both professional and lay may perform similar societal functions, they operate within and interact with different surrounding cultures. Testing and re-testing meanings may take time, but it is absolutely key to unlocking the truth. The repetition of opinions by many judges is indicative of a common understanding within the judiciary on a given subject area.

The interviewees' spontaneous responses are a very important tool for drawing out valid data. The interviewer has recorded where non-prompted opinions have been given. This is the most indicative of the interviewees' internal thoughts before the interviewer begins to lead. Research prompts then direct the conversation forward. The interviewer provides the interviewee with the basic interview structure and questions. He retains a number of research prompts to keep the conversation flowing. He may also spontaneously expand upon arguments given by interviewees through 'on the spot' follow up questions. This is a common Court room occurrence that both the interviewer and interviewees are familiar with. It tests and re-tests what is being said and why.

Throughout the interviews the use of deliberately controversial statements is important, i.e.) 'executive led' encourages the interviewees' to demonstrate both <u>how</u> and <u>why</u> they have arrived at their own knowledge and opinions. It provokes deeper analysis. Kvale (1996) helpfully sums up the importance of this technique:

> *"The qualitative research interview is particularly well suited for employing leading questions to check repeatedly the reliability of the interviewee's answers, as well as to verify the interviewer's interpretations. Thus, contrary to popular opinion, leading questions do not always reduce the reliability of interviews, but*

> *may enhance it; rather than being used too much, deliberately leading questions are today probably applied too little in qualitative research interviews…The decisive issue is not whether to lead or not to lead, but where the interview questions should lead, and whether they will lead in important directions, producing new, trustworthy, and interesting knowledge."*[258]

How does one approach this wealth of information? Firstly, one uses meaning condensation to reduce *ad verbatim* data down. This covers the first information theme, whereby selecting commonly repeated meanings and language the information volume is reduced and the significance is increased. The *ad verbatim* data can then form the basis of quotations direct from the judges. Such quotation provide context of the conversation and leaves the interpretation of judicial meaning for the reader themselves to decide.[259] Secondly, meaning categorization is used to bring out the results of the 1 – 5 scales and respective influence most – least scales used in the interview guide. This provides a firm starting point for the deeper analysis of a particular issue, i.e.) economic efficiency (1 – 5 scale), or a particular guidance source, i.e.) formal legislation on sentencing theft cases (most to least scale). Thirdly, judges spontaneously wanted to provide their own narrative examples to explain complicated issues influencing their sentencing approach. This is particularly relevant to the very personal issues explored in section D 6 - *'extent of influence of your own inherent concerns'.* The importance of this story telling by analogy is noted by Kvale (1996) and can be analyzed in the following way:

> *"The interview researcher may pay attention to narratives during both interviewing and analyzing, as well as at the reporting stage. When spontaneous stories appear during interviews, the interviewer can encourage the subjects to let their stories unfold...During the analysis the researcher may alternate between being a 'narrative-finder' – looking for common narratives contained in the interviews, and being a 'narrative creator' – molding the many different*

[258] Kvale, S. (1996). InterViews - An Introduction to Qualitative Research Interviewing (First ed.). London: Sage Publications Ltd, Chapter 8 at pp 158 - 159.
[259] Kvale, S. (1996). InterViews - An Introduction to Qualitative Research Interviewing (First ed.). London: Sage Publications Ltd, Chapter 14, pp 266 – 267 provides helpful guidelines for reporting interview quotes.

> *happenings into coherent stories…The result may be a good story, providing new convincing insights and opening new vistas for understanding the phenomena investigated."*[260]

Fourthly, the level of analysis turns to an *ad hoc* meaning generation which by its own flexible nature allows the interviewer to adopt a multiple analysis of all the approaches discussed above in order to understand the deeper data semantics. This approach recognizes that an interpretation of meaning and language requires recognition of the particular academic perspective being used. In this case, it is socio-legal which incorporates the interviewers' subjective interpretations of what is positive and negative, similar and different. This in turn is interpreted for and later by a validating readership of judges, the criminal justice research community, legal practitioners, politicians and the general public. As Kvale (1996) further clarifies:

> *'There is a free interplay of techniques during the analysis. The researcher may read the interviews through and get an overall impression, then go back to specific passages, perhaps make some quantifications like counting statements indicating different attitudes to a phenomenon, make deeper interpretations of specific statements, cast parts of the interview into a narrative, work out metaphors to capture the material, attempt a visualization of the findings in flow diagrams or charts. Such tactics of meaning generation may, for interviews lacking an overall sense at the first reading, bring out connections and structures significant to the research project."*[261]

[260] Kvale, S. (1996). InterViews - An Introduction to Qualitative Research Interviewing (First ed.). London: Sage Publications Ltd, Chapter 11, pp 200 – 201.
[261] Kvale, S. (1996). InterViews - An Introduction to Qualitative Research Interviewing (First ed.). London: Sage Publications Ltd, Chapter 11, pp 203 – 204.

Thus we are left with a multiple analytical approach of the interview transcribes by the researcher that is based upon the following data:

1) Common meanings and languages.
2) 1 – 5 and Most - Least scales.
3) Spontaneous judicial responses.
4) Researcher prompted judicial responses.
5) Deliberately controversial and leading questions and the judicial responses to them.
6) *Ad verbatim* judicial quotations.

This data is then structured under the following three principle headings:

1) The subtleties of Court room interactions and sentence decision making – (What you regulate.)
2) The unpredictable external societal influences – (What is beyond the remit of judicial regulation?)
3) The judicial disempowerment trend within both Denmark and England. – (How and why you regulate.)

The researcher then adds his own subjective critical analysis throughout. This has its own limitations in terms of potentially reducing the validity of the research results examined. However, this can be justified as Kvale (1996) concludes:

> *"Though increasing the reliability of the interview findings is desirable in order to counteract haphazard researcher subjectivity, a strong emphasis on reliability may counteract creative innovations and variability."*[262]

[262] Kvale, S. (1996). InterViews - An Introduction to Qualitative Research Interviewing (First ed.). London: Sage Publications Ltd, Chapter 13, at p 236.

Finally, the researcher acknowledges that some findings (judicial perceptions) relate more specifically to theft offences and theft offenders, i.e.) Chapters 5 and 6. For the remaining findings, the researcher acknowledges that the wider judicial debates generated can be more easily generalized across all offence and offender categories, i.e.) Chapters 7, 8 and 9. A majority of the judicial perceptions collected and analyzed therefore can be broadly applied to inform the wider academic debate on judicial discretion and regulation of the sentencing approach.

Chapter 5: Comparing the aims behind sentencing theft offenders within the lower Courts of England and Denmark.

Introduction:

To understand judicial discretion in the lower Courts today one must overcome some very difficult practical and methodological hurdles. Firstly, on the practical side, one must find those judges who are willing and then have the time in their busy working lives to openly discuss their sentencing approach. Secondly, on the methodological side a qualitative interview guide is required to help judges understand *how* they may deeply analyze their own complex theft sentence decision making. Many did so for the first time in their lives with the researcher facilitating the process. It took time, effort and sensitivity for this very subjective judicial self-analysis to happen, typically over an hour or so. It also took a high degree of interviewer skill to test and re-test judicial thinking in order to establish an accurate picture of the current sentencing approach practices within Danish and English lower Courts.

The discussions were largely dominated by the judges as can be seen by both the high number of spontaneous responses provided and the high volume of *ad verbatim* judicial commentary recorded. This was before the researcher provided his own research prompts to stimulate the conversation as can be seen in the qualitative interview guide.[263] In what were inevitably complex discussions, the judges tried their best to make sense of *how* they think when they approach their theft sentencing decisions. This meant judges not only shared their opinions on themselves and the Courtroom environment they face. They also analyzed *how* they made an impact upon wider society and *how* wider society in turn made an impact upon them.

[263] Please see the appendices for the qualitative interviewer (with research prompts) and interviewee (without research prompts) guides.

This chapter introduces comparative philosophy. It then evaluates the quantitative profiles of the 12 English and 12 Danish judges. Finally the current judicial philosophy behind the sentencing of theft offenders in England and Denmark is compared. This is based on the qualitative judicial perceptions gathered in 2008 and 2009. The introductory analysis is split into the following three sections:

1.) The philosophical debates that comparing law and society generate.

2.) Comparing the Danish and English judges' quantitative profiles.

3.) Comparing the relative influence of theft sentencing aims on the sentencing approach towards theft offenders in England and Denmark.

5.1) The philosophical debates that comparing law and society generate:

We now turn to the comparative dynamics of this research and both the opportunities and difficulties. Why attempt a sentencing study which is comparative in approach? What makes the comparison of judicial attitudes towards their sentencing approach useful? What new knowledge can it possibly achieve? Firstly, just in asking judges questions about their sentencing approach new measurable and comparable knowledge is revealed. This is despite the comparative dangers of incoherent judicial answers.[264] A qualitative study will always be indicative, but this is still of value. Secondly, the judges interviewed hold the key to better understanding the sentencing approach and judicial discretion because they ultimately produce the sentence. If asking judges does not help us to understand the sentencing approach, then there is no hope of getting answers at all. Nelkin sums up some of the highly complex questions that comparative sentencing law asks about wider society, culture and humanity;

> *"What are we comparing when we compare cultures or legal cultures? Should our unit of comparison be single institutions, communities, countries, the world society? What about cultural differences within countries – between areas, age groups, classes and genders? How does legal culture relate to wider culture? Is comparison a question of explaining or of translating? Last, but not least, how far is it possible to avoid our definition of legal culture being already marked by the culture of the observer so that it reflects the situation in some societies better than others?"*[265]

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[264] Both Roger Cotterrell's 'legal ideology' and Laurence Friedman's 'legal culture' distinctions recognise that understanding judicial attitudes is not about precise measurements or explanations. Instead, it is about exploring common understandings and meanings. In making comparative inferences regarding judicial attitudes this research attempts to understand the immeasurable. See further Nelkin, D. (1997). *Comparing Legal Cultures* (First ed.). Dartmouth: Ashgate, Chapters 1 and 2.

[265] Nelkin, D. (1997). Comparing Legal Cultures (First ed.). Dartmouth: Ashgate, Chapter 4 at p 69 to which can be added further research specific questions such as: What is sentencing approach regulation? Is it necessary? Why? What sentence decision making areas do we regulate? How do we achieve best practice? Whom do we most trust and accept to ultimately sentence us? Why? What fears or tragedies can be identified and analyzed when one seeks to understand the role of judicial discretion in the sentencing approach?

Nelkin asks that the wider meanings of law and society in the compared jurisdictions are properly understood. This is important, because this rigorous analytical approach provides some reference points in order to better understand how judicial attitudes regarding their sentencing approaches are interacting with wider society and vice versa. One of the important reference points in this research is the separation made between English and Danish judicial attitudes and the respective geo-political borders of England and Denmark. The wider influences on a legal culture are not always clearly restricted by legal jurisdiction. King discusses the danger of comparative researchers stereotyping legal identity, i.e.) judicial sentencing approach attitudes, with national identity. He supports Luhmann's social autopoietic theory that favors comparisons between legal systems of functional communication rather than geo-politically defined legal cultures. This would be a more persuasive argument against the comparison of legal cultures adopted in this research, if the theft sentencing approaches of lower Court judges in both countries were not predominantly influenced by what are historically distinctive domestic sentencing approach debates on theft. There is no formal interaction or communication between Danish and English lower Court judges on theft sentencing approaches. This is because there is no time or economic resource for the respective judiciaries to meet regularly and influence each others' sentencing approach.[266]

[266] Nelkin, D. (1997). *Comparing Legal Cultures* (First ed.). Dartmouth: Ashgate, Chapter 7 which is provided by Dr Michael King.

5.2) Comparing the Danish and English judges' quantitative profiles:

The research sample was comprised of 24 lower Court judges, half of which were based in English Magistrates Courts and the other half based in Danish District Courts. In England, 6 Professional District Judges and 6 Lay Magistrates were interviewed across six geographically spread rural and urban locations. In Denmark, 6 Professional District Judges and 6 Lay District Judges were interviewed in comparable rural and urban locations. It is important to note that judges were selected by local Court administrations on the basis of voluntary interest and participation in this PhD research. The primary aim was to capture new data and make a new comparison by closely examining the Danish and English sentencing approach.

In terms of gender, there were 18 males, 9 from English lower Court judges and 9 from their Danish counterparts. There were 6 females, 3 from English lower Court judges and 3 from their Danish counterparts. This gender disparity in favor of males may not be surprising and cannot assert to be representative. However, nevertheless it may suggest gender equality has some way to go in the fairer representation of both genders in the English and Danish lower Courts. In terms of age, unsurprisingly all the 24 judges interviewed were beyond 40 years old and no older than 65 years old making them predominantly from the 60's and 70's generations.[267] In comparison, there was a more even age spread amongst the Danish District Judges whereas their English counterparts were predominantly of a more senior stage in their sentencing careers.[268] This is reflected in the average mean time on the bench comparison of 15.3 years for the English sample and 12.1 years for the Danish sample.

The entire sample comprised of White British or White Danish racial backgrounds. However, any deeper analysis of this quantitative fact comes with a warning. For Davis and Vennard out of 128 Magistrates quantitatively surveyed using questionnaires and who were from 14 Court areas, 28% of ethnic minority Magistrates

[267] This was a highly progressive time where societal values and beliefs were being challenged and reformed in both Denmark and England.
[268] 11 English judges were in the 50 - 70 age bracket compared to only 8 Danish judges.

had perceived instances of racism. [269] However the perceptions from only 4 ethnic minority Magistrates *could* be construed as indicating some institutional bias. Focussing on the minority perception is misleading. It can ultimately work against multi-cultural society and the message of tolerance, respect and inclusion. It is more important to derive from judicial perceptions the subjective connections they make between their own racial background and their sentencing practices. In this sense, the wider judicial perceptions of what race can be linked to, i.e.) gender, socio-economic background, education, culture and offender court room behaviour paints a more realistic, albeit very complex picture. The above statistical data has been mentioned only because a quantitative analysis of it shows the limited results that it can provide about judicial discretion and the diverse elements that make up the current sentencing approach. This justifies why such a complex qualitative methodology is necessary and has been chosen.

Judicial reasoning is premised on complex social psychology.[270] To add to this complexity, in both jurisdictions both professional and lay judges continue to be selected from a wide pool of talents, i.e.) the local general public and respected legal professionals. However, comparing the statistical trends in the gender, age, experience level and racial background of Danish and English judges selected is highly unwise. The sample size was never meant to be quantifiably representative. Thus any serious attempt to make quantifiable comparisons on the basis of gender, age, experience level and racial background is therefore almost meaningless. Given the complexity of the sentencing approach and judicial discretion, not only would this methodology be highly problematic

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[269] Davis, G. Vennard, J. (2006). Racism in Court: The Experience of Ethnic Minority Magistrates, *Howard Journal of Criminal Justice*, 45(5) Dec, 485 – 501 at p 494.

[270] Further social psychological analysis of sentence decision making is provided by:
1) Sporer, S. Goodman-Delahunty, J. (2009). *Disparities in sentencing decisions*. In Margit Oswald, Steffen Bieneck & Jörg Hupfeld-Heinemann (Eds.), *Social Psychology of Punishment and Crime* (Chapter 20, pp. 379 - 401). London: John Wiley & Sons Ltd.
2) Bird, G. & Rogers, N. (2008) *The Art of Judging - A special issue of the Southern Cross University Law Review.* Southern Cross University Law Review, 12(1), 1 - 178.
3) Connolly, A. (2009 (Feb). *Judicial Reasoning and the Acquisition of Concepts*, Judicial reasoning: art or science? Canberra: National Judicial College of Australia/ANU College of Law/Australian Academy of Forensic Sciences.
4) Farrar, J. (2009 (Feb). Reasoning by analogy in the law, Judicial Reasoning: art or science? Canberra: National Judicial College of Australia/ANU College of Law/Australian Academy of Forensic Sciences.
These were research papers were presented along with a number of other interesting conference papers from *'Judicial reasoning art or science?* (2009 - Feb) Canberra, hosted by the Australian National University at the following link: http://law.anu.edu.au/nissl/JudReas_09.htm

in terms of gaining any meaningful in-depth analysis, it would be highly onerous in terms of time, resources and ethical concerns for a single researcher to undertake successfully.

Instead, by conducting a small number of qualitative interviews in two jurisdictions, complex judicial perceptions could be planned, gathered and compared within a reasonable time span of 12 - 18 months. The huge amount of data produced from such an approach meant that a larger sample would have posed serious practical limitations upon a sole researcher in terms of additional time and resources. In practical terms, the judicial selection process was reliant on the discretionary efforts of independent lower Court administrations whose support, knowledge and management access to lower Court judges made this research possible.[271] Such busy Court management systems were concerned with juggling their judges' every day heavy caseloads rather than ensuring the judicial volunteers that they passed on to the researcher represented any sort of gender, age, experience and racial background balance. This is why local Court administrations were never asked nor expected to provide a balanced sample. However, what the judicial sample did provide was a suitable testing ground for a creative and fresh in-depth analysis. This involved a critical dialogue between a highly inquisitive socio-legal researcher and a highly interested and motivated judicial sample.

[271] I should like to add here, the personal and very kind efforts of Dr Rasmus Heugh Wandall in organising access to the Danish lower Court judges was extremely important to making this research possible and was very much appreciated.

5.3) Comparing the relative influence of theft sentencing aims on the sentencing approach towards theft offenders in England and Denmark:

In order to introduce the interviewees to a self analysis of their sentencing approach a general set of six theft sentencing aims were provided. The judges were asked to rank and discuss the aims from the most influence to the least influence as they deemed appropriate. Judges were also asked to suggest further sentencing aims if they considered that this was necessary. However, no judge felt it necessary to add further aims. The results of their responses can be seen as follows:

England:

Out of the following general sentencing aims which has the **most and least influence** on your theft sentencing approach:

We are looking at the 'most' top 2 answers here – (out of 24)

A) retributive justice 2

B) deterring future theft 10**

C) custody to stop theft re-offending (general prevention) 1

D) denouncing theft offender's crimes publicly 0

E) reforming the theft offender (individual prevention) 10**

F) financial reparation to the victim 1

Out of the following general sentencing aims which has the **most and least influence** on your theft sentencing approach:

We are looking at the 'least' top 2 answers here – (out of 24)

A) retributive justice 8**

B) deterring future theft 1

C) custody to stop theft re-offending (general prevention) 4

D) denouncing theft offender's crimes publicly 11**

E) reforming the theft offender (individual prevention) 0

F) financial reparation to the victim 0

Denmark:

Out of the following general sentencing aims which has the **most and least influence** on your theft sentencing approach:

We are looking at the 'most' top 2 answers here – (out of 24)

A) retributive justice 1

B) deterring future theft 4

C) custody to stop theft re-offending (general prevention) 6**

D) denouncing theft offender's crimes publicly 6**

E) reforming the theft offender (individual prevention) 6**

F) financial reparation to the victim 1

Out of the following general sentencing aims which has the **most and least influence** on your theft sentencing approach:

We are looking at the 'least' top 2 answers here – (out of 24)

A) retributive justice 5

B) deterring future theft 1

C) custody to stop theft re-offending (general prevention) 1

D) denouncing theft offender's crimes publicly 5

E) reforming the theft offender (individual prevention) 3

F) financial reparation to the victim 10**

Introduction:

Overall, the high number responses which are double starred ** and in blue indicate, there is a clear focal importance attached by English judges on two sentencing aims. These are deterring future theft and reforming the theft offender. In terms of least influence, retributive justice and particularly denouncing theft offender's crimes publicly were selected. The Danish judicial responses on the other hand tell a different story. The most influential aims were spread much more broadly than their English judicial counterparts between custody to stop re-offending, denouncing theft offender's crimes publicly and reforming the theft offender. Both public denunciation and financial reparation to victims of theft stand out as attracting a difference of interpretation and influence on the sentencing approach when comparing the responses of English and Danish judges.

The interviewees provided a number of repeated and detailed arguments explaining why they made the suggestions they had. Their arguments explored the judicial purpose in sentencing and what general sentencing aims were influencing their discretionary approaches. This contributed to a collective understanding which was shared between both professional and lay judges.[272] Firstly, the English judicial views will be discussed. Secondly, the Danish judicial views will be discussed and compared to the common themes provided by their English counterparts.

English theft sentencing aims:

All the English judges interviewed agreed that theft was a complex and wide ranging offence category committed by a diverse array of theft offenders. They then turned to the six theft sentencing aims and picked B and E as having most influence and A and D as having the least influence.

[272] It is important that the differences in how lay and professional judges in English and Danish lower Courts approach sentence decisions is remembered. In England, professional District judges always sit alone to hear theft cases. English Magistrates sit in a panel of three with 1 nominated lay Magistrate as Chair. In Denmark, both lay and professional District judges sit together and sentence as a panel of three with 1 professional District judge as Chair.

B.) Deterring future theft:

In relation to B and E, 8 English judges spontaneously linked these two aims as mutually supporting each other. This would indicate that the form of deterrence in England was primarily and specifically seen as reforming the theft offender's anti-social behavior in some way. As one English lay judge summed up;

> *"The whole point of deterring future theft offending is through some sort of theft offender reform."*

The limited short term deterrent effect of custody was noted by 5 English judges. This common criticism was used to help justify the better utility of applying more long term reformative community sentences. As one English professional judge argued;

> *"I am not convinced custody deters future theft offending as many persistent theft offenders have an underlying alcohol or drugs habit that they are trying to feed. Custody does little to address this as it addresses basic needs i.e.) food, water and shelter and not basic wants or desires which would be present in forms of community based reform."*

For the 10 English judges who placed deterrence as a very important aim, the emphasis for this was on deterring through changing a theft offender's behavior patterns. Not the behavior towards basic needs, but the behavior towards basic wants and desires in life. Despite the difficulties of deterring through reform, 10 English judges considered this aim of high influence and offered pragmatic reasoning for this. As one English lay judge concluded;

> *"In simple terms, my main aim is to prevent future theft offending and deter future theft by any means at my disposal"*

E.) Reforming the theft offender (individual prevention):

In relation to aim E and reforming the theft offender, 10 English judges placed this as having a high influence on their sentencing approach. There were a number of common judicial responses to justify this choice. The first argument provided by 4 English judges was based on common causes of theft offending behavior, i.e.) drug and alcohol abuse which some form of rehabilitation could cure. 5 English judges then spontaneously turned to their own assessment of the theft offender support structures i.e.) community sentences which were available and appropriate. There was positive support for the community penalty mix and match approach first allowed for under section 177 of the Criminal Justice Act (2003).[273] In relation to specific community punishment orders, 2 English professional judges similarly commented on their positive faith in applying Drug Treatment and Testing Orders with the help of the Probation Service. For one English professional judge the help of probation was best enhanced when judges could maintain familiar working relations with local Probation Service staff;

[273] Section 177 of the Criminal Justice Act (2003) provides a very specific and comprehensive list of community penalties, i.e.) "(1) Where a person aged 16 or over is convicted of an offence, the court by or before which he is convicted may make an order (in this Part referred to as a "community order") imposing on him any one or more of the following requirements –
(a) an unpaid work requirement (as defined by section 199),
(b) an activity requirement (as defined by section 201),
(c) a programme requirement (as defined by section 202),
(d) a prohibited activity requirement (as defined by section 203),
(e) a curfew requirement (as defined by section 204),
(f) an exclusion requirement (as defined by section 205),
(g) a residence requirement (as defined by section 206),
(h) a mental health treatment requirement (as defined by section 207),
(i) a drug rehabilitation requirement (as defined by section 209),
(j) an alcohol treatment requirement (as defined by section 212),
(k) a supervision requirement (as defined by section 213), and
(l) in a case where the offender is aged under 25, an attendance centre requirement (as defined by section 214)." What is then provided is an extension to the legislation through an even more prescriptive and directive SGC guideline. This is in order to help judges interpret this complex legislation, i.e.) Sentencing Guidelines Council. (Dec 2004). New Sentences: Criminal Justice Act 2003 (pp. 1 - 31): Sentencing Guidelines Secretariat: London at pp 5 – 13. At what point is this additional guidance helpful to judges or merely seen as a direct interference to their own interpretative freedom, i.e.) as p 6 states, "The key issues arising are:
(i) which requirements to impose;
(ii) how to make allowance for time spent on remand; and
(iii)how to deal with breaches."

> *"It is important that both the probation service and the sentencing judge see the same theft offender throughout their numerous Court appearances to ensure that they cannot change their story. Non-compliance with any order made is helped by talking with the same Probation Officer who is most familiar with the same theft offender. The same panel of judges or District Judge used throughout best helps to ensure consistency of approach and encourages the enforcement of Drug Treatment and Testing Orders. The efforts of the probation service are best encouraged by aware judges who are seen to be actively supporting them through their Court room discussions and eventual sentencing decisions."*

These judicial sentiments importantly recognize that community penalty sentencing is a collaborative effort, with particular stress placed on the day to day working relationship between English judges and Her Majesty's Probation Service in order to achieve successful offender reform.[274]

A.) Retributive justice:

In terms of least influence, aims A and D were focused upon by the English judges. In relation to retributive justice, 7 English judges neutrally felt ambivalent and could see little relevance in respect of their theft offence sentencing approaches. As one English lay judge concluded;

> *"I struggle to see how retributive justice fits into Magistrates' Court sentencing of minor theft offences. Punishment for punishment's sake is less apparent in the Magistrates' Court than in the Crown Courts."*

Retributive justice was spontaneously and commonly associated with two forms of wider societal judgment by 5 English judges. 3 English judges provided negative arguments justifying a limited influence and 2 English judges provided positive

[274] If there are any significant cuts to funding of the Probation Service the effectiveness of community sentences are inevitably significantly reduced.

arguments in favor of a strong influence. The 2 English judges (both lay) with positive arguments felt some sort of retributive punishment was essential in order to protect society and safeguard commonly held societal morals. Thus retributive sentencing helped ensure some sort of general offender detriment occurred. It was felt retributive justice provided a wide social standard which the judiciary should uphold.[275] This societal standard represented a line drawn in the sand for what anti-social behavior i.e.) stealing other peoples' personal property without their consent, wider society as interpreted by judges could accept and could not. As one English lay judge argued;

> *"If someone is guilty of a crime they have to pay for it. You cannot let them get away with offending behavior. The sentence you give therefore must be both credible and enforceable. Some form of retributive punishment is required, proxy for general society saying that this is a shared concern and therefore society is not going to put up with it."*

The 3 English judges (2 professional, 1 lay) with negative arguments challenged the general utility of retributive justice in re-balancing the wider economic and social harm caused to victims of theft. As one English professional judge concluded;

> *"When you are dealing with theft offenders, retributive punishment is least likely to have an impact on their future conduct. It is also least appropriate in terms of those who are the direct and indirect losers. We are all the losers in society from those that commit theft offending. This is because shops put up their prices to cover goods that have gone missing. The appropriateness of applying equivalent punishment depends on the type of theft and on the situation. Where there is harm caused to individual victims, i.e.) theft from a person or breach of trust, then this must be more of a focus than the harms suffered by wider society."*

[275] There is the possibility of interpreting a subjective emotional element attached to retribution within the biblical descriptions of "life for life, eye for eye, tooth for tooth, hand for hand" (Ex. 21:23, 24). It can be seen as promoting unregulated personal revenge. However, it can also be interpreted as objective, controlled and focussed with only the guilty party getting the equivalent punishment for the harm that they have caused to the victim and wider society. It is interesting how the English judges focussed on the later interpretation in their responses.

D.) Denouncing theft publicly:

Of particular limited influence was public denunciation of the theft offenders' anti-social behavior. A very high proportion of 11 English judges placed this aim as a low priority when approaching theft offender sentencing. Why? Firstly, 10 English judges argued that public denunciation had almost no long term positive impact on a theft offenders' future behavior, particularly after they had committed theft. Instead public denunciation or humiliation in Court could further alienate or even anger the theft offender from accepting blame and antagonize any legitimate attempts at their reform. These 10 judicial interviewees had a particular personality type of theft offender in mind. As one English lay judge eloquently summed up;

> *"There is little impact on hardened persistent theft offenders because they know full well what they have done is wrong. It is like water of a duck's back to them. Public shaming only has an impact if the theft offender cares about what others think of him."*

Therefore, reform through public denunciation was dependent on the extent of the theft offender's sensitivity to societal exclusion and their previous theft offending history. For a judge to determine this would be highly problematic in terms of psychological expertise, time and financial cost. Even with a seemingly less anti-social young theft offender in Court, public denunciation could lead to unpredictable results. How a judge is to determine whether a nice carrot or a harsh stick approach is better for reforming offending behaviour is haphazard at best. However, denunciation could perhaps reform by helping to foster a sense of victim empathy if it is presented constructively in Court to the theft offender, i.e.) You have harmed the victim in this way due to your criminal behaviour. Do you fully understand this? Let me explain why if you do not. The fragility of English judicial faith in public denunciation was further justified by linking it to the doubts of the local public that they served. As one English lay judge noted;

> *"You can see the potential negative repercussions of public denunciation by looking at local community payback schemes and the public's view of the projects conducted. In cleaning up public parks, theft offenders are seen openly reading the paper and having a smoke rather than working hard. I try to persuade the public and other judges that this is not representative of the majority of offenders, but the public and judicial perception has already been tarnished. It will take a long time before any faith is regained in this form of punishment."*

Secondly, 7 English judges argued that wide spread media distortion and a lack of interest reduced the positive impact of judges publicly denouncing theft offenders. Firstly, these judges recognized that the media itself was heavily reliant on public interest. This led to the tendency to sensationalize in order to maintain public interest. Thus only severe theft offence facts were ever worth reporting. This means that the public's perceptions of theft seriousness as reported by the wider media are not the same norm as what the judges perceive. Secondly, these judges recognized that the media had a lack of access to all the information which the judge sentences on. Thus judicial approaches to common theft were at a high risk of being misunderstood by the wider media. As one English professional judge concluded;

> *"We cannot rely on the media to accurately report everything which we take into account at the sentencing deliberation stage. Confidential pre-sentence reports are only available to probation and the judiciary."*

C.) Custody to stop theft re-offending (general prevention):

There was a moderate response to the utility of custody to stop theft re-offending. Predominantly aim C was negatively assessed by 8 English judges suggesting a general lack of faith in incarceration as a reformative tool. The judicial consensus was that custody had a limited long term impact on those persistent theft offenders most likely to face a custodial sentence. Imprisonment was considered most effective in its first application often as short sharp shock for young theft offenders. It was then viewed as

rapidly losing any reformative impact after repeat applications, particularly for persistent and hardened theft offenders with serious underlying anti social psychological problems caused by long term drug and alcohol addiction. There were 2 English judges who strongly felt that custody was most helpful to young theft offenders from middle class backgrounds where the experience would be a short sharp shock. It was not seen as addressing more complex psychological issues of social and educational exclusion, poverty, alcohol/drug abuse in the most persistent theft offenders. This might explain the moderate level of judicial cynicism shown towards custody as a positive reformative tool. As one English professional judge perceptively noted;

> *"For some theft offenders who sadly lead very unstructured lives, custody does provide them with structure, accommodation, food and water. Life is easier for them in custody and they can cope better than outside in society."*

Out of these 8 negative English judges, there were 5 English judges (4 professional, 1 lay) who viewed custody merely as a last resort in order to protect the public from harm. For 1 English lay judge a spontaneous link was made to 18th Century transportation practices in England whereby persistent theft offenders, usually from poor socio-economic backgrounds were simply removed from the country by ship to British colonies worldwide in order to permanently resolve theft re-offending. These same 5 judges also spontaneously added that as a last resort, current custody length limits in the Magistrates' Court were too low for this function to be optimally achieved. There was professional and lay judicial confusion as to whether the judiciary or the executive were to blame for the lack of change in custody maximum sentence lengths. There was also judicial disagreement over whether professional judges and lay judges should have the same custodial sentencing powers. As one English professional judge summed up;

> *"The custodial sentencing limit of 6 months per theft offence with a maximum of 12 months for 2 or more offences is inadequate to protect the public. I would like to see a 2 year custodial limit to save the time and expense of requiring Crown*

Court involvement in order to extend a custodial sentence on appeal above our current limits."

F.) Financial reparation to the victim:

Providing financial reparation to the victim was negatively assessed as having a moderate influence on the theft sentencing approach of the 12 English judges. There were two common judicial arguments which emerged from the responses given. Firstly, the theft offender's limited resources and usual inability to compensate their victims negated the utility of applying fines. Specifically, 6 English judges felt this way and further argued that onerous fines simply caused further socio-economic inequality to often volatile and vulnerable individuals. To try and means test all theft offenders' financial resources was fraught with 3 practical difficulties according to the interviewees. Firstly, the sheer volume of claims to means test would be very high. Secondly, gaining full access to credible evidence would be held to high standard of proof. Thirdly, the means testing process could potentially cause unacceptable trial delays as different government departments attempted to cooperate with each other. As one English lay judge further concluded;

"Financial reparation to the victim is only partial as most theft offenders are in receipt of either benefits or no income at all and their offending is alcohol or drug abuse based. I rarely get the professional theft offender who does it for pure greed and financial gain."

Secondly, the victim type requiring financial reparation was the sentencing approach focus for the other 6 English judges. In particular, the extent of victim insurance support available affected judicial assessments of victim harm and the degree to which Court-led victim compensation was considered appropriate and necessary. A victim harm type distinction was made between commercial victims and individual members of the public. Individual members of the public were considered more vulnerable than commercial businesses as they were usually less insured to take theft

induced losses. Such an aggravating feature justified a harsher sentencing approach. As one English lay judge noted;

> *"Many theft victims are collective institutions who have extensive economic resources and are prepared for loss with insurance. This is usually not the case for individual theft victims whose more common lack of economic resources and insurance adds to the seriousness of the theft's impact."*

Danish theft sentencing aims:

In comparing the overall Danish judicial responses provided, there were many similar common reasons given for the respective influence of the 6 theft sentencing aims posed to them. All the Danish judges interviewed, like their English judicial counterparts agreed that theft was a complex and wide ranging offence category committed by a diverse array of theft offenders. However, there was a much broader spread of highly influencing aims, i.e.) C, D, E, than the more specific focus of the English judges on aims B and E. In terms of least influence, particularly aims D and A were considered of low influence to the English judges. The Danish judges did not follow this response trend and instead focused on aim F as having very limited influence on their sentencing approach. In relation to aims C, D and E the common judicial responses can be summarized as follows.

D.) Denouncing theft publicly:

In relation to public denouncement of theft, 6 positive Danish judicial arguments were provided compared to 11 negative English judicial arguments. The 6 Danish judges spontaneously discussed the advantage of educating wider public perceptions and promoting a general sense of social moral standards through their sentencing approach. As one Danish lay judge concluded;

"You have to keep reaffirming that theft is wrong and you are not allowed to steal in order to prevent public moral standards from slipping away."

Firstly, the 6 Danish judges positively felt that their sentencing approach was important to the development of wider society as they helped reaffirm and safeguard public moral norms. Secondly, 3 of the 6 Danish judges specifically mentioned the positive theft offender impact which public denunciation could achieve. Instead of denunciation alienating vulnerable and volatile theft offenders, it was a valuable shaming and warning tool that helped to reaffirm to individuals why their conduct was wrong and should not be repeated again. Overall, the more positive arguments by the Danish judges when compared to the English judges on the utility and role of public denunciation, reflects how judges and wider society are interacting. This interaction shapes what public denunciation means and achieves in the eyes of our judges. Thus, where the threat of social exclusion to re-educate is believed in most, i.e.) in Denmark, in order to achieve positive social inclusion and theft offender reform through warning and shaming; This suggests that Danish theft offenders are indeed reacting to this form of social control and conformity, otherwise why would Danish judges put their faith in public denunciation in the first place. As one Danish professional judge confidently stated;

"When you explain why conduct is unacceptable in society, particularly early on in a theft offender's anti-social habits, it can act as an important wake up call."

Interestingly, there was no specific mention of media distortion like 7 of their English counterparts. Instead, 5 Danish judges provided negative arguments which were differently focused on judicial public denunciation being hijacked by politicians for electoral gain rather than for general societal education and enhancement. These 5 Danish judges, like their English counterparts, similarly felt that denouncing theft crimes was both an irrelevance to the theft offender and also to wider society. In terms of judicial disempowerment, there was a strong hint that these 3 Danish judges felt their role as public denouncers of theft crimes was less important and unnecessary to educating

wider society due to political and media distortion. This can be compared to 7 English judges who made similar arguments.

Reforming the theft offender (individual prevention):

Linked with aim D were aims E and C regarding the reform of theft offenders. Theft offender reform had a high influence for only 6 Danish judges compared to 10 English judges. The most common argument given by the 6 Danish judges which was similar to their English counterparts was positive offender support structures. In Denmark, this was specifically linked to the *Kriminalforsogen* (criminal information report) guidance. Such support could lead to community penalties or suspended conditional sentences, both of which were slightly favored over using custody. For 4 Danish judges there was a particular focus on the type of theft offender most likely to benefit from community based reform. They were usually young (18 – 20 years old), drug/alcohol addicted and from a socio-economically deprived background. For 8 English judges, aims B and E were spontaneously linked together compared with only 3 Danish judges. This suggests that various practical forms of community re-engagement to change the theft offender's mindset were favored over more punitive deterrent reforms, i.e.) suspended conditional sentences in the minds of Danish judges. However, a slight note of historically based judicial cynicism should be mentioned to what were predominantly positive arguments in favor of theft offender reformative sentences. This was a specific rejection by 1 Danish judge of the relevance of current reformative sentencing approaches in light of past failures to re-educate particularly young theft offenders in Danish youth borstals.

C.) Custody to stop theft re-offending (general prevention):

The use of custody to stop theft re-offending was considered of much higher influence and leading to a positive impact on both theft offenders and wider society by 6 Danish judges compared to 4 English judges. The positive utility of threatening custody coupled with community based reform of some kind afterwards was shared by these

English and Danish judges. For 1 Danish judge there was specific mention of a public Government run drug rehabilitation course delivered locally which helped rehabilitate drug addicted persistent theft offenders back into the community. The ultimate ability of incarceration to protect the public from harm was similarly spontaneously discussed by 5 Danish judges. The importance of custody usage as the last resort was similarly linked by these 5 judges in relation to a specific theft offender type, i.e.) the prolific and addicted theft offender. This particular type of theft offender was considered to be the most commonly appearing before the Danish lower Courts.

F.) Financial reparation to the victim:

There were 2 moderately negative common arguments provided by the 12 English judges regarding the influence of financial reparation to the victim on the sentencing approach. These were firstly based on theft victim type, i.e.) individual person or commercial business. Secondly, the limited means of the theft offender themselves. No English judge placed aim F as having least influence on their theft sentencing approach compared to 10 Danish judges.

For the 10 Danish judges there was a highly negative interpretation of the utility of providing any financial reparation to the theft victim at all regardless of their type or whether the theft offender had limited means. The 10 Danish judges firstly felt that their sentencing approach did not require any judicially-led compensatory element because external victim insurance, i.e.) individual person and commercial business was more than sufficient.

The second main focus for the 10 Danish judges who sought to criticize the influence of aim F, was based on its general irrelevance to their theft sentencing approach. The judicial responses in this area were very loosely defined, but were predominantly from lay District Judges. The common response of the 4 lay District Judges was that it was for the professional judge to ultimately determine whether financial reparation to the theft victim was appropriate or not. This appears to suggest

that there may be some reliance on the professional judge by the two lay judges in the District Court sentencing panels which would explain why aim F was firmly rejected as least influence by 10 of the 12 interviewees. As one Danish lay judge summed up;

> *"Of course, the financial reparation to the victim is automatic from insurance and therefore is not really an issue I see as important in my sentencing approach."*

Interestingly, only 2 Danish judges like 6 of their English counterparts similarly argued that theft offender led compensation was ineffective due to their often limited personal financial resources. This may be due to differing cultural perceptions of the extent of economic resources that most theft offenders have by English and Danish judges.

B.) Deterring future theft:

In relation to aims B and A there was a moderate influence on the Danish sentencing approach based on a mixture of positive and negative arguments. The strong influence of deterrence in England by 10 judges compares with only 4 Danish judges who felt the same. For 8 English judges aims B and E were spontaneously linked together suggesting that deterrence through community reform was of most influence in England. In Denmark, only 2 judges similarly linked aims B and E together as being mutually supportive. This would suggest that deterring future theft in Denmark was not considered as typically reformative in nature, but as a more generalized concept that could be linked with either conditional community or custodial punishment. For 4 Danish judges, deterring future theft was about having positive faith that a theft offender could be persuaded somehow to not re-offend over time. As one professional Danish judge concluded;

> *"For a young theft offender starting out, you would hope to deter them in the future with a conditional sentence."*

Compared to only 1 Danish judge, 5 English judges argued that the limited short term deterrent effect of custody justified the utility of applying more long term community focused sentences. This further indicates a slight and subtle difference in emphasis between English and Danish judges on what forms deterrence can take, i.e.) reformative or general conditions as a tool of persuasion. By indicating a slightly lower hope in offender reform, the Danish judges were perhaps expressing wider doubt in what deterrence based sentencing approaches could ultimately achieve.

A.) Retributive justice:

In relation to the influence of retributive justice on the Danish sentencing approach there was only a very slightly more positive emphasis when compared to the English judicial arguments given. There was one similar common judicial argument given in both England and Denmark. In relation to retributive justice, 7 English judges felt ambivalent and could see little relevance in retributive sentencing in respect of their theft offence approaches compared to only 4 Danish judges. There were two other different judicial arguments given by the English judges or Danish judges respectively. For 3 English judges a specific negative argument was provided. They felt there was little utility in using retributive sentencing to re-balance wider economic and social harm. By contrast, 3 Danish judges specifically noted the opposite. They felt retributive sentencing could and should positively engage with and re-balance popular public sentiments and emotions. As one Danish lay judge summed up;

> *"My sentencing mirrors public moral opinion, which has a strong element of retributive punishment at the moment. I am aware of this and feel my sentencing approach should reflect these current public feelings."*

These same 3 Danish judges like 2 of their English judicial counterparts felt that retributive sentencing helped protect society by safeguarding commonly held societal morals. Comparing the English and Danish judicial opinions, suggests that perhaps the retributive law of maintaining moral equivalency operates with a slightly higher and more

positive influence in Danish sentencing approaches than in English sentencing approaches.

Chapter 6: Comparing the subtleties of familiar Court room interactions and sentence decision making in England and Denmark – (What you regulate.)

The main areas of comparative analysis are the familiar court room interactions and the application of judicial discretion to this. The analysis is split into three sections. Each section compliments the next and explores the wide ranging factors within the lower Courts that *can* be regulated if one desires to do so:

1) Theft offender specific information gathering.
2) Court room procedures and judicial evidence gathering.
3) The sentencing deliberation process.

6.1) Theft offender specific information gathering:

Firstly, an overview of the spontaneous judicial theft offender specific information gathering is shown. Secondly, the extent of influence of the theft offender specific factors detailed below on the sentencing approach will be critically compared. Ad verbatim quotes from judges will be used where this is considered of further explanatory value in order to sum up important common judicial sentiment:

What theft offender specific factors influence your sentencing approaches whereby you decide that the custody threshold has been reached?

(The following theft offender specific factors below will be posed to interviewees as research prompts if they themselves do NOT spontaneously mention it.)

S denotes spontaneity of English response which is indicative of influence levels.

S denotes spontaneity of Danish response which is indicative of influence levels.

A) Gender – S = 0 S = 4**

B) Age – S = 2 S = 6**

C) Previous offending history (bad character and same previous convictions) – S = 11 S = 5**

D) Previous failed responses to non-custodial sentencing options – S = 10 S = 7**

E) Offender's remorse – S = 3 S = 5

F) Offender's self help attempts both physically and psychologically – S = 5 S = 6

G) Future hope of offender's personality reform – S = 7 S = 10**

H) Offender's drug/alcohol abuse – S = 11 S = 9**

I) Offender's intelligence level – S = 3 S = 4

J) Offender's courtroom body language – S = 1 S = 7**

K) Offender's cultural background – S = 1 S = 6**

L) Offender's support structures (family support dynamics, partner support, economic stability history i.e. no fixed abode) – S = 7 S = 10**

Introduction:

For both the English and Danish judges, it was rare to hear theft offence facts which were so severe that custody must result. Instead, the majority of theft case loads involved persistent theft of low value goods. Therefore, when Danish and English judges did determine mitigation or aggravation which influenced their sentencing approach, this was primarily based on theft offender specific factors. Firstly, we consider the impact of factors A, B and K. Why? These are the only three factors which a theft offender cannot change. They are therefore static, biological traits as opposed to fluid sociological traits. They are also the most *sensitive* theft offender factors to arguments advocating a strictly objective approach to best ensure consistent and fair sentencing.

A.) Comparing the influence of offender gender on English and Danish sentencing approaches:

The discretionary assessment of a theft offender's gender or sex led to three common judicial responses, i.e.) a positive mitigation, a negative aggravation or a neutral irrelevance. 6 English judges argued that positive mitigation should usually be given to female theft offenders with dependents compared to only 2 Danish judges with similar responses. The 6 English judges highlighted that in reflecting normative social values, they felt gender roles largely still remained in favor of females as the usual primary care giver for children. For 1 English judge, formal justification for the positive mitigation of female theft offenders' on the basis of dependents was cited from Appellate Court case law, i.e.) *R v Mills (Joanne) (2002).*[276] In this case a single mother with young dependents had her 8 month custodial sentence for persistent shop theft substituted on appeal for a 6 month community rehabilitation order. However, it is important to note that the dependent's welfare was the main judicial reason for the leniency shown. There is also academic support for dependent welfare mitigation.[277]

[276] *EWCA Crim 26.*

[277] Easton, S. (2008). Dangerous waters: taking account of impact in sentencing. Criminal Law Review, 2 (1), 105 – 120 at p 113.

The 2 Danish judges highlighted two further sub-arguments justifying positive mitigation for female theft offenders. The 2 Danish judges mentioned these sub-arguments compared to 1 English judge. Firstly, the rarity of female theft offenders appearing in Danish District Courts made their presence a surprise. Secondly, there was a Danish minority judicial perception that because suggestible female psychological personality traits were more common their reform would be easier to achieve. This particular Danish judicial perception was also considered to be more widely practiced by other Court room actors. As one Danish lay judge further explained;

> *"I am not sure it is only the judges so much as the prosecutors also tending to prefer sentence suggestions to judges of fines for a longer time with persistent female theft offenders. When they come to the notice of the police and prosecutors for theft they usually are not for the first 5 – 12 times punished as harshly as males. The reason why you see a low number of persistent female theft offenders could be due to the belief that women will snap out of it earlier than men."*

In terms of a negative aggravation, there were overall only 2 English judicial arguments (1 professional, 1 lay) compared to 6 Danish judicial arguments (3 professional, 3 lay). 1 English lay judge linked the female gender to violent theft compared to 3 Danish judges (1 professional, 2 lay). For the other 3 Danish judges (2 professional, 1 lay) the opposite link was made between the male gender and violent theft. Overall the high number of 6 Danish negative gender perceptions compared to 2 only English suggests that in Denmark the lower Court judges are more sensitive to negative perceptions of gender and specific theft offence aggravating features. For the remaining English professional judge, negative aggravation was differently linked to the female gender and the use of the dependents' welfare to attract leniency. The argument of this English professional judge was retributive and conservative in nature;

> *"I don't take motherhood into account, the time to think of your child is before you have committed the theft offence, not after it hoping to soften some Judge or*

Magistrate into giving you a more lenient sentence than you deserve simply because you have a child."

There was an equal split of neutral opinions between 4 English judges and 4 Danish judges who commonly considered the impact of gender on theft sentencing to be an irrelevance.

B.) Comparing the influence of offender age on English and Danish sentencing approaches:

In assessing the theft offenders' age, overall there were 6 Danish spontaneous judicial answers provided compared to only 2 English spontaneous responses. This might suggest that age was more in the forefront of Danish judges' minds than their English counterparts. The most common judicial comment made by 9 Danish and 10 English judges related to a common sentencing normative perception of having predominantly young (18 – 30 years old) theft offenders coming before them. It is particularly interesting to note the width of the age extreme brackets given by the Danish and English judges, i.e.) 18 – 30 and 50 – 70. Modern advances in medicine lengthening the human lifespan and improvements in the social quality of life (welfare state) may explain why these judicially perceived age brackets that most favour mitigating reform are so wide. On the other hand, this majority of Danish and English judges considered it very rare for old theft offenders (50 – 70 years old) to come before them.

The Danish and English judges then split into either positive mitigating or negative aggravating assessments of age using their own spontaneous theft case fact examples. The discretionary assessment of sentence selection and suitability was most sensitive to age extremes, i.e.) very young theft offenders 18 – 30. Why mitigating? Inter-personal relationships forming, peer pressures, youth offender immaturity and not identifying the risks or harm of their behaviour and youth deprivation and poverty. A particularly sad young theft offender case example, 1 English judge recalls was of chocolates being stolen from a shop by an 18 year old for his mother's birthday. There

was a significant reduction in the mitigation perception of young age into middle age after this, which then increased up again to the very old theft offenders 50 – 70. Why mitigating? A re-emergence of past psychological issues, poor health and frailty, significant periods of no theft offending and old age deprivation and poverty were specifically mentioned. A particularly cautionary old aged theft offender case example involved dementia given as explaining forgetfulness within a shop theft. This mitigation was well received, but later the English judge learnt that the disease's deleterious impact through new medication had been reduced.

There were 9 English and 9 Danish positive mitigating judicial arguments based on age extremes and the appropriate sentence assessment. For these English and Danish judges there was a common focus on comparing offender life choices and personal circumstances with the age extreme brackets. The very young and very old theft offenders were considered highly vulnerable and in need of the most protection from social disadvantage. Custody for these theft offenders at the age extremities was avoided in favor of reformative community punishments. Whereas for the middle aged persistent thief (30 – 50 years old) custody was the most likely solution after all community based reforms had been exhausted.

In relation to negative aggravating judicial perceptions of age, there were clear differences in what most motivated the Danish and English sentencing approaches. For 3 Danish judges, old age (50 – 70) was specifically linked with a normative judicial perception of higher offender intelligence and culpability. As one Danish professional judge noted;

> *"Often the people behind organized theft gangs are older in their 50's with good personal finances and educational background. In such instances, their older age can lead to the harshest sentence I can give as their court appearance is rare, they plan organized theft crime waves and they should know better."*

In comparison, 3 English judges provided entirely different and wider arguments for why old age was perceived as normally aggravating in theft offenders. Old theft offenders (50 – 70) were commonly described as the most persistent, hopeless and saddest theft offenders who usually suffered from a combination of alcohol and drug addictions. This had often left them trapped on the streets homeless and in abject poverty. For such individuals, who had long since exhausted all aspects of community based reform, custody was not only valued by judges, but often also by the old age theft offender's themselves. As one English professional judge further explained;

> *"Although it is still relatively rare to have old persistent drug or alcohol dependent theft offenders come before me, it saddens me that their familiar presence and on going psychological problems seem to evade all my attempts at reform. They almost seem to welcome custody as a release from the demands and responsibilities that modern society places upon us all."*

K.) Comparing the influence of offender cultural background on English and Danish sentencing approaches:

Comparing the judicial assessments of theft offender cultural backgrounds made by both the Danish judges and English judges highlighted a number of key similarities and differences. Overall 6 Danish judges offered spontaneous arguments for the theft offender's cultural background influencing their sentencing approach compared to only 1 English judge. This may indicate a higher Danish judicial sensitivity to cultural diversity issues when sentencing. Both Danish and English judges focused on what specific cultural background knowledge was most beneficial in informing their sentencing approach. This judicial development of and commitment to cultural sensitivity was used to ensure that the sentence approach promoted multi-cultural understanding and harmony.

Firstly, the interviewees focused on defining what cultural background meant to them, i.e.) similar and different racial ethnicities, socio-economic classes and religious or moral/ethical beliefs. Secondly, the interviewees' explored their own perceptions of

passing judgment on increasingly multi-cultural populations within contemporary England and Denmark. The interviewees' sought to explain how they best balanced the demands for equal and fair theft offender sentencing impact with diverse cultural backgrounds and different community expectations within their respective societies.

There are two historical-cultural flows of foreign people impacting Danish and English judicial perceptions of cultural background. Firstly, there is a general European integration of foreign EU and non-EU immigrants directed by an EU law approach from within the European Union which impacts England, Denmark and vice versa the wider world community. Secondly, there are Danish or English specific foreign immigration quotas determined by domestic integration law approaches. Danish and English judges are not responsible for the political decisions made in these areas. However, they are responsible for ensuring their sentencing approach is knowledgeable and fair by recognizing different cultural background impacts. If judicial discretion is not used to apply cultural sensitivity knowledge, judges are disempowered and cannot sentence different theft offenders in a fair and equal manner where cultural inequalities may exist. Judicial discretion in theft sentencing played a large role in ensuring that culturally specific impacts on offender's behavior were sensitively understood and applied.

For 5 English judges, but only 1 Danish judge, the common foreign immigrant regional focus was from Eastern Europe. These immigrants could be asylum seekers, but were predominantly described as economic migrants who were unable to find work and had turned to theft offending out of either desperation or greed. In Denmark, there was a slightly different focus in relation to the Eastern European cultural background which added to its potential seriousness. One Danish professional judge specifically mentioned organized theft gangs who deliberately came to steal high value items from a wealthier Danish economy. As the Danish judge explained, this sentencing approach was independently applied by Danish judges themselves using their judicial discretion. It was justified in open Court by judges who could see that conditional suspended sentences were not working for this kind of theft offender. This prompted a slightly harsher Danish judicial response than their English counterparts to deal with this specific issue;

> *"There is a growing phenomenon within Denmark, which I and other judicial colleagues have noted with Eastern Europeans coming to Denmark for a short period to commit theft. This form of theft tourism in the last 5 years has prompted the Danish judiciary to provide harsher unconditional custody sentences before deportation to both deter and denounce this kind of activity."*

Both Danish and English judges agreed that Eastern European immigration had increased significantly, particularly in the last 5 years. Firstly, in relation to the English and Danish general theft sentencing approach to Eastern European theft offenders all judges recognized the importance of their sensitivity to potential language translation difficulties which could slow down the Court process. Secondly, judges had to accommodate for the logistical problems of gaining access to the previous convictions of all Eastern European immigrants they sentenced. Thirdly, for those Eastern European immigrants without a fixed abode or financial resources, the utility of applying fines was limited and additionally such individuals would not suit community penalties or conditional suspended custody sentences over a long period of time. This increased the potential for unconditional custody to be applied. For 1 English judge, the need for creative sentencing was required due to an over populated English prison system. Fines given with Court based custody for a day whereby Eastern European theft offenders found guilty sat at the back of Court all day as an inconvenience was considered better than applying a fine or a conditional suspended community/custody sentence which would simply be ignored. Fourthly, whilst the 5 English judges and 1 Danish judge recognized wider community tensions caused by significant Eastern European immigration in the last 5 years, all felt that the cultural issues of theft offenders could still be relevant to and positively inform the sentence approach. As one professional English judge argued;

> *"You have to be so careful that you do not stereotype or create bias in your own head about the people your sentencing. The danger with utilizing cultural issues is unless there is actually very good information provision and a culturally*

sensitive decision making approach you can cause more problems than you solve. Having said this, I am not adverse to a good advocate or probation officer explaining to me that in a particular case there is a cultural issue of value that is relevant and should impact the sentence."

For 3 English judges,[278] there was a specific cultural perception impacting theft offenders from minority ethnic and religious backgrounds. In compensating for the different impacts that culture could have on theft offenders, the denunciatory shame approaches within Asian communities were singled out as having a subtle form of mitigation. As one English professional judge further explained;

"To know that for some Asian theft offenders, such a conviction will lead to a loss of status for them in their close-knit community. One needs to recognize that for certain cultural communities and for certain offence types there is going to be a particularly odious reaction that brings shame and a loss of status on both the defendant and the wider family members."

For 4 Danish judges,[279] there was a very different specific cultural perception impacting theft offenders from minority ethnic and religious backgrounds. These were predominantly Asylum seekers as opposed to economic migrants from Arabic or African States. Firstly, in compensating for the specific needs of these individuals there was a particular judicial sensitivity to ensuring mutual cultural and religious misinterpretation did not occur in the sentencing process between judges and theft offenders; As one lay Danish judges noted;[280]

"For many years, I did not like that middle eastern immigrants when asked short and simple questions in Court insisted on providing long and overly complicated answers. It took me some time to understand that this is a culturally specific

[278] In 1 rural area and 2 urban areas.
[279] In 2 rural and 2 urban areas.
[280] It was felt this lack of cultural awareness could be improved through both judicial training and wider cultural, language and religious education of the Danish population.

language norm and not an attempt to avoid answering my questions or provide deceitful answers."

Secondly, the 4 Danish judges noted that their sentencing approach needed to be sensitive to wider community cultural tensions which significant immigration of Arabic or African individuals in the last 10 years could lead to. Of particular judicial concern, was the gradual development of immigrant concentrations particularly in urban ghettos. This congregation of similar cultures into a specific area of town was felt to be interfering with wider cultural integration. As one professional Danish judge further explained;

"Where there is a high immigrant population, local sentencing is impacted due to cultural integration concerns. It is often more helpful that a unifying community sentence for theft offending is passed as opposed to a divisive fine or custodial sentence which can further alienate often vulnerable Arabic or African communities."

Thirdly, 1 Danish judge highlighted a wider spontaneous link to the specific cultural perceptions of prosecutors and defense lawyers who could make influential sentence recommendations. In their legitimate attempts to deter and denounce Arabic and African immigrant theft offenders, or in outlining cultural vulnerabilities both prosecutors and defense lawyers also needed to be highly aware and understanding. In this way, the level of cultural awareness responsibility was extended beyond all judges to all other Court room actors.[281]

There was a significant rejection of the theft offender's cultural background being relevant at all by 4 English judges and 7 Danish judges. There were two common judicial reasons provided. Firstly, specifically in rural areas of England, but to a lesser

[281] In England, this includes the probation service sentence recommendations as the equivalent sentence selection influence and can be extended to CPS charging decisions and even English police operations. In Denmark, this extends beyond the Rigsadvokaten (State Prosecutors) discretionary decisions on charging and sentence recommendations to the operations of the Danish police.

extent in Denmark,[282] a very low minority ethnic and religious population could explain why cultural diversity awareness was considered a low priority. In such population mix areas, Danish and English judges' felt that they rarely encountered theft offenders from minority cultural backgrounds. Secondly, there was a general Danish and English judicial concern centered on maintaining a neutral judicial stance towards cultural background. This was based on the premise that to best ensure a consistently fair and equal sentencing approach, all cultural similarities and differences should be ignored. However, 8 English judges compared to 5 Danish judges concluded that the potential positive benefits of gaining cultural explanations for a theft offender's behavior outweighed the potential negative drawbacks. To best interpret and understand cultural diversity issues when sentencing theft offenders, these Danish and English judges felt that preserving judicial discretion would most help in ensuring fairness and equality.

C.) Comparing the influence of previous offending history on English and Danish sentencing approaches:

Having considered the fixed biological sentencing factors we now turn to the fluid sociological sentencing factors. The remaining 9 theft offender specific factors were universally recognized by the judges as being the most sensitive to the various psychological problems of the theft offenders themselves. Their high degree of personal responsibility for these factors meant that judges in assessing them had to understand how and why *each* theft offender behaved as they did. In achieving this complex task, judges relied upon both their subjective sentencing experiences as well as wider and more objective social behavior norms.

The aggravating impact of a previous theft offending history was considerably stronger in English than Danish lower Courts. 11 English judges compared to 5 Danish judges provided spontaneous comments that endorsed the high importance which previous convictions had on their sentencing approach. It is interesting to note that 7

[282] In England, all 4 judges were from rural sentencing regions. In Denmark, there were only 2 rural region judges compared to 5 urban judges.

Danish judges compared to 1 English judge considered previous theft convictions to be of only moderate importance to determining the overall aggravation extent when sentencing theft offenders. In accounting for this difference of importance in Denmark, the Danish judges felt that both their judicial discretion and theft previous convictions case law were broad which resulted in a slightly more mitigating influence on their sentencing approach. The extent of aggravation depended on a sliding scale of reform chances that reduced as similar and recent theft convictions rose.[283] The previous convictions of theft offenders were commonly assessed by all judges using their discretion and specifically mentioned guidance sources. The common judicial reasoning given by the 11 English judges for the high importance was that legislation primarily influenced their sentencing approach upwards under section 143 of the Criminal Justice Act (2003) rather than case law. Only 2 English professional judges specifically mentioned the influence of theft case law on previous similar and recent theft convictions. On the other hand, 5 Danish judges considered previous theft case law on the extent of aggravation as the primary basis for attaching a high importance to previous convictions.

D.) Comparing the influence of previous failed responses to non-custodial sentences on the English and Danish sentencing approach:

The causes of past offending behavior patterns, were then further explored by a prompted judicial analysis of previous failed responses to non-custodial sentencing options. A similar pattern of spontaneous judicial commentary emerged like the previous convictions assessment with 10 English judges indicating a high importance and generally aggravating impact compared to 7 Danish judges. The common judicial reasoning provided by both the 10 English judges and 7 Danish judges centered on two principal measures of theft offender reform. Firstly, the theft offender risk, i.e.) low to high recidivism, the nature of psychological problems and commonly occurring patterns of previous theft offences committed was assessed. Secondly, the extent of offender compliance with any previous court orders made was assessed by liaising with the

[283] In both England and Denmark, judges looked back mainly 5 years with a lesser significance applied up to 10 years.

Probation Service report writers in England and the Kriminalforsogen report writers[284] in Denmark. In assessing the effectiveness of reformative community based sentences, there was a high degree of Danish and English judicial faith expressed in the extended theft offender knowledge gained by such report writers and related support staff. It is interesting to note that 5 Danish judges compared to 2 English judges considered previous failed responses to non-custodial sentencing options theft convictions to be of only moderate importance to determining the overall aggravation extent when sentencing theft offenders.

F.) Comparing the influence of offender self help on English and Danish sentencing approaches:

Factors F, G and H were commonly linked together by both the Danish and English judges. In assessing the merits of these 3 theft offender specific issues, both behavior observations in and out of the Court room were considered relevant.

In relation to the impact of the offender's self help attempts both physically and psychologically, there was an even spread of spontaneous responses, i.e.) 5 English judicial responses compared to 6 Danish judicial responses. The common theme within the spontaneous responses of these English and Danish judges was the valuable information potential attached to the investigations of theft offenders made by either the Probation Service in England or the Kriminalforsogen in Denmark. The investigations by these two Government led services were considered as meriting the highest judicial trust and support, which private offender reform agencies could not match.[285]

This was because the independence and high standards of work by both the Kriminalforsogen and the Probation Service received particularly high spontaneous judicial praise. What interested both Danish and English judges the most were the perceived levels of self motivation and willingness to cooperate reported by Probation

[284] For further information, the Kriminalforsogen website is very informative: www.kriminalforsorgen.dk
[285] For 2 English judges, specific reference was made to the popular and privately funded Priory and Windsor psychological clinic chains.

Service or Kriminalforsogen staff. It was these observations of the theft offender's behavior outside of Court which most indicated the extent of their acceptance of self blame and responsibility for reform. In addition, within the similar spontaneous answers of the Danish and English judges, the actual theft offender's behavior in the Court room was also considered to be indicative of remorse levels and could significantly mitigate or aggravate the sentencing approach. As one English professional judge further explained;

> *"Most of the time we go along with the sentence suggestions of probation. We always have the final decision, but probation have a strong impact on our sentence decision making because we are mindful that they have had time to sit and talk with the theft offender one to one. They often find out a lot more than is discoverable in Court by judges, such as a past history of physical and or mental abuse. This information can help a judge determine the theft offender's self motivation levels and potential for future reform."*

For 7 English judges compared to 6 Danish judges there was a positive assessment and encouragement of voluntary rehabilitation particularly in relation to self motivated drug and alcohol addiction treatment. The extent of mitigation was usually moderate, but strongest when a particularly persistent theft offender attempted to reform themselves. This was due to a judicial recognition of both the difficulty of correcting drug/alcohol habit based anti-social theft behavior and the importance of consensual reform.

For 5 English judges compared with 4 Danish judges there was a positive assessment and encouragement of voluntary restitution, i.e.) the earning of money to compensate the theft victim and voluntary education. Voluntary victim restitution showed an important degree of victim empathy that the judges welcomed. There was also a shared judicial view that voluntary education mitigated because it was a positive step towards improving a theft offender's employability and their future ability to legally earn money. However, these types of voluntary reform were seen as relatively rare particularly amongst persistent theft offenders.

For the remaining 2 Danish judges, there was a negative assessment of voluntary rehabilitation based upon Court room investigations of theft offenders. The creation of sham self help attempts which witnesses later challenged were seen as particularly aggravating. This was because there was a judicially perceived rejection of responsibility for and willingness to participate in self reform.

G.) Comparing the influence of future hope of offender personality reform on English and Danish sentencing approaches:

In relation to the future hope of reforming a theft offender's personality there was strong concordance between the Danish and English judicial perceptions. Both the 10 Danish and 7 English judges spontaneously linked together factors C, D, E, F, H and L as the criterion most commonly considered as helpful to establishing *real* future reform hope.

For 3 English judges compared to 4 Danish judges supporting future positive outcomes, i.e.) long term educational training, stable employment and regular psychological treatment was important and mitigated, particularly for first time theft offenders. The mitigating evidence for these future positive outcomes needed to highly robust in the face of judicial scrutiny, particularly for the more persistent theft offenders with long term alcohol or drug abuse problems.

On the other hand, for 3 Danish judges and 3 English judges, similar negative aggravating arguments were provided for what constituted the most hopeless theft offenders. Typically, they were the highly recidivist theft offenders who were most likely to cross the custody threshold. Their limited future prospects were based on gradual negative judicial assessments of factors C, D, E, F, H and L. Frustrated over time, all 6 judges pointed to the development of a negative theft offender profile norm. This entailed a strongly aggravating judicial perception of almost complete immunity from all positive attempts at community based reform. A shared judicial concern was

that frequently highly negative assessments of individual theft offenders should not become entrenched in the absence of any equally strong mitigation over time.

For the remaining 5 Danish judges and 6 English judges, there was a largely neutral interpretation of future reform potential having a moderate influence on their sentencing approaches.

H.) Comparing the influence of offender drug and alcohol abuse on English and Danish sentencing approaches:

For 9 Danish judges and 11 English judges there was a particularly high spontaneous link made between theft offenders and persistent drug/alcohol abuse. For 2 English judges persistent drug/alcohol abuse was associated with other anti-social addictions such as gambling and violence. The common consensus of 10 Danish judges compared to 6 English judges was that drugs and alcohol had a negative aggravating influence on their sentencing approach. This was because of the long term damage which drug or alcohol dependency caused to a theft offender's potential future reform. For both the 10 Danish judges and 6 English judges, two main causes for this long term damage were identified. Firstly, drug and alcohol addiction was seen as both a rejection of the offender's own psychological problems and of wider society. Secondly, there was also a common judicial link made between the difficulty in treating ongoing drug and alcohol addictions and the long term damage caused by poor offender support structures, i.e.) factor L.

Interestingly, 2 English judges and 1 Danish judge felt it was particularly important to tackle youths developing drug and alcohol addictions as early on as possible. This was because there was a judicial recognition that firstly, the treatment of youth addicted theft offenders became progressively more difficult up to 18 years old. It was considered common for addicted youths (12 – 18) to graduate from alcohol binge drinking to soft drugs and then to hard drug dependency. Theft was seen as a means to pay for these expensive dependencies. Secondly, these judges specifically noted that the

increased availability of cheap alcohol products particularly in the last 5 years was negatively aggravating youth addiction problems further. For 3 English judges and 1 Danish judge, limited potential reform was also linked to the type of addiction and how wider society perceived it. As one professional English judge noted;

> *"I have less sympathy with drug addicts than I have with alcoholics. Drug addicts will generally know what they are getting into from the outset, plus they know it is illegal and it can escalate from soft to hard drugs. On the other hand, drink can creep up on you and is more socially accepted, thus its effects can be subtle at first, plus it is not illegal from the outset."*

The positive potential reform of drug and alcohol addicted theft offenders was recognized by only 2 Danish judges compared to 6 English judges. Where theft offender's recognized their addiction was causing them to be anti-social and were willing to cooperate with treatment, this was particularly mitigating to both the English and Danish sentencing approach. It was considered particularly important to encourage voluntary reform with carefully applied judicial leniency. These second chances were often deterrent based and took the form of suspended conditional sentences.

E.) Comparing the influence of offender remorse on English and Danish sentencing approaches:

The negative influence of remorse in theft offenders was slightly stronger for Danish judges than for their English judicial counterparts. This was reflected in the comparison of the common English and Danish prompted judicial commentary. By comparing the number of spontaneous responses given, there was also a slightly lower English judicial impact, i.e.) 3 English compared to 5 Danish spontaneous responses. All Danish and English judicial interviewees commonly indicated that despite the difficulty and danger of misinterpretation that genuine remorse could and should be assessed. This was primarily achieved through subjective theft offender behavioral observations whilst in Court, i.e.) factors C, D, F, G, H, J, and L. Whilst the independent Government run

Probation Service and the Kriminalforsogen were most trusted by judges, the efforts of privately hired defence lawyers to justify the genuine remorse of their clients were usually met with a significant degree of negative judicial cynicism. However, out of Court theft offender behavioral observations were also considered as very revealing and influential. Judicial experience in assessing these Court room and out of Court subjective theft offender observations for remorse was considered to be a particularly valuable judicial skill which improved over time. As one English professional judge with over 10 years experience further explained;

> *"The timing and to whom the remorse is made to is critical. Everybody shows remorseful body language whilst in the Court. However, where was their remorse at the commission of the theft, what was their reaction at the police station and later at the police interview? I ask myself is this just another ploy to gain judicial mercy, particularly if they are a hardened theft offender."*

The majority of common English and Danish judicial comments in relation to the assessment of remorse were negative in nature. For 7 English judges compared to 10 Danish judges, judicial faith in the genuine remorse displays from theft offenders dissipated gradually over time. However, this reduction of mitigating impact increased more rapidly, if accompanied by a negative assessment of factors C and D. Furthermore, repeated displays of remorse from highly recidivist theft offenders aggravated and increased the harshness of the sentencing approach. Such repeat theft offenders were highly likely to be met with judicial contempt with their pleas of remorse merely seen as a cynical ploy to further disrupt or delay proceedings. The common negative emotional displays of remorse by hardened theft offenders prompted an equally common English and Danish negative emotional reaction in response. The application of emotion in sentencing suggests the presence of retributive justice thinking in the sentencing approach of the majority of 7 English and 10 Danish judges. As one Danish lay judge summed up;

> *"When you try to judge the remorse of the hardened theft offender, the defendant can often appear untouched by the situation, is cold and doesn't care. Alternatively, the defendant may be overtly provocative and aggressive. I think this unconsciously influences my sentencing approach. This sort of negative offender behavior makes me feel as a sentencer that there is no sign of genuine remorse. This creates a very uncomfortable almost sad feeling within me when I sit in judgment of such individuals."*

The remaining 5 English judges compared to 2 Danish judges provided positive assessments of remorse on their sentencing approach with similar reference to supportive features within factors C, D, F, G, H, J, and L. For the 5 English judges and 2 Danish judges, genuine remorse could retain it's persuasiveness over time and lead to judicial mercy if it was based on independent and credible evidence. Thus, for the hardened repeat theft offender, mitigating remorse evidence could come in the form of a particularly vulnerable background and or voluntary awareness of psychological problems that was corroborated within a probation pre-sentence report. Genuine victim empathy could also be proven through voluntary reparation or through police cooperation with an early submission of a guilty plea at police interview. This was more persuasive if visible highly emotive body language was also present in Court, i.e.) signs of truthfulness, crying and significant judicial eye contact.

Interestingly, 1 English judge noted that in violence aggravated theft, judicial determinations of genuine remorse were more influential on the sentencing approach because of the focus on offender's psychological health, the more serious victim impact and protection of the public from risk concerns. However, for both the 5 English and 2 Danish judges, the most persuasive and commonly accepted mitigation for genuine remorse was normally reserved for first time theft offenders who were usually of a young age, immature and still naive to the victim harm their theft offending had caused.

J.) Comparing the influence of offender court room body language on English and Danish sentencing approaches:

Strongly linked to judicial assessments of remorse were Court room observations of theft offender body language, i.e.) factors E and J. Similar to both the Danish and English judicial commentary regarding assessing remorse, most interviewees ultimately felt that despite the difficulty and danger of misinterpretation offender court room body language could and should be assessed. For 2 English judges and 2 Danish judges there was high scepticism of interpreting offender body language in the Court room. They pointed to complex individual personality differences which could easily make their assessments unreliable, i.e.) nervousness could interpreted in a variety of different ways. However, the more judicial experience gained especially of the same familiar repeat theft offenders could reduce this unreliability danger, more so for professional judges who sit more frequently than lay judges in both England and Denmark. In explaining why, the majority, i.e.) 10 Danish and 10 English judges similarly felt that they could gain a slightly better general understanding of offender empathy levels and personality. This valuable opportunity would be lost if all offender body language were routinely ignored by judges.

This judicial understanding was assessed on observed anti-social behavior within the Court room setting. It was felt that, judicial sentencing experience gained over time improved the sensitivity of judges towards judging offender anti-social behavior, which could either positively or negatively impact the sentence approach. For 9 Danish judges (5 professional judges) and 7 English judges (4 professional judges) it was commonly felt judicial experience gained over time greatly aided their sentencing approach towards assessing theft offender's Court room body language. The higher number of spontaneous arguments provided by 7 Danish judges compared to only 1 English judge was indicative of a higher general Danish judicial sensitivity to offender led Court room interactions. More specifically, 6 Danish judges and 4 English judges argued that their subjective observations of theft offender Court room compliance and cooperation were helpful in determining suitability for a reformative community based punishment.

There were several common Danish and English judicial arguments given which were negative in nature and could aggravate the sentence approach. For the majority, i.e.) 10 Danish judges compared to 8 English judges, there was a slight annoyance and or suspicion derived from observing direct anti-social behavior, i.e.) arrogant, aggressive, indifferent, uncaring or rude attitude to any Court room actor questioning or analysis and use of deliberately obscene and inappropriate language. There was also a similar slightly negative judicial reaction by these same judges to more indirect and subtle anti-social behavior in Court, i.e.) highly evasive minimal eye contact, wearing of obscuring clothing to hide facial expressions or placing hands in pockets which was taken as disrespectful. Interestingly, 5 English judges and only 2 Danish judges specifically argued that informal clothes had very little impact on their sentencing approach. This was because they were used to informally dressed defendants. Instead, the subtle details with the court room based evidence presented i.e.) witness and documentary evidence was considered to be much more reliable and persuasive. It was considered best practice by these 10 Danish and 8 English judges to publicly denounce and thereby attempt to deter future anti-social behavior in Court. This was particularly the case where a severe lack of respect or disruption persisted. For 2 English professional judges, the specific threat of formal contempt of court proceedings was used as an effective and useful means to restore judicial respect and order within the Court room. As one English lay judge concluded;

> *"It might get your hackles up at times. A non-caring or cocky little bugger attitude in Court may have a subconscious aggravating effect on my sentencing approach. In terms of rude language or informal clothing I am so used to it now that it has little negative impact. Some of my colleagues get uptight when a Defendant keeps his hands in his pockets and won't maintain eye contact. Those theft offenders who persistently behave in a highly anti social way in Court without a good explanation as to why, risk marking themselves out as deserving harsher punishment because their behaviors are so different from the social norm."*

Two less common trends of anti-social theft offender behavior in Court were noted and publicly denounced for future deterrence purposes by both the Danish and English judges. Firstly, for 4 Danish judges and 5 English judges young age (18 – 30 years old) bravado and immaturity displays to public audiences was considered slightly aggravating. The common judicial feeling was that such disrespectful behavior was most likely due to a perceived peer pressure from theft offenders fearful of losing their local gang credibility and who had poor interpersonal skills and psychological problems, i.e.) a low mental age.

Secondly, for 3 English professional judges and 1 Danish professional judge there was a mutual cultural perception that theft offender Court room behavior had gradually diminished over time, i.e.) from the 1960's. These judges felt that punctuality was poorer, inappropriate and informal clothing was being worn more often and rude language with general bad manners had increased. Lower Court proceedings were becoming more commonly viewed by offenders as unimportant and judges as not worth respecting. This was particularly noted in the most hardened repeat theft offenders. Ignoring such gradual societal changes on sentencing expediency grounds was considered as part of the reason why judicial respect had seemingly dissipated.

Interestingly, for these 3 English professional judges the solution to this growing problem was to increase both the enforcement powers and reliance on the sentencing experience of professional judges. As one English professional judge further explained;

> *"The professional bench is better equipped to deal with offender Court room disrespect than the lay Magistracy because they have a better consistency of approach. This is due to their more regular Court work, extensive legal training and practice experience. They also have higher confidence levels in how best to control the Court room."*

For a judicial minority, i.e.) 2 Danish professional judges and 1 English professional judge, judicial will power to instil respect in those sentenced through Court orders was hampered by two gradual societal shifts since the 1960's. Firstly, the growing pressures of economic efficiency has limited the judicial attention that can be spent on increasing respect within the Court due to the high volume of theft offenders sentenced. Secondly, any enforcement of judicial respect requires additional reformative education outside of Court which is above and beyond the normal welfare expectations which English and Danish politicians are now inclined to fund.

I.) Comparing the influence of offender intelligence level on English and Danish sentencing approaches:

The judicial assessment of the theft offender's intelligence level was considered by both Danish and English judges to be highly subjective process unless in exceptional circumstances the theft offender had been previously examined by a suitably qualified expert witness. In Denmark and England, the judges order and take responsibility for the time and resources required for reports on theft offender's psychological health to be produced. This is carried out by the Kriminalforsogen in Denmark and the Probation Service in England.

Interestingly, only the English judges, i.e.) 3 judges specifically identified pressures on an under-resourced and therefore pressurised Probation Service that in turn reduced their judicial inclination to gain extra offender intellect information by ordering in-depth reports in Court. This is a worrying trend for England as a cursory assessment of offender intelligence means that many important offender specific issues are ignored. It is important that there are enough financial and human resources available for the Probation Service to comfortably respond to any judicial wishes for in-depth offender analysis. In addition, there is a general need for more training for both the Probation Service and Magistrates Court Service in order that they can better identify when an offender intellectual issue needs to be further investigated in the high volume of theft offender cases. Although the impact on the sentence approach was slight, there were two

common intelligence level trends identified, one of a positive nature and one of a negative nature with a low theft intelligence norm overall. The spontaneous judicial response of 3 English judges and 4 Danish judges was indicative of a generally low impact for the offender's intelligence level in judge's sentencing approaches.

Firstly, low intelligence theft offenders were commonly considered by 5 Danish judges compared to 6 English judges to have a distinct lack of understanding and responsibility which excused their criminal behavior. This had a positive mitigating impact on the sentence approach. Such theft offenders were also often considered to be of low mental age due to a legally recognized mental illness or disorder which made them more vulnerable to the suggestions of their peers. In such instances, low theft offender intelligence commonly led to a community based sentence where some form of psychological help run by local Government led institutions could be given. As one English professional judge eloquently summed up;

> *"The offender's intelligence level is important to take into account. More so, with low intelligence theft offenders and the levels of Government help that they receive outside of the Court room. Some persistent theft offenders that border on mental impairment should not be in Court at all, but the Police have no other option, but to send them for sentence. For those theft offenders with a proven low intelligence, their low subjective understanding of wrong makes me inclined to give them several warnings and Community based chances with custody as a last resort."*

Secondly, low intelligence theft offenders were commonly considered by 7 Danish judges compared to 6 English judges to have a below average emotional quotient (EQ) which was considered more revealing than any indications of intellectual quotient (IQ). It is important to note that these Danish and English judges distinguished between IQ and EQ as objective measures of offender intelligence with EQ and low intelligence as the main focus. Why? Average and higher IQ and EQ theft offenders were commonly considered by these judges to share the normative Danish or English social perceptions of

wrong and harm. On the other hand, low EQ theft offenders even with a high IQ still lacked these social harm and empathy norms. This was observable within the Danish and English lower Courts through low interpersonal skills and anti-social behaviors, i.e.) rude or inappropriate language, a distinct lack of empathy and or ignorance for any victim and wider social harm caused. Other written evidence promoted within Danish and English judicial minds a commonly linked perception between educational and social exclusion and an expected negative reaction to any reformative community sentence attempts. As one Danish lay judge further explained;

> *"The offender's intelligence level does have some impact on my sentencing approach. Most of them lack intelligence in basic social relations. They do not realize how they as individuals should behave within society or as part of a peer group. They have a lack of intelligence and empathy on forming relationships with others."*

L.) Comparing the influence of offender support structures on English and Danish sentencing approaches:

There were a number of common Danish and English judicial responses towards the impact of the theft offender's support structures, i.e.) family support dynamics, partner support and economic stability history on their sentencing approach. As the high spontaneous response, i.e.) 7 English judges and 10 Danish judges, and spontaneous judicial linkage to all the other theft offender specific factors shows, the assessment of the offender's personal choices and circumstances were of high importance.

All 12 English and 12 Danish judges commonly valued the additional offender support information provided by the English Probation Service and the Danish Kriminalforsogen. These two Government led offender rehabilitation organizations provided independent external assessments which together with internal Court room observations could then help judges to determine the most appropriate sentence suitability based on the level of re-offending risk. What were these risks? All the

interviewees commonly identified the following 4 risk triggers that hampered potential future community based reform and could lead to a harsher sentence:

1) Limited offender social support networks – This included judicial assessment of the theft offender's family, friends, relationships, dependents, and local community contributions. The degree of social isolation and damage to self esteem levels could be observed by the extent of in-Court support, offender response to Court room actor questions as well as through written documentary evidence.

2) No fixed abode. – It was commonly considered harder to monitor such offenders for compliance due to their lifestyle choice and lack of local community ties. This affected traveling gypsy groups, some foreign failed economic migrants, asylum seekers who had been officially refused asylum and illegal immigrants.

3) Limited future prospects – This included judicial assessment of the theft offender's education, employment, poverty and long term social indolence. This was particularly influential on whether a fine was considered most appropriate or not with many vulnerable theft offenders already on Government financial support.

4) Destructive anti-social addictions and maladjustment patterns – All interviewees commonly identified drug and alcohol abuse, gambling and vagrancy as persistent long term problems. These particular problems were mainly noted in hardened repeat theft offenders and contributed to a negative general judicial perception of a chaotic, fragmented and desperate lifestyle that hampered any serious judicial attempts at reform.

It is important to note that a positive assessment of these 4 principal factors could lead to a more lenient sentence due to good offender support structures.

6.2) Court room procedures and judicial evidence gathering:

We now move onto Court room procedures and judicial evidence gathering. Firstly, an overview of the spontaneous procedural specific factors is shown. Secondly, the extent of influence of these procedural specific factors detailed below on the sentencing approach will be critically compared:

What procedural specific factors influence your theft sentencing approaches whereby you decide that the custody threshold has been reached?

(The following procedural specific factors below will be posed to interviewees as research prompts if they themselves do NOT spontaneously mention it.)
S denotes spontaneity of English response which is indicative of influence levels.
S denotes spontaneity of Danish response which is indicative of influence levels.

A) Full Confession given S = 4 S = 6

B) A plea in mitigation is given S = 3 S = 3

C) Prosecutor/Defence Lawyer possible sentence suggestions are given S = 1 S = 4**

D) A pre-sentence report is provided S = 5 S = 5

E) A victim impact statement is provided S = 1 S = 1

F) Any other factors[286]

[286] 1 Danish judge and 2 English judges individually mentioned the mitigating impact of a) early and extensive police cooperation, b) prosecutor incompetence in case presentation and analysis when opening the trial process, and c) offender time spent on remand before trial for more serious forms of theft.

Introduction:

For both the English and Danish judges there was some initial confusion as to precisely what procedural specific factors meant, until it was properly explained to them. Within the formalized lower Court processes of England and Denmark, judges are provided with verbal and written information from Prosecutors, Defence Advocates and either the English Probation Service or Danish Kriminalforsogen regarding the theft defendant before them. Factors A, B, C, D, and E will be critically compared in turn.

A.) Comparing the influence of a full confession being given on the English and Danish sentencing approach:

The spontaneously indicated importance of a full confession being given was slightly higher in Denmark than England with a common higher lay judicial focus, i.e.) 3 English lay judges and 1 English professional judge compared to 5 Danish lay judges and 1 Danish professional judge. The common judicial sentencing approach accepted by all Danish and English judges was based on a discretionary sliding scale of mitigation. All judges assessed 1) offender specific factors, i.e.) C, D, E, F, G, 2) the strength of evidence in favor of conviction and 3) when a cooperative confession had been provided. As one English lay judge eloquently summed up;

> *"A repeat theft offender caught red handed and pleading guilty at the first opportunity is highly likely to be convicted anyway, has little choice but to cooperate and is simply saving some time only. However, a first time theft offender who isn't caught red handed and pleading guilty at the first opportunity is less likely to be convicted and has a high degree of choice to cooperate. Leniency credit should be given because such theft offender's have willingly saved both Police and Magistrates' Court time when it could have been wasted by their challenging weak evidence against them."*

However, there were three significant noted differences impacting this common Danish and English guilty plea approach. Firstly, in England there was a prescribed structured approach based on legislation and the collaborative guidance of the Sentencing Guidelines Council.[287] English judges were limited to strictly defined parameters of a recommended 1/3 reduction for a guilty plea given at the first reasonable opportunity to a recommended 1/10 reduction for a guilty plea given at the door of the Court after the commencement of trial.[288] In Denmark, the Danish judges were not limited to any strictly defined parameters within legislation (Straffeloven), theft case law, or other forms of collaborative guidance such as national sentencing guidelines.

Secondly, for 8 English judges compared to only 2 Danish judges, the potentially high mitigating impact of the guilty plea on their sentencing approach generally was specifically mentioned.

Thirdly, 7 English judges compared to only 2 Danish judges shared a specific judicial cynicism of usually highly recidivist theft offender's adopting a defensive mocking tactic of deliberately delaying plea submission until after full evidence disclosure had occurred. This often defence advocate led objective testing of the persuasiveness of evidence before submitting a plea was seen as particularly aggravating due to the plea being seen as an instantaneous, independent and subjective offender led process. Judicial annoyance was also based on the wasted Court time which added to the overall expense of the theft trial.

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[287] Sentencing Guidelines Council (July 2007). *Reduction in Sentence for a Guilty Plea: Definitive Guideline* - Revised 2007, (Original Version Dec 2004, pp. 1 - 10): Sentencing Guidelines Secretariat: London, pp 1 – 16. Relevant legislation on the discretionary sliding scale of mitigation is detailed within sections 144, 174 (2) and the importance of offence seriousness and proportionality is detailed within sections 148 (2) and 153 (2) of the Criminal Justice Act (2003).

[288] Sentencing Guidelines Council (July 2007). *Reduction in Sentence for a Guilty Plea: Definitive Guideline* - Revised 2007, (Original Version Dec 2004, pp. 1 - 10): Sentencing Guidelines Secretariat: London, pp 1 – 16 at pp 5 – 6.

B.) Comparing the influence of Defence pleas in mitigation on the English and Danish sentencing approach:

In relation to the specific influence of the Defence plea in mitigation being given, both Danish and English judges gave it an equally low spontaneous significance, i.e.) 3 Danish and 3 English judicial comments. However, looking beyond this to the actual content of the judicial responses revealed that 8 English judges compared to only 3 Danish judges felt that there was usually a strong positive influence from this procedural factor on their sentencing approach. The reason for this difference of influence focused on two commonly provided Danish and English judicial perceptions. These two common judicial perceptions were interpreted as either positively increasing, i.e.) the focus of 8 English judges and 3 Danish judges, or negatively decreasing, i.e.) the focus of 9 Danish judges and 4 English judges, the full mitigation potential of the Defence plea.

The first common judicial argument related to the competency of the Defence advocate especially when there was a significant amount of credible evidence against their client. This was positively assessed by 8 English judges and only 1 Danish judge as normally of high presentation and content quality. These judges felt that Defence advocates were most persuasive when they presented with genuine emotion and novelty of argument. In addition, a trustworthy mitigation reputation coupled with extensive Court room experience led to the gradual subjective development of a familiar judicial receptiveness, i.e.) as specifically noted by 5 English judges.

However, for 9 Danish judges and 1 English judge there was a negative assessment of Defence advocates as incompetent when faced with having to challenge strong convicting evidence. These judges commonly perceived that the weakest Defence submissions were often due to an over repetition of arguments with little or no emotional attachment to clients being shown in Court. This could be subtly shown by the use of formalized 3rd person legal language, i.e.) 'my client has informed me to tell you that…' It could also be shown through a deliberate over reliance on mitigation within Probation Service or Kriminalforsogen reports. In addition, these judges commonly noted an

increasing law firm led working practice trend towards using early career lawyers who lacked consistency in caseload management skills within the lower Courts.[289] Due to these factors, at worse, the role of the defence advocate in mitigating could be seen as almost irrelevant. As one professional Danish judge further explained;

> *"To me what the Defence advocate says almost means nothing. They are simply going through the motions of their job. I ask myself the question, has each mitigating factor provided been adequately proven or not. In a non-complicated theft case, I will already have a good idea of the mitigating factors by the end of the Court process. For this reason, I usually don't listen very much to or question the Defence plea in mitigation or the Prosecutor's summing up lectures at the end of the trial."*

The second common judicial argument related to the impact of personal mitigation given by highly recidivist theft offenders. For 3 English judges, there was a negative assessment of any personal mitigation provided due to a repetition of the same arguments from the same theft offenders over many years. This in turn led to the gradual subjective development of a familiar judicial hostility.

However, for 2 Danish judges, there was a positive assessment of personal mitigation from prolific theft offenders when out of the blue and with some credible proof they had voluntarily provided a genuinely new perspective to the nature of their psychological problems and potential reform. As one Danish professional judge noted;

> *"I think there are rare occasions where you hear something really important that can be supported by witnesses. The repeat theft offender has gained further insight into the nature of his problems and has accepted what needs to change in order that long term reform can be achieved. Your own genuine surprise leads you into giving them one more chance."*

[289] For 2 Danish professional judges and 1 English professional judge this was a reflection of the increasingly high economic efficiency pressures placed upon defence advocates within the Criminal Justice System.

C.) Comparing the influence of Prosecutor/Defence sentence suggestions on the English and Danish sentencing approach:

The impact of Prosecutor and Defence lawyer non-binding sentence suggestions at the end of trial were spontaneously interpreted as having a slightly lower impact in England, i.e.) 1 English judge and 4 Danish judges. However, these spontaneous responses only hinted at the wider reasons why this lower English sentence suggestion impact was apparent. The prompted judicial responses further explained the higher influence of sentence suggestions in Denmark in three ways.

Firstly, there was higher English than Danish judicial criticism of the adversarial practices of Prosecutors and Defence lawyers in Court. This took the form of a negative judicial perception of particularly the prosecution and to a lesser extent the defence role as usually biased and distorted when providing sentence suggestions, i.e.) 6 English judges compared to 2 Danish judges. As one English professional judge argued;

> *"It is up to the Prosecution to put forward the case facts and their arguments for conviction. It is then up to the Defence to provide a Defence which may involve sentence suggestions at the end of trial as appropriate. If the Prosecutor outlined the case and then the sentence, it would distort and bias the case. It would become too blurred as to whom was sentencing, the prosecutor or the judge."*

Secondly, in England, all 12 judges interviewed considered it both unnecessary and unwise for the Crown Prosecution Service to provide sentence suggestions. This was due to a long established English lower Court procedural tradition that prosecutors outline the case facts only. Non-binding sentence suggestions at the end of trial in England were not considered appropriate by the judges because this risked a public perception of biased and non-independent Crown Prosecutors influencing the sentence discretionary decisions made by judges. This procedural Crown Prosecutor role expectation norm coupled with the more negative English judicial perception of Crown

Prosecutor inflation and Defence advocate deflation of sentence lengths reduced English judicial faith and trust in the helpfulness of the whole sentence suggestion process.

On the other hand, all 12 Danish judges felt no such negative public risk to how the Rigsadvokaten sentence suggestions were perceived. They were comfortable with their long established Danish lower Court procedural tradition that Prosecutors outlined both the case facts and provided sentence suggestions at the end of trial. There was a particular lay Danish judicial receptiveness and reliance on the importance of informative sentence suggestions being given by both the Prosecution and Defence advocates. As one Danish professional judge further explained;

> *"I will always listen to what the prosecutors and defence lawyer suggest to make sure my own sentence ideas are right. I also want to know what the lay judges will know, because the lay judges can only take in so much and often heavily rely upon sentence suggestions being given at the end of the Court process. The end of trial sentence suggestion process is an important consolidation of information and ensures all issues are taken in by the sentencing panel."*

Thirdly, the higher extent of negative English judicial commentary regarding various guidance sources behind sentence suggestions may explain why there was a lower sentencing impact perception in England. In England, 8 judges specifically focused on the unpersuasive negative sources of sentence suggestions compared to only 3 Danish judges. For 8 English judges (5 lay) the most commonly argued unpersuasive source of guidance for sentence suggestions were the Sentencing Guidelines Council guidelines on theft. However, as the theft sentencing ranges and how to approach them were already available to the judges there was very little impact from predictable Defence advocate sentence suggestions made at the lower end of these recognized ranges.

On the other hand, the remaining 4 English judges positively noted that Probation Service supported sentence suggestions coupled with high Defence advocacy competency and skill were particular persuasive, but not common enough and they should be practiced more often.

For 9 Danish judges, the most commonly argued persuasive source of guidance for sentence suggestions was theft case law and legislation. In terms of legislation, a good example provided by one professional judge was section 855 (2) and (4) of the Straffeloven. This places a 3 month limit on custodial sentence lengths when a Defendant is a non-attendee at Court. There is prosecutor discretion in deciding the merits of delaying the case proceedings due to defendant non-attendance. It is based on whether their sentence suggestion of likely to be longer than the 3 months custody limit. The ultimate decision on whether to continue trying the case, however rests with the sentencing panel. If similar and relevant theft cases were chosen by both the Prosecution and Defence and this concurred with the judges' own research into the appropriate case law range this was particularly persuasive.

The Danish professional judge's research into the most appropriate theft sentencing ranges on behalf of the two lay judge panel members was seen as an important independent judicial check on the sentence suggestion process. It was primarily based on the online theft case law databases: *'Tidsskrift for Kriminalret'* [TfK] and *'Ugeskrift for Retsvæsen'* [UfR] which are both provided by Forlaget Thomson. For a minority of judges there was a preference for annually published books: *'Dommi i Kriminel sager'* which is also provided by Thomson. In addition, high advocacy competency coupled with Kriminalforsogen support was met with high judicial receptiveness, though more of this practice was preferred.

On the other hand, for the remaining 3 Danish judges the rarest and least persuasive source of guidance for sentence suggestions were the regionally specific Rigsadvokaten policies on theft sentence ranges. As one Danish professional judge noted;

"There appear to be some regional differences in prosecutor behavior which I felt when moving from one Court prosecution service area to another. Generally a harsher prosecutor approach to theft sentence suggestions in rural compared to urban areas. Some prosecutor discretion is necessary so that they can flexibly respond to regionally fluctuating crime trends. However, judicial discretion is separate and the final sentence decision is always reserved for the presiding sentencing panel to make."

D.) Comparing the influence of pre-sentence reports on English and Danish sentencing approaches:

As a procedural factor, despite the common presence of a pre-sentence report[290] when sentencing theft offenders from usually either the Probation Service or the Kriminalforsogen, there was only a moderate impact on the sentencing approach.[291] For 7 English judges and 7 Danish judges there were 4 common positive arguments provided regarding the helpful utility of pre-sentence reports in aiding their sentence approach.

Firstly, the quality of pre-sentence reports was generally considered to be of a high standard with in-depth and informative analysis of all available sentencing options. The content provided, gave these judges a better understanding of the theft offender's background, personality and level of compliance to reform, i.e.) theft offender specific factors D, F, G, H, I, L.

Secondly, pre-sentence reports were considered to be an independent means for these judges to assess sentence suitability, particularly at the custody cusp.

[290] This includes independent expert witness theft offender personality reports (personundersøgelse) commissioned by the Defence counsel in England and Denmark.
[291] This could be seen in both the spontaneous judicial responses given, i.e.) 5 English and 5 Danish, as well as from the common content within the prompted judicial responses provided.

Thirdly, the quick and flexible production of summarized pre-sentence reports was considered helpful in reducing procedural delays in the high volume sentencing of theft offenders generally. Fourthly, these judges felt reassured that the final decision regarding how to interpret pre-sentence reports remained theirs.

There were comparative differences in the negative interpretation of pre-sentence report provision by the English and Danish judges. For 5 English judges, there were 2 common criticisms made of Probation Service reports.

Firstly, although justified judicial departures from probation sentence recommendations were not required yet, there was a general English judicial dislike of Probation Service control over pre-sentence report types. These English judges felt particularly discontented with their loss of flexible discretion over what type of pre-sentence report was commissioned and the remit of its enquiry into the theft offender. This was reflected in Court by a lack of liaison between judges and the Probation Service over what was necessary which in turn reduced the overall quality and persuasiveness of the reports provided.

Secondly, these English judges felt that the top down political desire to alleviate economic efficiency pressures through the increase in fast delivery reports had simply created further delays and costs because they did not provide the specific information regarding the theft offender that they as judges desired. As one English professional judge further explained;

> *"Handing over any discretion for pre-sentence report content and type to probation is very frustrating because it takes away judicial control, wastes time and money and leaves defendants confused at to who is ultimately directing the sentence approach process. Probation if they want to can slow down the sentencing of theft offenders dramatically."*

In Denmark, 5 judges (4 lays) were particularly dissatisfied with how the Kriminalforsogen reports were routinely and selectively summarized in Court by the Prosecution and Defence advocates. This was also considered to be due to a top down political desire to alleviate economic efficiency pressures. As one Danish lay judge further noted;

> *"I have often seen the Prosecution and Defence only selecting parts from the Kriminalforsogen to help their side of the case. I think we should see the entire Kriminalforsogen and not just be presented with a few sentences from it. The Court room selection process by the Prosecution and Defence hampers judges seeing the whole theft offender picture and negates the comprehensive and impartial effort put into the report in the first place."*

E.) Comparing the influence of theft victim statements on English and Danish sentencing approaches:

In relation to victim impact witness statements there was a relatively low aggravating impact on both the Danish and English theft sentencing approach, i.e.) only 1 Danish and 1 English spontaneous judicial response provided. It was commonly felt by both the Danish and English judges that the reason for this was because the vast majority of theft offences sentenced in the lower Courts were relatively minor. Thus whilst the detrimental impact of theft on a victim was considered important, this was limited to extreme circumstances where serious aggravation was present, i.e.) breach of trust or deception theft, violent theft and particularly vulnerable victim theft. There was relatively high English judicial criticism of how theft victim issues were routinely portrayed within Court proceedings.

In England, 8 judges felt that they rarely saw either witnesses or written statements in Court. Furthermore, the detail provided was less informative than was hoped due to economic efficiency pressures within the Criminal Justice System as a whole. As one English professional judge further explained;

> *"I think that Magistrates' Courts could be better informed about the actual impact of theft on victims. I can see that police time is not available for the taking of victim impact statements especially for theft offences which are very common and don't always involve exceptional circumstances. I can also see that with most common minor theft offence types they will be sentenced quickly. This means there is little time to consult victims properly and involve them if they wished within the sentencing process."*

In comparison, 4 Danish judges provided positive praise of how theft victim issues were routinely portrayed within Court proceedings. These judges pointed to fairly common prosecution led victim impact examinations in Court of both witnesses and their written statements. The physical emotive presence of victims in Court coupled with usually additional lawyer support for the victim's reparation interests was considered particularly helpful and highly informative.

There was a particularly high Danish lay judge focus on publicly denouncing the harm caused to victims of theft, i.e.) 5 lays and 3 professional judges. By comparison, in England there was a lower and less pronounced lay judge focus on public denunciation as reformative educational tool, i.e.) 3 lays and 1 professional judge. The common Danish and English judicial sentiment supporting this positive cathartic impact on their sentence approach focused on how it helpfully promoted sentencer and theft offender empathy relations with both the victim and the wider community. For 1 Danish and 2 English judges there was a personal dimension to the empathy that they felt for the victims of violent theft because they had also been a violent theft victim. This enhanced their understanding of how they could *sensitively* approach the judicial assessment of the value of stolen private property as an offence seriousness factor. For these judges, there was an implicit understanding that the worth of stolen goods was not a mere calculation of economic loss. It was also about reflecting in the denouncement of the theft offender the detrimental and subjective emotional harm caused to the individual theft victim when

their personal autonomy was invaded and items of high sentimental worth were forcefully taken from them.

Both Danish and English judges saw themselves as managers of this psychological communication process between judges, theft offenders, theft victims and wider society. As one Danish lay judge concluded;

> *"I think it is important that we all hear and understand victims and the theft offender has an opportunity to reflect and learn from the impact he or she has had upon the victim and wider society."*

6.3) The sentencing deliberation process:

Introduction:

In the final third part we will consider the sentencing deliberation process. At this final procedural stage, all the evidence has been presented and a sentence outcome needs to be debated and finalized into a formal pronouncement of sentence. Having already compared much of the theft trial factors considered relevant to the sentencing approach, it is the influence of judges advising and debating with each other during the sentencing deliberation that is the focus and not the content of what is discussed. Firstly, an overview of the spontaneous responses is shown. Secondly, the extent of influence of these two judicial peer factors as detailed below on the sentencing approach will be critically compared:

To what extent do you feel influenced by the theft sentencing advice of your judicial peers?

(The following two judicial peer research prompts below will be posed to interviewees, if the interviewees themselves do NOT spontaneously mention it.)
S denotes spontaneity of English response which is indicative of influence levels.
S denotes spontaneity of Danish response which is indicative of influence levels.

A) Generally your judicial bench fraternity S = 4 S = 4

B) Specifically, the opinions of other Panel members when deciding the theft sentence
S = 6 S = 9**

A.) Comparing the influence of the judicial bench fraternity on the English and Danish theft sentencing approach:

The extent to which the wider judicial bench fraternity positively influenced the Danish and English sentencing approach was determined by the background of the judge, i.e.) lay or professional, [292] and their working practice norms.[293] Of particular relevance to the sentencing approach was how often judges communicated with each other, why and the extent of influence these informal processes had.

In Denmark, all 6 lay judges commonly considered that the wider judicial community had very little influence on, or relevance to their sentencing deliberations. This was because, outside of Danish Court room business, the level of social or working contact with the wider judiciary from which an influence might be drawn was extremely limited.[294]

By comparison, 3 English lay judges provided similarly themed arguments. For the other 3 English lay judges there was a specific positive reference made to the limited influence of their fairly regular sentencing training sessions. In these sessions, spontaneous contact and advice was sometimes sought from local professional judges in order to identify or clarify accepted theft sentencing practice norms. Such advice although haphazard was usually considered helpful, but more importantly it promoted a sense of respect, cohesion and understanding of the views of the higher judiciary in the minds of lay lower Court judges. The diverse and flexible influence of Appellate and Supreme Court judicial advice on the lower Courts challenges the top down political obsession with controlling sentencing approach consistency. With more political trust and support, lower Court lay judges in England and particularly Denmark could benefit

[292] All 4 Danish and 4 English spontaneous judicial responses were from professional judges.
[293] A good example of a working practice norm could be the dress code in Court. In Denmark, all lower Court room actors usually wear formal but generally seen clothes. In England, rarely seen formal wigs and gowns are still worn by all Court room actors, especially for more serious forms of theft.
[294] For one Danish lay judge there was specific mention of a short introductory sentencing booklet (*Rethandbogen*) which was recommended reading. This broadly explained lay judge civil responsibilities, i.e.) fairness of judgment similar to the English judicial oath, and generally outlined the Danish legal system and working practice norms.

from more regular training contact with experienced professional High Court judges. As one English lay judge concluded;

> *"Certainly advice from the resident liaison District Judge helps, but this only tends to happen during sentencing training exercises on how to apply the Sentencing Guidelines Council guidelines where they happen to be present and we have chosen to ask questions about a particular problem that we may have. You sometimes meet local circuit judges socially and listen. They all seem to have slightly different views on how to approach theft offenders which they justify on the basis of preserving judicial discretion."*

For all 6 English professional judges, sentencing consultation meetings where they compared and contrasted their sentencing approach with their colleagues within the wider judicial bench fraternity were considered to be relatively rare events. There was therefore a limited positive influence on sentencing deliberations from this wide pool of potential advice. Interestingly, 2 English professional judges who had moved between rural and urban Court areas specifically mentioned that accessibility to potential informal advice from their judicial colleagues was relatively straight forward, i.e.) by a phone call or email. However, in rural locations, it was not a working practice norm to regularly contact fellow judicial colleagues for advice in other areas seeking sentencing approach advice. English District Judges sit alone whilst their Danish counterparts sit within a panel of two lay judges. This working practice norm difference where English District Judges sentence by themselves requires a decisive, confident and independent approach. Given this, it is inevitable that more common informal contact between District judges will take place in urban Court areas when there is a wider pool of professional judges present and less networking effort needs to be made. Furthermore, this very limited influence became even less over time as sentencing experience developed and confidence improved.

By comparison, in Denmark all 6 professional judges reported a moderate positive influence on their sentencing approach and a considerably lower perception of

professional judge isolation. Frequently scheduled professional District Judge seminars were commonly reported by these judges which, helped to identify sentencing practice norms, but more importantly encouraged a social support network amongst each other. These advantages of encouraging widespread judicial networking and sentencing knowledge transfer as a working practice norm were subtly reflected in how often Danish and English professional judges referred to the theft sentencing guidance given by their respective higher Courts. Thus in England, the helpfulness of the broad sentencing case law advice of Appellate and Supreme Court judges was noted by only 1 professional judge compared to 5 of their Danish judicial counterparts.

B.) Comparing the influence from other Sentencing Panel members on the English and Danish theft sentencing approach:

The discussions between judges within sentencing panels when deciding the appropriate theft sentence showed a moderate impact in England compared to a high impact in Denmark according to the spontaneous judicial responses. The nature and extent of this impact difference was further revealed within the spontaneous judicial responses as having a distinct lay judge focus, i.e.) 6 English lay judges compared to 6 Danish lay judges and 3 Danish professional judges. The reason for the spontaneous 3 Danish professional judges was due to different working practices whereby Danish sentencing panels incorporate professional and lay judges sitting together. The Danish professional judges were therefore placed at the epicenter of panel discussions by directing the two lay judges as the Chairman.

All 6 Danish professional judges considered themselves to be the authoritative knowledge source, leading the debate with the 2 lay judges. A positive negotiation approach was commonly adopted to manage panel discussions which respected everyone's right to express their opinions. This democratic stance led to lay judicial feelings of acceptance, support and mutual respect in return. Ultimately, it promoted a final sentence consensus being reached by listening first and guiding second towards a common position. A negative negotiation approach during Danish panel negotiations

would be to hastily disregard lay opinions without explaining why. This would then foster lay judge disrespect, low confidence, anxiety and perhaps at worse even anger. It would almost certainly hamper consensus decisions being made and would lead to a number of enforced lay majorities over the professional judge's stance. This could in time, damage lay judicial involvement and respect for their professional panel counterparts and the wider judiciary. As one Danish professional judge further explained;

> *"There is a great need to find a consensus. I feel lay judges focus a great deal of their attention to the sentencing frames dictated by the case law and practice which I have set up for them. They then feel if I give them my sentence suggestion and properly listen to them that they have sufficient influence that they do not need to forcibly voice their own opinions as much. It is extremely rare that there is anybody dissenting or indeed I am dissenting."*

Danish professional judge working practices are very unlike the traditional separation of judicial roles in the lower Courts of England into lay only panels and sole professional judge decision makers. This makes the English professional judge's role unique and distinct from the sentencing panel consensus based decision making of their Danish professional counterparts. Unsurprisingly, all 6 English professional judges had very little interaction with or consideration for the opinions of lay Magistrates in consensus focused panels. They showed less reliance on theft guidelines and made more direct reference to Appellate Court theft case law guidance and legislation than their lay counterparts. It is important to understand why the English professional judges were far less concerned with theft guidelines than lay Magistrates. Formal legislation on sentencing theft cases and Appellate Court case law guidance were more commonly referred to and therefore considered slightly more influential than their lay counterparts.

There were however, a number of common sentiments expressed by both the English and Danish professional judges. This focused on their shared advanced legal training and the highly positive impact they perceived this had on their own sentence

decision making. All professional judges interviewed shared a high self confidence and competence borne out of their legal career and extensive sentencing experience. They all shared a common belief that their legal practice experience gave them an objectively balanced and structured legal mind. Due to this common belief, they all lauded themselves as better able to assess sentencing choice decisions, i.e.) type and length, than their lay judicial colleagues. As one Danish professional judge concluded;

> *"When you come to assess the guilty or not guilty decision, very often the lay and professional judges have equal ability. When you come to assess the appropriate sentencing punishment, I think the lay judges' abilities are unequal. This is because the professional judge knows more about case law and legislation. Lay judges are dependent on the opinions of the professional Judge, Prosecutor and Defence lawyer. Due to this lack of knowledge and experience, lay judges very rarely disagree with where within the range the professional judge feels the sentence should sit. On the very rare occasions, when I have been outvoted it has nearly always been due to a majority lay disagreement against me on the guilty or not guilty decision. Mostly, the two lay members of the Panel are asking me what the sentence level should be."*

This high level of sentence choice conformity in Danish lay judges was further explained by their reflections on their involvement in the panel deliberation process. For 2 Danish lay judges there was specific acknowledgement of the rarity of lower Court lay judges questioning defendants in Court. This would be for the professional judge to normally pursue. In England, Magistrates will generally question defendants in Court when they consider it necessary. There of course would be no professional judge present to lead this process in England due to different working practices. All 6 Danish lay judges agreed that the professional judge led sentencing panel discussions, but the opinions of the other lay judge panel member were also listened to. Danish lay judicial respect for the professional judge was based on his or her extensive legal knowledge, skills of sentence application and practice experience. During panel deliberations there was universal positive lay support for the helpful authoritative influence of the

professional judge. The consensus based approach of the Danish lay judges was mainly focused on determining the guilty or not guilty decision rather than the sentence choice. For 4 Danish lay judges there was specific reference made to a guilty or not guilty decision focus, whereas the remaining 2 Danish lay judges strongly hinted this to be the case. Determining guilt was considered to be a particularly subjective process that involved emotions and thought processes. These subjective processes were an intrinsic part of the objective legal evaluation and judicial debate regarding the evidence presented in Court, i.e.) comparing the strength of one's convictions with the other lay judge and the professional judge in the panel.

For a minority i.e.) 2 Danish lay judges, the presence of lay subjectivity brought two potential variations into their sentencing panel discussions. Firstly, these judges noted the complex interactions between different judicial personalities had a varied influence. Secondly, they noted that the various life choices of lay judges could lead to variations when there was a similar concordance between the defendant's vocational choices and their own. As one Danish lay judge further explained;

> *"Our personalities and life choices inevitably influence each other and can be observed in our levels of self confidence and inter-personal skills, i.e.) some judges sit back and listen before commenting, others are more vociferous in putting their views across. We will always vary in how we comprehend and emotionally react to a defendant's personality and life story. Some lay judges may vary in empathy and understanding depending on their life choices and those of the defendant."*

In comparison, the English lay panels were primarily led by the Sentencing Guidelines Council guidelines on theft as the principal authoritative knowledge source. All 6 English lay judges mentioned theft guidelines as the primary focus in order to structure their deliberations of the evidence presented to them in Court. Sentencing training exercises reinforced this dominant influence. Legislative and case law support

was provided by a legally qualified Court Clerk, but he rarely entered the panel deliberation process once it was underway.

The Danish professional judge and other Court room actors have been the only support in Danish District Courts for lay judge legal knowledge since the early 1990's. Before this, Court secretaries were also in Court supporting the professional judge in his legal knowledge guidance duties towards the panel. The lay chairman of the panel in England like the Danish professional judges adopted positive negotiations with the other 2 lay judges in order to find a common consensus. This consensus based approach was particularly lauded by 4 English lay judges as promoting diversity of opinion, openness of discussion, mutual respect and fairness. During panel discussions the main focus was on considering the final sentence choice by following the relevant theft guideline, i.e.) 5 English lay judges, rather than on determining the guilty or not guilty decision, i.e.) 1 English lay judge. For 2 English lay judges it was specifically felt that the sentencing guidelines promoted the likelihood of a consensus decision being reached. As one very experienced English lay judge noted;

> *"As a chairman on panels, what I have noticed is an increased ease at gaining a consensus on sentencing decisions since the introduction of theft guidelines. This is because the theft guidelines are now so prescriptive that similar sentencing outcomes are almost inevitable. In the past, before the guidelines the diversity of opinions regarding the appropriate sentence outcome had more impact on our sentence debates and I would have to investigate much more thoroughly in order to draw out the consensus sentence choice."*

However for one lay English judge there was a specific concern that their over-reliance on the Sentencing Guideline Council's prescriptive theft guidelines could interfere with the diversity of factors that were being routinely considered by panels. This was despite the justified deviation in open Court option being available.

Unlike their Danish lay counterparts, not all the English lay judges felt positively supported by the helpful authoritative influence of the professional judge. Only in some sentencing training exercises would advice from professional judges ever be sought regarding how to approach lay panel deliberations. For 2 lay judges, there was a negative interpretation of the sole decision making approach of professional judges. They questioned the merits of a non-consensus based sentencing approach that did not involve any consultation either with lay judicial peers or a jury. For this minority of lay judges, although quick and efficient, their professional counterparts appeared to be unrepresentative, non-transparent and therefore potentially unfair. As one of the lay judicial pair concluded;

> *"District judges should not be making sentencing decisions on their own without some form of lay peer consultation with either Magistrates or a jury. This is not out of disrespect for District judges, but more a faith that everyone should be judged by their peers."*

To address these minority English lay judicial concerns one could create mixed 2 lay and 1 professional panels (as already occurs at Magistrates' Court appeals) that routinely sentenced in the Magistrates' Courts. This could address, firstly the English lay focus on making sentencing choices rather than guilty or not guilty decisions. Secondly, it could help reduce the lay over-reliance on theft guidelines from the Sentencing Guidelines Council and promote greater diversity of opinions within English panel deliberations. However, given the openly hostile views of 2 lay judges, a professional judge chairing mixed panels would need to be piloted. The Magistrates Association would need to be convinced that a professional chairman is *'primus inter pares' (first amongst equals)* and merely communicates the sentence only.

Chapter 7: The uncontrollable external societal influences – (What is beyond the remit of judicial regulation.)

The main areas of analysis are external societal influences from:

1.) The media.
2.) The local public.
3.) Each judge's own subjective inherent concerns regarding the problems within wider society.

It is a matter of ongoing legal debate whether one should or even could strictly regulate these external societal influences.[295] In understanding these regulatory limits and how they may be impacting theft sentencing approaches we gain a more realistic appreciation of the wider society in which judges operate.

[295] Although all the articles of the European Convention of Human Rights (Rome - 1950) apply, articles 8, 9, 10 and 11 are qualified rights regulating wider society which may particularly influence Danish and English judges when sentencing theft offences. Both Denmark and England signed and ratified which led to the same 03/09/53 entry into force date. See generally, www.echr.coe.int/echr and http://conventions.coe.int.

7.1) Comparing the influence from the media on the English and Danish sentence approach:

To what extent does the Media impact your theft sentencing discretion?

Is there anything the media could say that would affect your discretion?
(Positive or Negative Media Commentary Examples?)

Introduction:

There has been much academic debate about the frenetic pace of the modern media communication networks and its influence on the measured pace of legal development.[296] The constant stream of media outputs on sentencing issues are hard for any judge to ignore. The Danish and English judicial perceptions regarding the media influence on their sentencing reflected this by showing a high level of similarity, i.e.) either a low extent influence or none at all. Interestingly, there was a spontaneous shift of judicial support in favor of minimal media influence, despite their being some initial reluctance to admit this. There was a higher reluctance from the English judges to openly admit any media influence on their sentencing approach with 3 judges spontaneously shifting from no influence to a low influence after being probed further to explain why compared to only 1 Danish judge.

A.) The extent of the English and Danish media influence:

The Danish and English judges were asked to comment on firstly, how the media impacted their sentencing approach and secondly, they were then probed further on their sentencing discretion. 7 English judges (2 professional, 5 lay) and 7 Danish judges (4

[296] The media as internet, television and radio all test the sentencing reactions of judges and promote judicial reflection. For further reading on how regulating networks impacts society and judges see Dijk, J. van (2006). *The network society: social aspects of new media* (Second ed.). London: Sage Publications Ltd at p 128.

professional, 3 lay) felt there was a low media influence which affected how they approached their theft sentencing. This was based upon 2 common arguments.

Firstly, positive and more common negative information communicated by the media on sentencing issues was persuasive to judges provided that it was based on a responsible and credible source, i.e.) government[297] or academic.[298] These two specific sources of information prompted further judicial thought regarding the effectiveness of their sentencing approach because they were trusted and respected.

Secondly, media involvement in sentencing issues could influence judges provided that there was a local community problem, i.e.) a theft crime wave, which once highlighted by the media could be addressed through public deterrence and denunciation. Particularly in relation to persistently occurring and local theft offences, deliberate judicial acceptance and use of wider media communications was felt apt for showing their intolerance towards future drug and alcohol abuse, violence and organized theft from gangs. It was also felt important to accept the influence of the media when there were reports of vulnerable victims within the local community that judges wished to reach and show support for. As one English professional judge further explained;

> *"If there are local media reports of a higher incidence of handbag snatchers and then I hear from our local Criminal Justice Board and the Police that this is becoming a real local concern. In this instance, there could be an influence in that I would want to adopt a more deterrence and denunciation based sentencing approach. This would send out a clear message of local judicial disapproval, but the media reporting would need to have a strong, relevant and reliable evidential basis. The media might enhance my awareness of a particular local problem, but the aggravating influence is dependent."*

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[297] Interestingly, for the 2 English professional judges, influence from police policy was accepted as aggravating the sentence approach in order to support their initiatives. However, these 2 judges also considered the police as being far more sensitive to media and politics than themselves.

[298] For 2 Danish lay judges there was some respect for and therefore influence from what they considered to be a historically independent and more academically minded media source, i.e.) *Dagbladet Information,* available online at www.information.dk

There was a complete negative rejection of any media influence on their sentencing approach from 5 English judges (4 professional, 1 lay) compared to 5 Danish judges (2 professional, 3 lay). Three common judicial arguments were provided to justify this stance.

Firstly, these judges were highly skeptical of media distortion and misinformation when reporting theft cases.[299] Introducing this level of potential inaccuracy and inconsistency into the sentencing process was considered to be too dangerous to contemplate.

Secondly, there was a common perception that media sources repeatedly ignored common, uncontroversial theft offences. This was due to a general lack of readership interest in theft offending and the short attention span of media providers.

Thirdly, both Danish and English judges cited a common respect and support for their independence from all forms of media criticism. There was a strong belief in due process and the appeals system. As one Danish lay judge argued;

> *"There is no impact. A few times I have been criticized for a sentence I have given, but this has never influenced me. I think in this way, if I am wrong then either the prosecution or the defence can appeal. The media can have their opinion, but they have never been able to pressurize or influence me. If anyone disagrees with my sentences the system is flexible enough for the theft defendant concerned to seek another sentence on appeal."*

[299] For one English professional judge the common presence of media spin and sensationalism was considered to be the reason why public denunciation had lost so much favour in England.

7.2) Comparing the influence from the local public on the English and Danish sentence approach:

We now move on to the influence of the local community on the sentencing approach of Danish and English judges. The spontaneous judicial responses are shown below, followed by critical comparative analysis:

To what extent do you feel influenced by the concerns of the LOCAL public?

(The following two local public influence research prompts below will be posed to interviewees, if the interviewees themselves do NOT spontaneously mention it.)
S denotes spontaneity of English response which is indicative of influence levels.
S denotes spontaneity of Danish response which is indicative of influence levels.

A) the offenders general impact on the local community harmony and economy.
S = 10 S = 4
B) local concerns regarding specific theft recidivism levels? S = 4 S = 4

A.) Comparing the general impact of theft offenders on the local community harmony and economy within England and Denmark:

The general influence of local community concerns was spontaneously interpreted as having a higher significance (see above) in England compared to Denmark. This was further supported by the detailed judicial explanations given. For 10 English judges (5 professional, 5 lay) compared to only 4 Danish judges (2 professional, 2 lay) there was some influence on their theft sentence approach from the local public. There were two shared judicial perceptions supporting this in both England and Denmark.

Firstly, Danish and English judges commonly considered that their selection of community service sentences, i.e.) unpaid work, was a general means by which they positively engaged with, and addressed the wider societal harms challenging their local

community. These wider societal harms included social exclusion, limited educational and training opportunities and economic impoverishment. In England, this took the specialised form of Community Justice Centres which despite high running costs due to extensive support staff were positively praised by 6 English judges as a unified way to reform both theft offenders and their wider local communities. Regular and extensive public consultation meetings which involved the police, probation and even lawyers set a high bench mark for how effective community based restorative justice *can* be achieved. Their sentencing approach was influenced by general public concerns because it incorporated a strong desire to publicly denounce theft offenders and deter their future re-offending by supporting local community re-engagement schemes, i.e.) public works. This form of community payback addressed the limits of victim compensatory schemes that relied on the theft offender's own limited financial resources. As one English professional judge further explained;

> *"If someone argued that they were tired of being a victim of theft and the quality of life in the local community had been diminished as a consequence of that, then these are serious problems that can and should be solved through ones' sentencing approach. Using my discretion, I might try and persuade probation that their work with theft offenders should be more focused on unpaid work or community service to rectify the community harm they have caused."*

Secondly Danish and English judges commonly considered that local public concerns were influential because of the importance of justifying sentences publicly. These judges felt they had an important civil duty to preserve their local community from harm by making protective sentencing choices. Their sentencing approach could show this influence through a careful assessment of the risks to and needs of vulnerable victims within their local community. This involved taking on board general public concerns regarding local theft crimes indirectly expressed through the media. It included local newspaper articles which were based on interviews with the local public. It also included online blog responses made by the public to these articles and to individual sentences made by judges. There were also personal letters and emails sent directly to individual

judges from members of the public, which were subjectively assessed by these judges and taken on-board.

In England, there was a unique interpretation of this sentence justification process by the 5 lay judges. These judges pointed to their long established historical role at the heart of community affairs as public keepers of the peace. This meant they were obliged to properly respect the views of the local public whom they served and from whose ranks they were picked. As one English lay judge further outlined;

> *"Remember, we Magistrates, are part of the local community because our ranks are directly chosen from the local public. To this extent, all Magistrates should reflect local public concerns. Magistrates' awareness and understanding of local public issues is high. The more detached you are from local public concerns, the less responsive and representative you will be in the eyes of the public whom you serve. You risk losing local confidence in keeping the peace if you don't take their concerns properly on board."*

For 8 Danish judges (4 professional, 4 lay) compared to only 2 English judges (1 professional, 1 lay) there was no general influence from local public theft concerns. This position was commonly justified in 4 ways. Firstly, local public concerns were considered to be irrelevant where there was a judicially perceived low theft rate. Such local communities had particularly high standards of community harmony and economic support. Secondly, local public concerns were considered to be irrelevant due to a common judicial perception of anonymity within the local community. This meant that there was minimal interaction with members of the general public. Thirdly, there was a common judicial rejection of local public concerns in favor of national public concerns generally as the source of influence. For the 2 English judges there was specific mention of the importance of preserving national theft approach consistency by following the SGC theft sentencing guidelines. In so doing, these judges felt they were justified in rejecting the general influence of the local public. Fourthly, Danish and English judges considered it dangerous to take on board local public concerns due to misinformed

popular punitive justice, i.e.) retributive based vigilantism. Instead they placed greater faith in their own judicial experience and discretion. As one Danish lay judge summed up;

> *"You can have unfair sentencing if you listen to local public emotions which are usually jumped on by the media and politicians alike. This is because they are often too varied and too harsh."*

B.) Comparing the impact from local concerns within England and Denmark regarding specific theft recidivism levels:

In relation to specific local concerns regarding theft recidivism levels, there was an equal spontaneous reaction indicating a low aggravating influence on Danish and English sentencing approaches. However, looking beyond this to the common judicial sentiments expressed there were some noteworthy similarities and differences between England and Denmark.

For 6 Danish judges and 6 English judges there was a low aggravating influence from specific local concerns regarding organised theft gangs that caused extensive community disruption. Community disruption from theft was linked to wider social issues, i.e.) violence, drug and alcohol abuse, racism, tourism and vulnerable community members. Such organised theft gangs came from both domestic[300] and immigrant[301] sources. The damaging impact of organised theft gangs was slightly higher in Danish urban areas than in rural locations, i.e.) 4 urban judges compared to 2 rural judges.

However, the 6 English judges did not show any difference between urban and rural areas, i.e.) 3 urban judges compared to 3 rural judges. As one Danish professional judge explained;

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[300] In Denmark, 'hells angel' bicycle gang members of Danish nationality were identified by 3 judges. In England, shop theft gangs of English nationality were identified by 4 judges.

[301] In Denmark, 2 judges identified predominantly asylum seeker theft gangs from African and Arabic States. In England, 3 judges identified predominantly economic migrant theft gangs from Eastern European States.

> *"Pick pocketing groups of foreign immigrants is a specific urban local concern which has some influence. Its presence gives some support to judges keeping their harshest punishment selections for this type of persistent theft than for other types of theft."*

For the remaining 6 Danish and 6 English judges there was no influence from specific local concerns regarding theft recidivism levels. The common judicial reasoning was that fortunately the problem was not yet present in their local area. In Denmark, this was more likely to be from rural areas than urban locations, i.e.) 4 rural judges compared to 2 urban judges. In England, there was no difference between rural and urban areas, i.e.) 3 rural judges compared to 3 urban judges. For 2 English judges the reason for this high degree of theft gang movement between urban and rural locations was due to two wider social regulation sources beyond judicial control. Firstly, the apparent mobility of theft gangs was a product of intense gang rivalry. Secondly, local police policy which extensively monitored and detected the damaging activities of theft gangs and which sent them to Court on a regular basis was simply moving the problem elsewhere.

7.3) Comparing the influence from judicial inherent concerns and subjective life experiences on the English and Danish sentence approach:

In the final part of the analysis we consider how the subjective profile of judges influences their theft sentencing approach. One's past life experiences help to define our current self identity and habitual thought patterns. Importantly, the judicial interviewees were open to discussing their own introspective perceptions of themselves as the spontaneous responses show below. This demonstrated a high degree of trust in the interviewer:

To what extent do you feel influenced by your own inherent concerns?

(The following judicial inherent concerns and subjective experiences as research prompts below were posed to interviewees, if the interviewees themselves did NOT spontaneously mention it.)
S denotes spontaneity of English response which is indicative of influence levels.
S denotes spontaneity of Danish response which is indicative of influence levels

A) your own moral and ethical standards S = 8 S = 8**

B) your personal religious beliefs S = 2 S = 2

C) your cultural background S = 2 S = 6**

D) your legal and non-legal education S = 3 S = 6**

E) your levels of experience and self confidence in making reasoned/justifiable decisions S = 1 S = 3

F) the importance you attach to your civil duties as a sentencer S = 4 S = 6

A.) Comparing the influence from subjective judicial moral and ethical standards on the English and Danish theft sentencing approach:

Both English and Danish judges interviewed indicated strong personal feelings regarding why theft behaviors within society were morally wrong and worth denunciation. These moral judgements by judges were based on external societal influences, i.e.) religion, education, law, politics and the media. In addition, all judges were aware of their own sense of fairness and equality when considering sentencing options. This was reflected in the equally high spontaneous judicial recognition of subjective moral and ethical standards influencing the sentencing approach, i.e.) 8 English judges and 8 Danish judges. Interestingly, there were different common Danish and English judicial arguments provided based on their lay or professional working background rather than their nationality.[302] Looking further into the common judicial sentiments expressed, there was a moderate influence on lay judges and a low influence from professional judges in relation to their personal moral and ethical standards.

For both Danish and English lay judges there was a specific common focus on the theft offender's moral choices. The focus on theft offender moral choices produced a moderate impact because of the lay emphasis on judicial empathy and mercy shown in their sentencing approach depending on the particularly mitigating or aggravating aspects of the theft case facts. Interestingly, 8 Danish judges (6 lay, 2 professional) and 8 English judges (6 lay, 2 professional) spontaneously mentioned many other more contentious offences rather than theft which promoted a much stronger judicial empathy and mercy reaction, i.e.) animal cruelty, child abuse, domestic violence and dangerous 'drink driving' road traffic offences. Note the high lay focus and emphasis here. For 3

[302] The European Union promotes the moral and ethical integration of Danish and English judiciaries through, The European Network of Councils for the Judiciary - ENCJ CHARTER E.N.C.J. (2004 (May, 20) set up by The Maastricht Treaty (1992) Articles 2 & 6. This supposedly *independent* trans-national interchange of judicial experiences and cooperation brings with it a common moral and ethical dialogue which all contributes to the integration of European State judiciaries. European sentencing law conferences, judicial visits and even friendly e-mails between Danish and English judges all reinforces this trans-national process of unifying European sentencing approaches towards a common societal morality and ethics. Comparative research also plays its part in this process as well as over 60 years of European treatise on common trans-national societal values that began with the European Convention on Human Rights (1950).

Danish lay judges and 4 English lay judges this was specifically negatively interpreted as aggravating due to dishonesty which they commonly considered was morally wrong. As one Danish lay judge summed up;

> *"I feel that honesty in people is very important. I don't want to associate with people who are dishonest. In sentencing theft, I do judge such offenders as dishonest and this has a negative impact on my general view of theft offender morals."*

For the remaining 3 Danish lay judges (2 female) and 2 English lay judges (2 female) there was a specific positive interpretation of theft offender moral choices based on their socio-economic background norm, i.e.) severe deprivation and desperation. Judicial empathy and mercy to help and reform such theft offenders was considered more morally desirable and mitigated the sentence approach. Although the entire judicial sample interviewed only included 3 English female judges (1 professional, 2 lay) and 3 Danish female judges, (1 professional, 2 lay), it is still noteworthy how positive empathy and mercy for the severe deprivation and desperate means of some theft offenders was usually mitigating for such a high proportion of the female sentencers when compared to the male sentencers. Does this suggest a higher female judicial sensitivity to empathy/mercy impact their sentencing approaches? As one English lay female judge further explained;

> *"Being a Magistrate opens your eyes to how chaotic and desperate some theft offenders' lives are. You could prevent a lot of theft offenders re-offending if you provide a future for them in education or a job."*

By comparison, all 6 professional Danish judges and all 6 professional English judges both similarly provided much more general arguments for how their moral and ethical standards were having an impact, albeit a low impact. These judges commonly considered their personal moral values as a general reflection of wider society rather than a specific assessment of theft offender's moral choices. In so doing, despite being aware

of their personal moral compass shaped through life experiences and learning, they also showed a preference to distance themselves from their own moral and ethical standards. As one Danish professional judge uncomfortably summed up;

> *"There is no specific impact that I am aware of, but certainly my verdicts are a product of my way of seeing things. I hope that my personal standards in life do not impact my verdicts."*

B.) Comparing the influence from personal religious beliefs on the English and Danish theft sentencing approach:

In terms of personal religious beliefs, there was an equally low spontaneous indication of influence on the sentencing approach, i.e.) 2 English and 2 Danish judicial responses. However, the prompted common judicial commentary showed a slightly higher influence from religious beliefs, i.e.) Christianity, in England compared to Denmark. For 3 English lay judges and 2 Danish lay judges, Christianity was *interpreted* as a helpful sentencing support because it promoted a compassionate understanding of other people in society.[303] How these judges interpreted their personal religious beliefs was not based on literal Old and New Testament application of meanings, i.e.) *'thou shalt not steal'.* Instead a wider purposive approach was adopted which sought to harmonise current religious sentiments with accepted social norms, i.e.) through religious democracy and debate. The more common socio-economic problems presented by these persistent theft offenders, i.e.) violence, deprivation, drug and alcohol abuse, were viewed as aggravating features that Christian teachings sought to mitigate by encouraging repeated reform attempts. Continued judicial forgiveness was considered an established and acceptable means through which these judges could express their personal religious beliefs and support the continuing relevance of them to the wider society around them. As one English lay judge summed up;

[303] Celebrating Christmas is a good example of how adopting the wider purposive approach encourages the continued relevance of personal religious beliefs. The belief in all the religious Christian aspects of Christmas may have lost some resonance with some people, but the wider purposes of Christmas remain intact, i.e.) an established time for mutual support, sharing, caring and reflection of one's life.

"I was brought up with Christian moral values. I would hope this would make me more considerate of the social pressures on theft offenders and more willing to give them chances to reform through the Christian notion of forgiveness."

The majority of Danish and English judges rejected any influence from personal religious beliefs on their sentencing approach, i.e.) 10 Danish judges (6 professional, 4 lay) and 9 English judges (6 professional, 3 lay). The universal rejection of religious beliefs influencing the sentencing approach by all English and Danish professional judges, but not all of their lay counterparts suggests a secular sentencing approach dominates most in those judges who have received a legal education and have practiced law before becoming lower Court judges. There were two common judicial sentiments expressed as to why this was the case.

Firstly, for 8 Danish judges (6 professional, 2 lay) and 6 English professional judges, no religious belief ever existed within them. This made this form of inherent concern an irrelevance to their sentencing approach.

Secondly, for the remaining 2 Danish lay judges and 3 English lay judges, there was a Christian belief admission, but this was not allowed to impact their sentencing approach. This was because these judges generally considered it to be potentially divisive when religion was publicly seen to influence any legal decision making. For this reason, their sentencing approach did not express or support any religious sentiments i.e.) secular sentencing. As one professional English judge concluded;

"My religion has no influence at all on my public sentencing approach. I do have Christian beliefs, but I always keep them private."

C.) Comparing the influence from personal cultural background on the English and Danish theft sentencing approach:

As one might expect, the judicial interpretations of their own cultural background and its impact on their sentencing were wide ranging. Judicial perceptions of their cultural background ranged from political allegiances (left or right wing) gender (empathy levels) and race majority (white English or Danish). These particular examples were not however allowed to influence the sentencing approach. There was a higher spontaneous recognition of personal cultural background influencing the sentencing approach within Danish judicial minds, i.e.) 6 Danish judges compared to 2 English judges. Comparative analysis of common prompted judicial sentiments further supported this higher Danish focus. Thus cultural identity and experiences were considered to be a low source of influence on the sentencing approach of 8 Danish judges compared to 7 English judges. There was an even spread of lay and professional judicial responses to cultural background having some influence on the sentencing approach, i.e.) 8 Danish judges (4 professional, 4 lay) and 7 English judges (3 professional, 4 lay). These judges commonly acknowledged that they were part of society and society was a part of them. They had a wide range of life experiences over time which involved travel and social networking within diverse social circles. Therefore cultural background was seen as a product of their life choices. There were three specific common arguments supporting why cultural background had some, albeit a low impact on the sentencing of theft offenders.

Firstly, a stable conservative upbringing was commonly considered to be an important source of influence on the sentencing approach. Positive family values of mutual respect and support instilled in childhood by parental example helped to shape later life choices. Cast your mind back to your own childhood, it is without doubt an immensely informative stage in your life which shapes you well into adulthood. We are all products of our childhood are we not? Theft is taught to children as an anti-social behaviour. As one Danish lay judge argued, as children we are encouraged to share and earn resources we would like rather than simply take them without permission. Without

this vital childhood lesson about the fair allocation of resources, life loses its social civility and a Darwinian survival of the fittest ensues. [304]

When approaching a sentencing decision, there was some judicial emulation of their past conservative upbringing in how they compared the life choices of theft offenders with their own life choices. As one Danish professional judge explained;

> *"I think my family background has importance. My father was a lawyer of high standing locally and a strong role model to me. I had a clever and morally conscious father whom I respected and this stability endured into adulthood, despite the usual rebellious teenage years. In sentencing a theft offender, I am attempting to understand and help him. In order to achieve this I therefore inevitably compare my life choices to his before passing judgment."*

Secondly, the vocational choices of both Danish and English judges (particularly lay) were commonly considered to be a significant part of the judicial cultural identity. Two work place backgrounds featured strongly and had a positive supportive influence on the sentencing of theft offenders. These were public sector jobs in the media[305] and or education.[306] Experience of such vocations where judges regularly interacted with the public helped sentencing to remain well informed of public sentiments. In the long term, such vocations promoted a continued judicial understanding of evolving social norms in the wider multi-cultural society.

Thirdly, judicial self perceptions of their own socio-economic class had some influence on how they approached the sentencing of theft offenders. For 5 English judges (1 professional, 4 lay) and 2 Danish judges (1 professional, 1 lay) there was a common working class focus linked to their cultural identity.[307] These judges considered

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[304] As Thomas Hobbes warned in *Leviathan, The Matter, Forme and Power of a Common Wealth Ecclesiasticall and Civil* (1651) at Chapter XIII, mans life becomes "solitary, poor, nasty, brutish, and short."
[305] Specifically mentioned by 2 English judges (2 lay) and 3 Danish judges (1 professional, 2 lay).
[306] Specifically mentioned by 4 English judges (1 professional, 3 lay) and 3 Danish judges (3 lay).
[307] Particularly English lay judges considered themselves to be from working class roots.

themselves to be closely connected to the majority working class culture, despite their high disposable income. This was because they had led very similar working class life styles in the past to the general public whom they served. In terms of a minimal impact on the sentence approach, these judges perceived that the commonest group of theft offenders came from poor socio-economic cultural backgrounds. Coupling this perception with the common judicial working class focus, these judges felt they had a close personal understanding for the working class life style issues facing the majority of theft offenders. A sharper, more informed and intimate sentencing approach resulted as one English lay judge concluded;

> *"I was brought up in fairly abject poverty like many of the theft offenders who come before me in Court. I think my working class routes help to make me more aware of theft crimes occurring when it is not obviously apparent. This is the advantage having lived amongst the majority working class, but you have to get back to hard evidence and facts."*

For the remaining 5 English judges (3 professional, 2 lay) and 4 Danish judges (2 professional, 2 lay) there was a common rejection of any influence from their cultural background on their theft sentence approach. This was commonly explained in two ways. Firstly, non-awareness of cultural background similarities or differences made it an irrelevance to the sentencing approach. Secondly, through careful judicial selection and regular sentencing approach training, strong cultural based opinions were discouraged as unfair because they led to potential inconsistency and subjective bias. As one English lay judge remarked;

> *"My cultural background may have some impact on how I look at what people have done generally, but not in terms of my subjective sentencing approach. Judicial selection, training and lay panel decision making greatly reduces the extent to which my cultural background can have any influence."*

D.) Comparing the influence from legal and/or non-legal education on the English and Danish theft sentencing approach:

Comparing all the Danish and English educational backgrounds showed common judicial arguments were separated on the basis of whether legal education and practice had been pursued or not. The judicial interpretation of their educational achievements was not just based upon the formal subject content selected, but also how it had been informally applied over time through diverse life experiences. Thus both Danish and English judges considered that their development of knowledge was determined by their personal vocational experiences as well as through their academic qualification choices. The spontaneous judicial reaction to the impact of previous education and training, both legal and non-legal was higher in Denmark, i.e.) 6 Danish judges compared to 3 English judges. This was further supported by the content of the prompted judicial responses provided.

For 6 Danish lay judges and 4 English lay judges,[308] educational background had a moderate and positive influence on how they constructed their sentence approach. For these judges the diversity of their academic qualification choices which were then shaped by a variety of different vocational experiences was advantageous. Lay judicial educational backgrounds in England and Denmark were extensive, i.e.) ranging from education, medical, banking, engineering, information technology to the media and local government sectors. This was because it firstly made their sentencing approach representative of all industrial sectors of society. Secondly, the direct input of specialist knowledge into the sentencing approach of the local bench promoted a greater awareness and balanced understanding of wider social values. Thirdly, lay judges highlighted that their involvement in the sentencing approach allowed unique and creative minority educational approaches to have an influence. As one Danish lay judge further explained;

[308] For the remaining 2 English lay judges their educational qualification choices and personal vocational experiences were considered to be irrelevant to their sentencing approach.

"Yes there is an influence from my primary school days on how I sentence. I was educated in a very avant-garde creative environment with painting, outdoors work and the teacher as a facilitative guide. At this time in the 1960's we were working with the principle that you could learn math through artistic expression and music. It was a school that promoted world issues awareness and practiced democracy. They don't do this now as a mainstream educational approach, though a lot of these ideas have been adopted into private folketskole across Denmark. I feel this unique education gave me my current open minded and enquiring sentencing approach."[309]

For 5 English and 6 Danish professional judges their legal education was an important information source and had a moderate influence on their sentencing approach. There were two principal similarities between the responses of professional judges from Denmark and England. Firstly, these judges commonly considered that their academic legal qualifications provided them with a structured legal mind. This meant that in day to day sentencing evaluations of evidence, procedure and eventual punishment choices they felt they were more objectively fair and consistent than their lay counterparts. Secondly, these judges commonly cited their extensive legal practice experience as their most valuable educational resource. The professional judges noted that over time there was an increasing proficiency gained in applying complex legislation[310] and case law.[311] As one Danish professional judge concluded;

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309 The Montessori alternative educational method is currently applied as a minority educational approach in England and Denmark. The child directs the focus of his or her own learning. The teacher observes the child's learning journey and guides them through physical activities with self correcting materials that usually combine theory and practice. The child centric approach compliments the liberal individual principles of Howard Gardner's theoretical work, Frames of Mind. The theory of multiple intelligences, 10th Edition explained further at: www.infed.org/thinkers/gardner.htm.

310 The main English professional focus was legislative, i.e.) section 172 of the Criminal Justice Act (2003) which outlines the duty of all Courts to take into account definitive Sentencing Guidelines Council (SGC) sentencing guidelines. For the remaining English professional judge, regular SGC sentencing approach training significantly reduced the moderate influence of formal legal education and practice experience to a minimal impact on the sentencing approach.

311 The main Danish professional focus was case law, i.e.) from the annual publication: *'Dommi i Kriminel sager'* or online databases: *'Tidsskrift for Kriminalret'* [TfK] and *'Ugeskrift for Retsvæsen'* [UfR].

> *"My approach to determining guilty or not guilty is the same as lay judges although my levels of doubt are lower than theirs. However, on sentence selection there is a lot of impact with my structured legal mind and diverse practice experiences directing the two lay judges towards a rational and well justified sentence conclusion."*

E.) Comparing the influence from sentencing experience and judicial self confidence levels on the English and Danish theft sentencing approach:

The impact of sentencing experience and judicial self confidence in making reasoned and justifiable theft punishment decisions was considered to be moderate and increasingly positive over time by all the interviewees. This high concordance meant that differences in Danish and English judicial responses were very slight. However, more significant differences could be detected by comparing the Danish and English professionals with the Danish and English lay judicial responses. Initially sentencing experience and judicial self confidence were more spontaneously recognized by professional judges regardless of nationality, i.e.) 3 Danish judges (2 professionals, 1 lay) and 1 English professional judge. Further comparison of the prompted responses of professional and lay judges revealed why professional judges particularly valued their sentencing experience and self confidence.

For all 12 professional judges interviewed their high self confidence was predominantly enhanced by long term and diverse legal practice experience, i.e.) 20 – 40 years. Of particular confidence value was procedural, evidential and case law knowledge which due to its complexity required years of practice experience to hone and perfect with competence. This was before they were appointed and trained as professional District judges and had begun to add sentencing experience on top of their legal practice skills and knowledge. For Danish professional and lay judicial interviewees alike, in service training by sentencing practice observation was considered the most helpful. This was because all the diverse influences on judges could be experienced first hand. By shadowing and questioning experienced judges on the job, many more situational

dependent and relevant questions could be asked. Judicial mentoring also promoted stronger interpersonal skills, a collegiate judicial ethos which in turn increased self confidence levels.

For 6 Danish and 4 English professional judges it was specifically pointed out that their lay judicial counterparts lacked the extensive period of time that they had spent in the Court room observing and learning from the sentencing approaches of experienced judges. This was often more than 40 years especially amongst the English professional judges interviewed. This led to a common professional judge perception that they had more self confidence and competence to sentence than their lay colleagues. Interestingly, no English or Danish lay judge provided the counter and opposite perception to this in favour of their having more self confidence and competence to sentence than their professional colleagues. Why did increased self confidence have such a positive influence on the professional judges' theft sentencing approach? Well quite simply, judicial motivation and inter-personal skills increased with time. Low theft complexity coupled with low public concern or controversy made theft decision making quick, decisive and almost instinctive. As one English professional judge concluded;

> *"When it comes to theft sentencing, I feel quite liberated having been around the Courts for over 30 years. Despite the overly prescriptive theft guidelines, sentencing theft offenders remains to me a relatively simple, comfortable and intuitive decision making process. I rarely retire to agonize over sentencing. Instead, I decide quickly and always seem to know what I want to do and why."*

In comparison, for all 12 lay judges interviewed, there was a similar recognition that their self confidence improved over time with Court room experience. There was also similar agreement with their professional counterparts as to why the influence of increased self confidence over time had such a positive impact on their theft sentencing approach.

However, there was a difference of lay opinion towards Court room practice being the main source of self confidence improvement and thereby sentencing approach enhancement. Despite their lack of legal practice experience, lay judges in both England and Denmark pointed out the particular value of their long term and more diverse specialist knowledge and experiences. This was supported by regular sentencing approach training and guidance.

Both English and Danish lay judges reported receiving more in service training than entry level training. It is the norm for common law jurisdictions to provide in service training with judicial peer mentors to compliment the development of valuable sentencing experience and confidence in applying case law developments. It is the norm in civil law jurisdictions for more structured entry level training on the content of the Penal code to be given with less emphasis on the need for continued training with judicial peer mentors on case law developments. In this way, Danish lay judges appear to buck the civil law entry level training norm. However, despite these similarities in training approach, there are very different dominant sentencing guidance sources impacting how the lay judges must sentence. The English lay judges pointed to the national consistency driven and highly prescriptive SGC theft guidelines. The Danish lay judges pointed to the voluntary training provided by regional Court administrations under the auspices of their Retspresident and the panel approach guidance from professional Chairman during sentencing deliberations.[312] Within sentencing panel deliberations these lay specific judicial advantages as well as voluntarily representing the public[313] bolstered their self confidence to a high level.

There was no specific lay argument provided that their self confidence did not match their professional counterparts. However, there was a lay recognition that self confidence in sentencing improves with Court room practice experience. There was also

[312] For an interesting further analysis of how adaptable and influential judicial training can be as a means to enhance efficiency and consistency see: Daniela Piana, Cheryl Thomas, Harold Epineuse, Carlo Guarnieri. (2007 (Oct). *Judicial Training & Education Assessment Tool - Meeting the Changing Training Needs of Judges in Europe: Draft report prepared for CEPEJ by the Judicial Studies Alliance*. London: Centre for Empirical Legal Studies, Faculty of Law, University College London, pp 1 – 17 at p 6.

[313] As active members of political parties, which the local Court administration was aware and selected from, representation lasted for a 4 year tenure that could be renewed and usually was.

a lay recognition of different working practice norms influencing how sentencing practice confidence develops. For 4 Danish lay judges it was specifically noted that they often followed the sentencing directions of their professional colleagues within sentencing panels, but this was far less for the professional guilty plea directions where their lay self confidence levels were higher. In England, lay only panels negated any professional judge direction in Court, except for the Court Clerk. However, this lack of professional direction meant a greater reliance on training sessions, SGC guidelines and required high competence and confidence particularly in the Chair person.

Whilst the positive influence of judicial self confidence increased over time, another inherent factor was also noted by both professional and lay judges alike in Denmark and England. This was the increasing mitigating influence of self confidence as sentencing experience developed. For 6 professional judges (4 English, 2 Danish) compared to only 3 lay judges (2 English and 1 Danish), sentencing experience led to greater intuitive understanding and compassion for the problems of repeat theft offenders. Reduced legal practice experience, self confidence and empathy skills to recognise subtle mitigating factors may explain why lay judicial perceptions showed a lower proclivity towards leniency over time. In addition, consensus based lay panel discussions may reduce the opportunity for judicial mercy mixed with high self confidence to have a mitigating impact on the sentence approach. This was particularly the case for the most common repeat theft offenders, whom these judges felt they knew well and thereby empathised better with. The increased judicial sensitivity toward mitigating factors in the most familiar theft offenders reflected their greater subtlety[314] when compared to most aggravating factors. As one English professional judge concluded about increased self confidence to apply judicial mercy discretion;

> *"When I first started sentencing in the 1970's, I think I was more rigid in my thinking and approach. I therefore did not allow for as many mitigating factors. However, now I feel the wealth of my sentencing experience has helped me to*

[314] See theft offender specific factors E, F, G, and L as usually mitigating examples of what judicial mercy discretion can be applied to.

recognize and sense many more relevant mitigating factors. I would hope that over time I have become more compassionate and understanding of theft defendants' personal issues both in Court and out. I now have more self confidence to reflect this where it is appropriate."

F.) Comparing the influence from the importance of civil duties and responsibilities on the English and Danish theft sentencing approach:

The high importance of the civil duties and responsibilities placed upon lower Court judges was initially emphasized within the spontaneous sentiments of both Danish and English judges, i.e.) 4 English judges (2 professional, 2 lay) compared to 6 Danish judges (4 professional, 2 lay). This continued into the prompted discussions where all 24 judges explained why their civil duties were so important and what impact this had on their sentencing approach. Comparative differences in the judicial answers to these two questions were slight and based more on professional or lay background rather than on nationality distinctions.

Danish and English professional judicial explanations similarly suggested that civil duties were important due to their continued formal commitment towards ensuring theft trials were fair. Only professional judicial expertise and legal practice experience could ensure procedural, evidential and sentencing rules were interpreted properly. For 4 Danish and 2 English professional judges there was a spontaneous recognition of their voluntary selection for the post and acceptance of a lower remuneration than they could have achieved in private legal practice.

In comparison, the spontaneous commentary of the 2 Danish lay judges and 2 English lay judges[315] was slightly different as to why they saw their civil duties as very important. These lay judges emphasized their voluntary representation of public

[315] In addition, these 2 English lay judges mentioned their historical independent role in administering their civil duties based on affirmation of the judicial oath and in acceptance of the Justice of the Peace formal role which carried with it an important keeper of the peace expectation within the local community that they served.

sentiments and acceptance of no salary for the sentencing role that they performed. Danish and English lay judicial explanations similarly suggested that civil duties were important due to the need for self motivated individuals with close community ties. The deep passion for the importance of civil duties was eloquently summed up by one Danish professional judge;

> *"I consider this job as almost all absorbing. I feel that the position of the Courts and we as judges within society are so important that you have to devote your whole intellectual capacity and moral integrity to it. I dedicate much of my time to my sentencing role and feel I am a stable and permanent guardian of social cohesion and integrity."*

As the above judicial quote hints at, the impact of civil duties on the sentencing approach was based on preserving the positive relationship between judges and the public whom they served. This meant that in sentencing theft offenders, the judges' civil obligations were best fulfilled when they felt that they had truly connected with the public's common sentiments and protected them. This introduces a powerful inherent conservative desire into the sentencing approach. It draws up a detectable, yet invisible social contract between judges and society which makes their role feel unique, integrative and personalized. In order to connect with the public both Danish and English judges (professional and lay) agreed that their sentence approach required a detailed Court room explanation of how and why a sentence had been reached. This ensured that local community trust, awareness and respect for their sentencing commitments were maintained.

For 5 English and 6 Danish professional judges interviewed there was an emphasis on their formal legal knowledge and experience to best explain sentences to the public.[316] For all 12 lay judges, English and Danish alike, there was a different emphasis on informal specialist knowledge adding a more balanced perspective which gave their

[316] For 1 English professional judge there was an acknowledgement that his sentencing explanations to the public could benefit from wider lay public debate and participation.

sentence explanations to the public a fresher and more democratic legitimacy. As one Danish lay judge concluded;

> *"I think the representative principles of the Danish lay judge system promote the inclusion of non-legal, local viewpoints into legal decision making and better connects professional judges with the public they serve."*

Chapter 8: Comparing the judicial disempowerment trend within Denmark and England. – (How and why you regulate.)

When we consider the influence of various regulatory powers, we are often too focused on its impact on sentencing outcomes. What is considered less is its impact on the sentencing approach and the extent to which judges feel they can flexibly interpret and respond to changing societal expectations. Discretion for judges is the expression of their independence and free will. It has largely been philosophically accepted that judicial discretion and independence are powers which must be balanced with various forms of sentencing regulation. These forms can be long established and broad, i.e.) executive, legislature and judiciary, or relatively new and specific, i.e.) working practice training and sentencing guidelines. They can be national or regional and have an obvious or a subtle influence on our judges.

As new forms of sentencing regulation have become more frequent and specific in the last 30 years, both English and Danish judges have found their sentencing approach more and more intensely reshaped. The more specifically defined the sentencing approach regulation is, the higher the standard of sentence justification required from judges. This in turn reduces the likelihood of any deviation from the sentencing practice norm being considered necessary. How judges *should* respond to current sentencing approach regulation attempts and whether future disempowerment is required is constantly debated by wider society. However in this research, the focal perspective is the reaction of judges to their own gradual disempowerment. The main comparative critical analysis areas are as follows:

1) Firstly, there is a critical comparative analysis of the impact of current sentencing approach guidance sources.

2) Secondly, the debate regarding judicial discretion limits and how well it is working within current theft offence ranges is addressed.

3) Thirdly, the extent of political and economic pressures felt by judges on their day to day sentencing approach is critically compared.

8.1) Comparing the impact of current sentencing guidance sources in England and Denmark:

1.) Comparing the influence from consistency on the English and Danish theft sentencing approach:

"The desire for consistency in theft sentencing approaches by judges promotes fairness and proportional sentencing responses. This ideal means Judges therefore must be regulated very tightly to ensure their sentencing is approached consistently."

To what extent do you agree with this statement on a scale of 1 - 5?
(Blue denotes the English judicial response.)
(Red denotes the Danish judicial response.)

Strongly agree		Not sure		Strongly disagree
1	**2**	**3**	**4**	**5**
0	**2**	**1**	**3**	**6****
1	**2**	**1**	**6****	**2**

How do you ensure your custody threshold decisions regarding theft offenders are approached in the same consistent manner?

Both Danish and English judges were introduced to the various regulatory impacts on their sentence approach by asking them to consider current democratically favored sentencing principles.[317] These were the desire for consistency of approach to

[317] What proportionate, consistent and fair sentencing standards currently are, changes over time in line with wider societal norms. Historically in both England and Denmark, politicians seeking to interpret and define what the majority held public sentiments are, have responded either by conserving past sentencing standards in times of social stability or when faced with an unhappy electorate have tried to create new sentencing reforms. The most common concerns and opinions of the general public are as much a judicial focus as a political one. Therefore what judges consider the current democratically favoured sentencing

promote proportionate and fair sentencing responses. The statement given was deliberately controversial, i.e.) *"regulated very tightly,"* in order to test judicial reactions and promote deep analysis of the main aims of sentencing approach regulation. Comparing the judicial responses on the 1 – 5 scale indicated that overall there was a slightly stronger preference for light touch consistency of approach regulation in England than in Denmark. The scale shows us that slightly higher levels of judicial discontentment were apparent in England than Denmark. Further detail as to why this was the case was provided within the expanded spontaneous responses of all 24 judges.

For 9 English judges (5 professional, 4 lay) compared to 8 Danish judges (6 professional, 2 lay) there was a similar dislike of strict consistency of approach regulation. The majority of judges that disagreed with very tight regulation came from both Danish and English professional judges. Sentencing experience and legal training which accentuates judicial independent thought and confidence could explain this preference for light touch regulation. These judges relished the opportunity to explain why they had come to the sentence choice they had. A tight sentencing regulatory system that created numerous written down concepts was seen as overloading the judicial mind with preconceptions rather than trusting pragmatic instinct. There were 5 shared reasons provided to justify why most judges rejected the tight regulation sentiments within the statement.

Firstly, the judges similarly felt that more political faith in objective judicial common sense needed to be publicly demonstrated. This involved the setting of broad sentencing minimum and maximum parameters within which judicial discretion could be applied.

Secondly, it was similarly felt that the key flexible fact finding role of judges was dangerously undermined by specific and detailed regulation. For both Danish and English judges there was a similar referral to diverse theft case facts and supporting

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principles to be and the extent to which they feel bound by them is of crucial importance if one is to properly understand the English and Danish sentencing approach.

evidence. In order to promote fairness and proportionality, it was felt judges needed to be trusted more and directed less.

Thirdly, there was a common judicial yearning for a limit to repeated short term political interference over their sentencing approach. Tight regulation was seen as threat to their long established constitutional independence. Instead, particularly professional Danish and English judges looked for a reaffirmation of political respect for their long term sentencing experience. Judges pointed to their structured legal minds which had been carefully selected and trained to a higher professional standard than politicians.

Fourthly, there was a common judicial fear that overly prescriptive and specific sentencing approach guidance would turn currently subtle non-deviation pressures into much more cumbersome barriers to overcome. These judges worried that overly precise instructions within binding guidance regarding acceptable legal interpretation would stifle the valuable creativity on which judicially led case law precedent shrived. This could be further accentuated if higher Court judges on appeal against their sentences were unsupportive. Instead of a pragmatic sentencing purpose approach, lower Court judges' with alternative theft sentence choices to the norm would be more inclined towards a limited literal interpretation of guidance.

Fifthly, particularly for lay English and Danish judges an embracement of very tighter regulation of sentencing approaches reduced their ability to represent wider public opinions. This damaged the democratic legitimacy of the sentencing approach within the lower Courts. As one Danish lay judge concluded;

> *"I don't like the words, 'must be regulated very tightly'. We should not be regulated very tightly if I am supposed to represent public opinion and involvement within the sentencing process. I therefore feel very strongly that during the trial I should be given the freedom to express my opinions, consider the case facts as I deem appropriate and be unhindered in how I approach my*

sentencing decision. In this way, later detailed panel discussions at the end of the case are fully representative of diverse public sentiments."

For the remaining 4 lay Danish judges and 3 English judges (2 lay, 1 professional) there was an acceptance of the tight regulation sentiments within the statement. Note the Danish lay judicial focus on the positive benefits of extensive regulation. This may reflect a lower faith in how current Danish sentencing approaches are kept consistent through case law comparison with limited reliance placed on the broad definitions within the Straffeloven. There were 3 reasons provided by these judges for their support.

Firstly, specifically for the 3 English judges the permissible deviations from current sentencing approach guidance were considered reasonable. These judges were confident that their justifications for any deviations from the sentencing norm would be supported.

Secondly, there was a shared judicial belief that the broad statement on consistency of approach was easy to instinctively agree with on the principles of certainty and clarity. There was an attraction by these judges towards a greater simplification and predictability within their sentencing approach through specific legislation. This would they felt enhance the public's understanding of the sentencing approach. It may also make the public complacent and misinformed. They may for example be more likely to accept sentence approach guidance which is structured and comprehensive without deeper analysis. They may also misperceive the sentencing approach far more simply than it actually is.

Thirdly, there was a common judicial belief that tight regulation was the best way to ensure a thorough sentencing approach analysis within Court occurred. Structured and detailed theft guidance particularly for the Danish lay judicial mind could benefit their theft case analysis of what seriousness meant.

The second part of the question then asked judges to spontaneously expand on their preferred consistency of approach guidance sources when determining the custody threshold for theft offenders. In terms of comparison, shared working practice norms meant that meaningful critical analysis was distinguished by either professional or lay background, rather than by jurisdiction. Two similar judicial responses were given by Danish and English professional judges.

Firstly, for all 12 professional judges interviewed there was a common mutual emphasis on the value of long term theft sentencing experience to aid consistency. Sentencing practice over time helped to develop a better proficiency in critically comparing borderline theft cases.[318] This particularly played to the strengths of professional judges who had on average, 30 years of legal practice experience behind them before they began to train as District judges.

Secondly, for all 12 professional judges there was a mutual recognition that theft offenders were often highly recidivist and therefore were usually repeatedly sentenced by them. This led professional judges to develop a familiarity with the personal problems suffered by repeat theft offenders and an understanding of the subjective impact of various reform chances applied to them. As one English professional judge concluded, the local community of thieves and judges over time will get to know each other well. This inevitably creates an intimate reform relationship that is based on empathy and a battle of wills as judges attempt to persuade theft offenders to stop their theft re-offending and understand their personal problems. If there is a success in reform, it is not so much achieved by a consistent sentencing approach, but by the subjective conscious recognition by the theft offender that change is necessary, supported by the familiar personality and will of the presiding judge. This supports the argument that retaining subjectivity within consistency of approach regulation has significant value.

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[318] For one English professional judge the broad advice expressed in the custody threshold case of *R v Howells (Craig) [1999] 1 All E.R. 50* was particularly useful. Lower Court judges were advised to consider the type and degree of the defendant's criminal intent, i.e.) planning. The level of harm caused to the victim, i.e.) physical and mental injury, permanence, culpability admission, previous convictions, sentencing responses and good character. Finally, a proportional response in light of accepted sentencing aims was considered a useful focus, i.e.) public protection through retributive punishment, deterrence and reform.

Judicial self review of these reform chances and their effectiveness was seen as a helpful tool aiding sentencing approach consistency. For a small number of professional judges, i.e.) 3 English and 2 Danish, useful consistency of approach came support from different sentencing practice guidelines and the broad ranges that they provided. In England, this took the form of SGC guideline prescribed ranges on various theft offences. In Denmark, staying consistent with Rigsadvokaten (State Prosecutor) theft sentence suggestion ranges was considered important. As one Danish professional judge further explained;

> *"What I do is to base my decisions on my past experience over many years and use this to assess whether my sentences are within the limits that can be accepted by Prosecutors that of course can later appeal if they are not in agreement."*

For all 6 English and 6 Danish lay judges there was one shared sentencing approach practice which significantly shaped consistent custody threshold decisions, i.e.) the sentencing panel deliberation process. In both England and Denmark, this involved a positive negotiation approach supported by a Chair person which eventually led to a consensus panel decision. However, the legal skills and experience of the English and Danish Chairperson differed as well as their permitted level of intervention within the sentencing deliberation process. In Denmark, the professional District Judges' guidance on case law and direct involvement in guiding lay judges within panels was considered highly influential to the consistent approach of custody threshold decisions.[319] In England, the Court Clerk provided legal advice on case law, but they were considered moderately influential because they did not always directly intervene and guide lay sentencing panels unless they were first prompted by the lay judges to do so.[320]

Unlike their Danish lay counterparts, all 6 English lay judges felt that the SGC sentencing guidelines were highly influential in structuring their theft case analysis

[319] This was supported spontaneously by all 6 Danish lay judges.
[320] For 3 English lay judges the legal advisor was considered a moderately influential source for sentencing consistency guidance based on case law.

throughout the trial and during the sentencing panel deliberations afterwards.[321] Unlike their English lay counterparts, 2 Danish lay judges felt that there was a low influence from comparing theft case facts to wider societal judgment norms. These judges specifically felt it was important to remain consistent with and informed of the societal norms they perceived to be present within the local media, public and political values.[322]

[321] For 2 English lay judges, regular SGC guideline support training further entrenched this consistency of approach reliance.

[322] Wider societal values denoted what the dominant and prevailing attitude towards the theft offence was at any given time.

2.) Comparing the influence from seriousness guidance on the English and Danish theft sentencing approach:

"Current guidance on what constitutes seriousness in theft offences is always clear and easy to apply."

To what extent do you agree with this statement on a scale of 1 - 5?
(Blue denotes the English judicial response.)
(Red denotes the Danish judicial response.)

Strongly agree		**Not sure**		**Strongly disagree**
1	**2**	**3**	**4**	**5**
2	**7****	**1**	**2**	**0**
1	**8****	**2**	**1**	**0**

For both the 12 English and 12 Danish judges, the above statement's meaning was interpreted similarly. All judges felt they were being asked to assess the relative effectiveness of applying current theft seriousness guidance sources to diverse case facts presented in Court. This left the precise source of theft seriousness guidance open to the judge to spontaneously interpret as they deemed appropriate. The statement was deliberately controversial, i.e.) *"always clear and easy to apply,"* in order to test levels of judicial contentment and promote deep analysis of what effective application means in sentencing practice. Comparing the judicial responses on the 1 – 5 scale indicated that overall there was a similar high level of positive Danish and English judicial contentment with current theft seriousness guidance. However, the Danish and English judicial reasons given for this majority agreement with the statement differed. In England, 9 judges (5 lay, 4 professional) and 9 Danish judges (5 lay, 4 professional) agreed with the

statement. The primary English theft guidance source was the SGC theft guidelines.[323] The primary Danish theft guidance source was the Higher Court theft case law.[324]

There was a common judicial consensus that their respective guidance source focus was presented in a clear and easy to use way. Firstly, this was based on openly drafted simple questions that led both Danish and English judges to predictable and logical answers. There were specific seriousness examples provided within both English theft guidelines and Danish theft case law. The English SGC guidelines were helpful because they were offence specific and set a common standard for theft seriousness that was becoming more and more familiar. In Denmark, more broadly defined and detailed theft case facts were provided within case specific sentencing judgments. Seriousness was defined through the comparison of similar fact theft case law, which through repeated sentencing application was established as the familiar and common standard for theft seriousness. Secondly, for those judges that agreed with the statement there was some confusion about what the dominant judicial method of interpretation was.[325] There were different judicially perceived sources of control over the entire sentencing approach guidance sources in Denmark and England. This directly impacted the judicial perception of clarity and ease of application of theft offence seriousness.

In England, the judges described an objective approach structure within the guidelines which meant that the appropriate interpretation of seriousness was initially pre-defined by the SGC through step by step processes. This opens up judicial disempowerment concerns regarding the membership of the SGC, it independence from the executive and who has ultimate control over it. In Denmark, the judges were clear that seriousness was completely judicially predefined through Higher Court theft case

[323] Additionally 3 English professional judges also mentioned the broad guidance provided within Appellate Court defined theft case law.
[324] This was found within the regularly updated online databases: *'Tidsskrift for Kriminalret'* [TfK] and *'Ugeskrift for Retsvæsen'* [UfR] which are both provided by Forlaget Thomson. For a minority of judges there was a preference for annually published books: *'Dommi i Kriminel sager'* which is also provided by Thomson.
[325] This before they were asked to expand upon the most to least influential sources of theft sentencing guidance upon them.

law precedent.[326] Both English and Danish judges who agreed with the statement felt that clarity and ease of application was further enhanced by their subjective searches for the most appropriate and similar seriousness thresholds within theft case law. In Denmark, the application of judicial precedent to determine theft case law ranges and to guide regarding an appropriate sentence has remained unchanged for centuries and is very familiar. However, in England the relatively new requirement supported by legislation that judges must extensively justify any deviation from SGC guidelines first and foremost was commonly felt by all 9 judges as reducing the influence of Higher Court theft case law. There are extensive duties placed on Courts to provide the reasoning behind and the impact of any sentence imposed under section 174 of the Criminal Justice Act (2003). The directive word **must** (highlighted in bold throughout) is repeatedly used.[327] In comparison, the Straffeloven, section 80 requests that judges **'shall normally consider'** various general sentencing factors. Aggravating and mitigating factors are then more specifically listed down in sections 81 and 82 which judges should 'normally consider', but there are no prescribed limitations within legislation for how judges may deviate from the wide sentencing range for theft stipulated at section 276. How Danish judges may justify a deviation is instead guided by previous theft case law norms.

For 4 English judges (3 professional, 1 lay) there was slightly more negative unease expressed in relation to using previous theft case law to successfully support a deviation from the SGC Guidelines. All 12 English judges similarly felt that in removing the deviation option, they would have little option but to retire. Retaining some sentencing discretion was considered of key importance. Although it was early days and there was some fear of difficult future deviation justifications from the SGC theft guideline seriousness ranges, there was still a majority judicial faith (8 judges – 3

[326] There was however a minority concern expressed by 2 Danish professional judges regarding the increased influence of popular punitive politics. This was evidenced by the increased frequency of sentencing legislation where offence seriousness was more specifically defined and linked to harsher punishments in order to satisfy the perceived majority views of the Danish electorate. Although theft offence seriousness currently remained a case law precedent defined concept controlled by the Higher Courts, these 2 professional judges felt this was only because theft was not particularly politically contentious unlike violent and sexual offences.

[327] Section 174 is stated in full in the appendix.

professional, 5 lay) in ultimately being able to deviate successfully if the interests of justice were being impugned. As one English professional judge concluded;

> *"There was a time when we had only guidance cases from the higher courts, but it feels like this case law precedent approach has been replaced by SGC guideline norms. The SGC guidelines have become the dominant guidance because all justifications for deviation are based on the standards of seriousness which they have set. These standards are clear and easy to apply largely due to the provisions made for justified deviation. However, I am not alone in feeling that we could be forced into a position where we have to impose a sentence which is against the interests of justice. This is either because an offence is more serious than the prescribed seriousness range suggests or vice versa. With the influence of theft case law precedent from the Higher Courts undermined I feel less confident in judge-made law. It is difficult to justify individual deviations from what are becoming ever more detailed and collective SGC guideline sentencing expectations."*

For the remaining minority, i.e.) 3 Danish judges (2 professional, 1 lay) and 3 English judges (2 professional, 1 lay), there was disagreement with the statement. There was one shared judicial sentiment between all these judges. This was based on a common acceptance of some anomalous or difficult interpretation of theft seriousness within diverse case facts. Both Danish and English judges referred to a common publicly held misperception of sentencing simplicity. Fines linked to offence seriousness could work for simple strict liability road traffic violations where no discretion was required.[328] However where more complex human interaction and intent were involved, i.e.) in theft offences, there was a greater danger perceived by judges that a fine could be applied unfairly. Two specific and different judicial sentiments were expressed by the 3 Danish judges and 3 English judges respectively.

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[328] There was a shared acceptance that police could issue on the spot fines fairly provided that the evidence for such fines could still be disputed before judges if a person so desired. There was also a shared judicial dislike of any prescribed fine grids for any criminal offences of intent that omitted the use of judicial discretion entirely.

For the 3 English judges, there was a shared concern that the prescribed ranges for theft offences within the SGC guidelines were too restrictive. There was particular judicial discontentment expressed in relation to limited custodial usage and maximum lengths of incarceration in the Magistrates Courts.[329] Longer custodial sentencing powers were sought by these two District Judges and one Magistrate. This was in order to reduce costly Crown Court trials and better protect the public for greater period of time from the most prolific alcohol or drug addicted theft offenders. Increasing maximum custodial sentences beyond 2 years was favored in light of current community punishment mixes of any length failing to deter or reform the most hardened repeat theft offenders. These judges specifically noted that for many addicted theft offenders, community punishments were much too onerous for them to ever complete, thus diminishing the future hope of encouraging their rehabilitation in this way.

For the 3 Danish judges, there was a shared concern that the theft sentencing judgments of the Higher Courts were too broad. It was felt that the high volume and diverse array of complex theft sentencing judgments that judges felt compelled to sift through could potentially hinder their effective application. This meant that more often than not a subjectively defined conformity with High Court sentencing practices on seriousness was followed. As one Danish professional judge concluded;

> *"On theft, there is wide span of offenders and sentencing options for them. You mainly find guidance in previous theft case judgments. It can be quite difficult to take in as many of these judgments as you would like which makes them unclear at times. It therefore becomes very much a daily routine approach where you initially consider where seriousness is likely to be on the case facts you have read before going into court and your sentencing experience. You then amend this*

[329] On commencement of Section 154 of the Criminal Justice Act (2003) the maximum sentencing length for one offence will be 12 months custody. Section 155 will amend the Magistrates Courts Act (1980), adding to the powers in section 154, by giving magistrates the power to impose a custodial term of 65 weeks in respect of two or more offences to be served consecutively. These provisions have not yet commenced and there appears to be no current plans to do so. See further this link for the precise statutory wording: http://www.opsi.gov.uk/acts/acts2003/ukpga_20030044_en_14#pt12-ch1-pb4-l1g154

seriousness decision depending on the case facts you hear that day, Prosecutor and Defence submissions, the two lay views and your own view. I try to be consistent with the assessment of seriousness that I think an appeal court would make based on their previous judgments."

3.) Comparing the respective influence from various guidance sources on the English and Danish theft sentencing approach:

Expand on the above statement in light of the respective impact that each of the following theft sentencing guidance sources currently has on your discretion:

We are looking at the most top 2 here – (out of 24) where M means Most.

(Blue denotes the English judicial response.)

(Red denotes the Danish judicial response.)

A) **Formal legislation on sentencing theft cases** M=4 M=7
B) **Appellate Court theft sentencing guidance** M=4 M=10**
C) **Online Databases and Official Court theft sentencing guidance books** M=1 M=6**
D) **Local judicial sentencing policy and training** M=3 M=1
E) **Executive led theft guidelines** M=10 M=0**
F) **Any other theft sentencing guidance source** M=1 M=0

Expand on the above statement in light of the respective impact that each of the following theft sentencing guidance sources currently has on your discretion:

We are looking at the least top 2 here – (out of 24) where L means Least.

(Blue denotes the English judicial response.)

(Red denotes the Danish judicial response.)

A) **Formal legislation on sentencing theft cases** L=5 L=3
B) **Appellate Court theft sentencing guidance** L=2 L=0
C) **Online Databases and Official Court theft sentencing guidance books** L=9 L=1**
D) **Local judicial sentencing policy and training** L=5 L=6
E) **Executive led theft guidelines** L=2 L=12**
F) **Any other theft sentencing guidance source** L=1 L=2

Introduction:

The Danish and English judges' discussions regarding the clarity and application effectiveness of theft seriousness, naturally led on to a more detailed analysis of various types of theft guidance source and their respective impact on discretion. Spontaneously, the English judges had already focused on the SGC theft guidelines whilst their Danish counterparts had focused on the Higher Court theft case law. Thus it was not too surprising to see this similarly backed up within the expanded judicial analysis of various theft sentencing guidance sources, i.e.) A, B, C, D, E, and F. The relative impact of these various guidance sources was determined using two measures. Firstly, each guidance source was counted each time a judge nominated it as either the most or second most influence. Secondly, each guidance source was counted each time a judge nominated it as either the least or second least influence. This provided the scores out of 24 for most influence and least influence respectively as seen on the previous page. For the English judges, executive led theft guidelines had the highest impact, i.e.) M = 10 and L = 2. However, compared to the Danish judges there was an opposing rejection of executive led theft guidelines having any impact at all, i.e.) M = 0 and L = 12.

E.) Comparing the influence from Executive led theft guidelines on the English and Danish theft sentencing approach:

For all 12 English judges there was a shared acceptance of the SGC as executive led, despite the deliberately controversial sentiments intended to test their reactions by the researcher. There is wider debate about the extent to which the executive and legislature should be involved in the approval of SGC Guidelines. To place politicians in ultimate control of guideline approval increases their democratic accountability, but creates the risk of short term politically expedient sentencing guidelines. For those in favour of a Diceyan constitutional model which seeks to separate and balance Government power between the executive, legislature and judiciary, a Parliamentary led SGC guideline approval process is a concern. This is because it interferes with a long established tradition of unfettered and independent judicial discretion to interpret the

sentencing ranges laid down by statute.[330] There was however, a split in English judicial perceptions either in positive support or negative dislike of the SGC theft guidelines that were produced to help guide their sentencing approach. For the majority 8 judges (3 professional, 5 lay) there was a negative dislike of SGC guidelines, despite them having the most influence upon their sentencing approach. There were three common judicial reasons provided.

Firstly, as the judicially perceived dominant source of guidance due to high accessibility in Court and strong legislative support[331] the SGC guidelines on theft undermined and limited the pragmatic ability to choose alternative theft guidance sources.

Secondly, these judges considered the growth of political interference in sentencing approach regulation as bordering on unconstitutional. The increased frequency of sudden and strong shifts in executive sentencing policy directly leading to intensive consultation then swift new SGC definitive guidelines which in turn redefined the related case law was distrusted.[332]

Thirdly, the extensive judicial consultation process organized by the Sentencing Advisory Panel which preceded the production of any definitive SGC guidelines, whilst nobly intended was considered to be deeply flawed. These judges considered that the judicial consultation process suffered from too much political administrative bureaucracy, which was too costly and inefficient. As one English lay judge regretfully concluded;

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[330] Why the deliberately controversial phrase *'executive led theft guidelines'* is used is previously explained in Chapter one and the methodology section. For further analysis see: Lord Justice Gage (2008). *Sentencing Commission Working Group: Sentencing Guidelines in England and Wales - An Evolutionary Approach* (pp. 1 - 45): Ministry of Justice: HMSO, Chapter 8 at p 31.

[331] This was based on the Criminal Justice Act (2003). Section 172 stipulates that judges must follow the SGC definitive guidelines produced. Section 174 (2)(a) stipulates that judges must extensively justify any deviations from prescribed SGC guideline ranges in open Court.

[332] For 4 lay judges a common example of this was production by the SGC of a knife crime guideline in response to intense political and media focus. See further the following link: http://www.sentencing-guidelines.gov.uk/docs/sentencing_guidelines_knife_crime.pdf [accessed Dec 2009]

> *"Certainly we are consulted when new SGC guidelines are being considered. However, the incessant amount of paperwork to go through and questions to answer, often over a hundred pages per guideline consultation is not conducive to us individually replying to it. Constant lengthy emails each day is overwhelming to extremely busy judges who often sadly have no option but to ignore them. This makes a mockery of a democratic consultation process as valuable individual Magistrates' voices are lost to larger interest groups with more time to go through it all."*

For the remaining minority 4 judges (3 professional, 1 lay) there was positive support for and faith in the general utility of SGC guidelines. There were two common judicial reasons provided. Firstly, there was a judicial perception that the production of most new SGC guidelines had suffered from only a low level of political influence. Instead, the integral sentencing practice concerns of the wider judiciary had for the most part been properly considered during consultations and been appropriately acted upon. Secondly, most members of the SGC were trusted and respected as impartial expert advisors, independent from their Home Office paymasters. This coupled with the diverse array of experiences meant that these judges were confident that SGC members adequately represented the interests of the wider judiciary and enhanced their sentencing approach. As one English professional judge noted;

> *"Most members of the SGC are extremely experienced people in sentencing law. Those who are not members of the judiciary have valuable experience to add and it is a meeting of intellects to give us a more rational and sensible sentencing approach,"*

In comparison, the majority 10 Danish judges (4 professional, 6 lay) considered that there was no influence from executive led theft guidelines. These judges considered that no dominant guidelines existed to influence their theft sentencing approach yet. There was however a common judicial recognition that political interest in popular

punitive punishments[333] had intensified since 2001. This political interest had evolved into a new trend towards extensive legislative commentary which judges digest both before and after formal enactment into the Straffeloven. The extensive commentary included information on the legislations background, purpose and recommended future interpretation by judges.[334] For these judges, there was no specific political interest noted in theft offences yet.[335]

For the final remaining 2 Danish professional judges there was a minority interpretation of a low influence coming from executive led Rigsadvokaten (State Prosecution Service) Guidelines. They were considered executive led due to the close involvement of the Ministry of Justice in the regulation of public prosecutors.[336] Within these guidelines the state of the law based on legislation and case law was felt to be concisely and effectively summarized. This involved the use of hypothetical theft case examples together with recommended sentence suggestion ranges. These guidelines were considered to be persuasive, partly because they are easily accessible online and partly because they are regularly consulted by the Higher Courts. As one Danish professional judge further explained;

> *"Although the Rigsadvokaten guidelines do not have a proper democratic mandate, they have become an authoritative theft guidance source. There has been a long term custom of guidelines used by Danish prosecutors, which have been extensively referred to in both lower and higher court proceedings. This has*

[333] The judicial perception was of an increased right wing political drive for harsher retributive, deterrent and denunciatory punishments. These judges felt that politicians *wanted* to influence how they applied fines, community sentences and most especially made use of custody.
[334] For the possession of a knife or drink driving the political debate strongly favoured custody for a fixed term. This was before the complex application of diverse case facts had been applied by judges in Court.
[335] There was a specific political interest noted by these judges in violent and sexual offences, drug offences and road traffic offences.
[336] This has legislative support under the Danish Administration of Justice Act – Consolidated Act No. 809 of 14.9.2001 of The Danish Ministry of Justice, Part 10, Section 98 which states: "The Minister of Justice is the superior of the public prosecutors and supervises these.
(2) The Minister of Justice may lay down conditions governing the execution of the work of the public prosecutors.
(3) The Minister of Justice may issue orders to public prosecutors concerning the processing of specific cases, including whether to commence or continue, refrain from or end prosecution.
(4) The Minister of Justice hears appeals of decisions made by the Director of Public Prosecutions as first instance." This legislative excerpt can be found at: http://www.rigsadvokaten.dk/ref.aspx?id=765

led to them being gradually relied upon by District Judges. I think their increasing influence today is because they are more easily accessible on the internet. However, there is no doubt that if there is a difference of opinion on a theft legal problem between the High Courts and the Rigsadvokaten guidelines, then we District Judges would adhere to the High Court."

C.) Comparing the influence from online databases and official court sentencing guidance books on the English and Danish theft sentencing approach:

Alternative theft sentencing guidance sources in the form of online databases and official court sentencing guidance books were considered to be of higher influence in Denmark compared to England, i.e.) M = 1 and L = 9 in England, M = 6 and L = 1 in Denmark. For the English judges, overall there was a negative and limited impact perception of using these two types of theft sentencing guidance in Court when sentencing theft offenders, i.e.) L = 9.

All 12 English Judges commonly considered that there were no online databases easily accessible and available in Court especially for their own judicial case law analysis.[337] Thus there was a strong judicial perception in England (both professional and lay) that the impact of online databases on their sentencing approach was at best minimal. Whilst the English professional judges shared a working practice norm backed up by their extensive legal education, training and practice of searching through and learning from academic sentencing practice books, the English lay judges felt that they lacked these specialist legal research skills. Thus in order for English lay judges to keep up to

[337] There was some judicial recognition by 2 professionals that online versions of 3 yearly updated academic sentencing practice books were produced, i.e.) Archbold Magistrates' Courts Criminal Practice, Stones Justices' Manual and Thomas Current Sentencing Practice. However, these judges did not feel there was enough time in Court to utilise these book or online resources extensively during their theft sentencing approach. These judges shared a common judicial belief that more comprehensive theft case law content and diverse legislative interpretations by academics could enhance their use of theft case law in Court. However, this would require financial investment in terms of IT logistics, reduced economic efficiency pressures and judicial online database training. Yet despite these hurdles these judges both concluded that the end result would be worth it. More regularly updated and comprehensive theft case law content could be provided by expanding judicial usage in Court of currently available online databases, i.e.) Westlaw UK (http://www.westlaw.co.uk/) provided by the Thomson Corporation and LexisNexis (http://www.lexisnexis.co.uk/) provided by Reed Elsevier (UK) Ltd.

date with theft case law, legislative content and diverse academic interpretations of these legal changes, the Court Clerk (legal trained advisor) was heavily relied upon to critical analyze various academic theft sentencing guidance books.

For all 6 English lay judges, there was a common positive feeling that the legally trained advisor was the authoritative legal knowledge source and a valuable guide to the diverse academic sentencing practice books that were produced. The English Magistrates' Court Clerk as a legally trained advisor for the panel of three English lay judges in the Magistrates Court takes on the same authoritative legal knowledge source role of the professional District judge guiding the two lay judges in the panels sentencing within the Danish District Courts, albeit in a less direct and inclusive way. If we were to have Danish style sentencing panels in England, this would negate the need for Court Clerks with legal training. For policy makers, the real question is would this save money in a Criminal Justice system which is sensitive to continuing economic efficiency pressures from the government and the general public. What about the loss of valuable human resources?

The majority view of 5 English professional judges and 4 English lay Magistrates was to place online databases and official court sentencing books as having a low influence, i.e.) L = 9. For these 9 English judges there was a shared recognition that some positive use could be made of academic case collection books during trial and at the sentencing deliberation stage.[338] However, these judges commonly concluded that due to the high volume of theft cases they sentenced each day, there was little Court time available for them to properly consult these books and for them to have a significant benefit on their sentencing approach.

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[338] There were three specifically mentioned yearly publications of influence on law, practice and procedure in the Magistrates' Court that were considered to have an informative benefit, i.e.)
1) District Judge B. Barnes (2008 Sep). Archbold Magistrates' Courts Criminal Practice 2009 (Fifth ed.). London: Sweet & Maxwell Publishers.
2) Carr, P. Turner, A. (eds). (2009 June). Stone's Justices' Manual 2009 (141st ed. Vol. I,II,III, & CD Rom). London: Lexis Nexis Butterworths.
3) Thomas, D. QC (ed) (2009). Current Sentencing Practice (Vol. 1 - 5). London: Sweet & Maxwell Publishing Ltd.

In comparison, there was a positive and moderate impact perception of using both online databases and various sentencing practice books to guide the judges' sentencing approach in Denmark, i.e.) M = 6.[339] Overall, the helpful utility of both online databases and official court sentencing guidance books was praised by 5 professional and 3 lay judges. The application of the annually published case collection book, i.e.) 'dommi i kriminel sager' which is provided by Thomson was considered the most commonly available and referred to resource in Court.[340]

However, for 3 Danish professional judges and 1 Danish lay judge, the most up to date and easily accessible theft case law content was provided by the online databases, i.e.) 'tidsskrift for kriminalret' [TfK] and 'ugeskrift for retsvæsen' [UfR] which are both provided by Forlaget Thomson.[341] Similar to their English judicial counterparts there was significantly more Danish professional judicial recognition, i.e.) by 3 professionals and no lay judges, that academic sentencing practice books were produced and could be highly beneficial to their sentencing approach.[342]

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[339] This group of 6 judges who commonly placed online databases and official court sentencing books as having a high influence were all professionals. For the lay judges there was little influence from these two legal knowledge sources due to their seeing the professional judges as being the authoritative guides to legal knowledge interpretation.

[340] This was directly referred to comprehensively by all 6 professional and by 4 lay judges as supporting their analysis of the Danish Criminal Code with less common reference made to the *'bekendtgørelse af straffeloven'* also available online at www.retsinformation.dk. For 2 professional judges and 1 lay further legislative advice could be found within the *'lovtidende'* journal available online at www.lovtidende.dk. Additional legislative, case law and academic commentary was provided by the Thomson publishing book series *'Karnovs Lovsamling'* available online at www.thomson.dk.

[341] For 1 professional judge and 3 lay judges the online databases provided by Thomson could benefit from greater coverage of all theft cases in the District and High Courts. There was also a shared preference by these judges for more in-depth judicial analysis of case law decisions.

[342] There were three specifically mentioned publications of influence on law, practice and procedure in the District Court by these judges, i.e.)

1) Greve, V. Jensen, A. Toftegaard Nielsen, G. (2005). Kommenteret straffelov - Almindelig del. 8. omargbejdede udgave. Copenhagen: Jurist- og Økonomforbundets Forlag. This general legislation commentary book provided additional information on theft sentencing ranges and sanction possibilities.

2) Greve, V. Jensen, A. Dahl-Jensen, P. Toftegaard-Nielsen, G. (2008). Kommenteret straffelov. Special del. 9. omarbejdede udgave. Copenhagen: Jurist- og Økonomforbundets Forlag. This general legislation commentary book provided additional information for judges on how to interpret the section 276 definition of theft (*tyveri)*. The book expands into a detailed analysis of specific theft offence categories with supporting case law examples.

3) Smith, E. Jochimsen, J. Kistrup, M. Lund-Poulsen, J. (2008). Straffeprocessen (Second ed.). Copenhagen: Forlaget Thomson. This criminal procedures book provided wider analysis of penal code processes and Court administrative reforms.

B.) Comparing the influence from Appellate (High) Court on the English and Danish theft sentencing approach:

Comparing the overall influence of Appellate (High) Court theft sentencing guidance on the English and Danish lower Court sentencing approach showed a much higher impact in Denmark, i.e.) M = 10 and L = 0, than in England, i.e.) M = 5 and L = 2. The detailed judicial commentary provided revealed more as to why this was the case.

For the Danish judicial majority, i.e.) M = 10 (6 professional, 4 lay) the theft case law guidance provided by the High Courts was highly important. Both professional and lay judges were united in the view that diverse High Court theft case law fleshed out the broadly defined theft offence under section 276 of the Straffeloven. Indeed no Danish judge, whether professional or lay place this guidance source as least influential, i.e.) L = 0. The reason for such strong judicial sentiments rested on the well established legal tradition of judicial precedent which had preserved flexible discretion and maintained extensive sentencing ranges. Interestingly, on being repeatedly questioned about the potential restrictions placed on judicial discretion by Danish High Court case law guidance, no Danish professional was concerned. Instead, the tone and language adopted by the Higher Courts was praised as non-directive with recommended sentence ranges. What was most helpful was the specific focus theft case law provided which was regularly updated through new judgements. As one Danish professional judge concluded;

> *"With regard to High Court and Supreme Court decisions, of course they have a crucial impact. They are absolutely determining the direction of sentencing approach guidance. You may say that the Appellate Court sentencing practices are the primary source which guides the interpretation of formal legislation."*

For the remaining minority 2 Danish lay judges who considered High Court theft case law of moderate influence there was a shared recognition that former, similar fact theft cases with range norms were pre-selected for them by the professional judge. These

2 judges considered this process to be slightly limiting as they had not been fully able to *seek* similar fact case law with sentence choice examples for themselves. These 2 lay judges felt they were proficient enough to independently consult the most up to date and easily accessible theft case law content which was provided by the online databases, i.e.) 'tidsskrift for kriminalret' [TfK] and 'ugeskrift for retsvæsen' [UfR]. For the other 4 Danish lay judges, how the professional judge as Chairman performed his or her case selection role, i.e.) by pre-selecting similar fact theft case law was strongly supported.[343]

Overall there was a moderate influence from Appellate Court theft case law guidance in England. However, beneath the surface the individual judges interviewed were split as to just how influential similar fact theft case law was to their sentencing approach. This level of division was reflected in 6 judges providing definitive opinions, whilst the other 6 judges remained neutral and non-committal. For the 6 judges with definitive opinions, the professional judges derived much more influence from previous, similar fact theft case law than their lay counterparts, i.e.) M = 4 (4 professionals) and L = 2 (2 lays). For the remaining ambivalent 6 judges, particularly the lay Magistrates erred in providing concrete and detailed arguments as to how relevant and helpful High Court theft case law was, particularly when dealing with low seriousness and frequently occurring theft, i.e.) 4 lays and 2 professionals. For the 6 judges with definitive opinions, the source of their division to either positive or negative perception of theft case law was based upon different training, educational background and levels of Court room procedural knowledge, i.e.) working practice norms.

For the 4 professionals that positively considered High Court judicial precedent as very influential, there was a shared perception of a low reliance on the theft case law selected by the prosecution and defence advocates. The content of previous, similar theft case law was largely pre-defined by the two Courtroom actors, i.e.) prosecution and defence counsel. It was their submissions during trial in support of, or criticism against relevant theft case law which determined what cases were analysed and how by the

[343] For 3 lay judges there was specific mention of a positive negotiation and consensus based approach by the professional judge in the panel which they welcomed as helpful and constructive.

judges at the sentence deliberation stage.[344] Instead, due to their extensive legal education, training and experience they were used to independently seeking, finding and critically evaluating the theft case law selections submitted before them. For these judges, the most persuasive High Court theft case law looked at specific case facts and sought to guide the interpretation of these factors through legal tests, definitions and recommended sentencing ranges.[345]

However, for the 2 lay judges that negatively dismissed Appellate Court judicial precedent as having a minimal impact, there was a very different shared perception of high reliance on theft case law selected by the prosecution and defence advocates. There was shared concern that a Magistrates' legal training primarily focussed on following the SGC guidelines rather than on respecting Appellate Court precedent and developing critical case law analysis skills. The seeking, finding and critical testing of case law selections submitted before them largely rested with the discretion of the Court Clerk whose legal knowledge and skills were relied upon in Court. For these 2 judges, there was criticism that the Court Clerk (legal advisor) only rarely selected similar fact case law examples for them to critically consider, particularly on common theft sentencing issues. This all contributed to a minority lay judge feeling of remoteness from the sentencing guidance advice of the Court of Appeal. Instead, High Court case law advice was considered to be usually peripheral to the SGC guidelines. As one English lay judge further explained;

> *"I know the Appellate judges do give sentencing guidance in their cases. However, this is rarely taken on-board in Magistrates' Court sentencing practice. I have never known any strong influence, unless perhaps it is also reported in the media of the Court of Appeal affecting our sentencing practices. It is just what a few Appellate Court judges say. Unless it is formally incorporated into*

[344] For 4 professional judges there was a further perception that theft case law guidance selected by both Prosecution and Defence advocates had diminished over their sentencing careers, particular after the introduction of the Sentencing Guidelines Council under the Criminal Justice Act (2003) to replace the Magistrates Association and Court of Appeal (Criminal Division).

[345] The 4 professional judges specifically lauded the Higher Court theft guidance cases of: 1) *R v Howells [1998] Crim LR 836* on offence seriousness and custody threshold; 2) *R v Page (2005) 2 Cr. App. R. (S.) 37* on highly recidivist shop theft; 3) *R v Ghosh [1982] QB 1053* on subjective dishonesty in theft.

legislation its impact is very limited. Cases are mentioned in Court, but they are clarifying rather than changing decision making as we don't have to follow it unlike the SGC guidelines. There are however, some specific sentencing factors such as determining the impact of the hooded theft offender as an aggravating feature which are helpfully examined within Appellate Court theft case law."

For 2 lay Magistrates, who had sentenced from the 1970's there were some important spontaneous recollections about their past sentencing approach. These judges felt that historically the current remoteness of Court of Appeal case law guidance in the Magistrates' Courts had its roots in the early 1980's. At this time, local judicial peer review and pre-rating of common theft starting points occurred. There was no natural tendency or opportunity for the Court of Appeal to comment upon everyday lower Court cases and thus regulation from this source was limited and guidance remained broadly defined. However, firstly these judges agreed that simple theft cases remained fairly decided upon their merits. Secondly, on more complex theft cases, the advice from the Higher Courts was particularly valued as a source of judicial led guidance. Magistrates were less concerned about consistency at this time and thus judicial experience and discretion guided the sentencing approach. During the 1990's the regional disparities in sentencing approach were considered to be too inconsistent and therefore the Magistrates Association sought to reduce this through their own guidance. The guideline formation process was later widened to more stakeholders and given strong legislative support when it was taken over by the SGC in 2003. The remoteness perception of the Higher Courts in simple theft matters remains especially for lay English judges. This could *now* be addressed by increasing the guidance influence coming from Higher Court judge led sources in order to counter balance the shift towards a greater politicisation of the sentencing approach.

A.) Comparing the influence from formal legislation on the English and Danish theft sentencing approach:

In both England and Denmark, the judges' role was similarly considered to be the interpretation[346] of the sentencing definitions and ranges set by statute. However, comparing the respective influence from formal legislation on sentencing theft cases revealed Danish judges were more supportive of guidance derived from legislation, i.e.) M = 7 and L = 3, than their English counterparts, i.e.) M = 4 and L = 5. On closer inspection, both English and Danish lay judges proportionally provided more of the positive commentary regarding statutory influence, i.e.) in England M = 4 (1 professional, 3 lays) and in Denmark M = 7 (3 professionals, 4 lays). Whilst the English and Danish professional judges proportionally provided more negative commentary regarding statutory influence, i.e.) in England L = 5 (3 professionals, 2 lays) and in Denmark L = 3 (2 professional, 1 lay). This left 3 English judges (2 professional, 1 lay) and 2 Danish judges (1 professional, 1 lay) providing ambivalent commentary towards statutory theft guidance.

For the 4 English and 7 Danish judges who provided positive commentary one common sentiment was expressed. There was a sincere respect shown for the democratic roots of legislation created from politicians interpreting the public will. This consensual relationship between the government and the governed was the basis of Parliamentary sovereignty. These judges felt duty bound to follow the will of Parliament, so long as it properly reflected the majority public view. The 7 Danish judges then provided two further positive sentiments that were different to their English counterparts.

For the 4 lay judges, there was a common positive view that the professional judges' helpful interpretations of the Straffeloven enhanced the influence it had upon

[346] For 8 English judges (6 professionals, 2 lays) and 6 Danish judges (6 professionals) a preference was shown for a purposive approach to legislative interpretation. The remaining 4 English lay judges and 6 Danish lay judges adopted a literal approach when applying legislation.

their sentencing approach.[347] For the remaining 3 Danish professional judges their task of interpreting the Straffeloven for the lay judges was helpfully supported through preparatory addendum notes. This view was based on the increasing political preference for preparatory addendums. Such notes were supported so long as they were broadly defined and thereby preserved judicial discretion. The notes needed to have a clear focus, use non-directive wording and not be produced so frequently as to make their consultation by judges an overly complex task. The preparatory addendum notes further explained the reasoning behind the broad theft offence frames, were regularly consulted and therefore could be persuasive. As one Danish professional judge further explained;

> *"There is an increasing tendency from legislative drafters to try to more specifically guide judges through their preparatory addendum notes. These preparatory addendums in principle may be mere indications from politicians, but in reality it is all the reasoning for a statute set out in a specific area of sentencing law by the Ministry of Justice. This is persuasive not just as a legal definition knowledge source, but also for indicating where the government wants the appropriate punishment level to be. Since the mid-1990's, violent and sexual offences have indicated within their preparatory guidance where the Government wants the appropriate punishment level to be. However, as far as I am aware, theft offences within the Straffeloven have not received this sort of preparatory addendum guidance yet."*

For the 5 English and 3 Danish judges who provided negative commentary three common sentiments were expressed as to why legislative guidance was remote and peripheral. Firstly, the legislative definitions of theft offences and their broad sentencing ranges were considered to be too generic and simplistic when complex theft factors were being considered. Interestingly, the remaining ambivalent 3 English judges and 2 Danish judges shared this point of view of theft legislation providing a broadly defined

[347] The Danish professional judge was considered to be the authoritative legal knowledge provider for lay judges to utilise. The structured legal mind of professional judges was particularly lauded by lay judges during the trial and sentencing deliberation process for clarifying the proper meaning of formally drafted theft offence definitions.

sentencing framework. This reduced its influence to a general guidance source that could be clarified through the use of specific guidance sources. In Denmark this has already been shown to be the Higher Courts' theft case law, whilst in England the SGC theft guidelines dominate over Higher Court case law largely due to strong legislative backing. Secondly, detailed and repeated discussion of theft offence legislation during trial and at the sentencing deliberation stage was considered to be relatively rare. This placed theft legislation as a guidance source to the back of the judges' minds. Thirdly, the limited sentencing powers of lower Courts in Denmark and England meant that the wider sentencing ranges for theft offences were well beyond the maximum remit of these judges. This led to a shared negative judicial perception of irrelevance in relation to legislative set ranges. Such broadly defined ranges were considered to be better suited to the more extensive sentencing powers of the High/Crown Court judiciary.[348]

For 2 English lay judges, there was an additional detachment from legislation due to their specific working practice norms. The English Magistrate perception of the Court Clerk as the authoritative legal knowledge source also created a perceived negative reliance upon them. These judges specifically noted that the interpretation and relevance of legislation on theft was often left to the Court Clerk's (legal advisor) discretion.[349]

D.) Comparing the influence from local judicial sentencing policy and training on the English and Danish theft sentencing approach:

Overall, the impact from locally created and defined judicial sentencing policy and training was slightly higher in England, i.e.) M = 3 and L = 5, compared to Denmark, i.e.) M = 1 and L = 6. On closer inspection, those judges with definitive opinions at these influence extremes were predominantly English lay judges, i.e.) M = 3 (1 professional, 2

[348] The maximum custodial sentence for theft in England is 7 years under section 7 of the Theft Act (1968). In Denmark the maximum custodial sentence for theft (aggravated) is 6 years under section 286 of the Danish Criminal Code. The lower Courts in England are limited to short custodial sentences (6 to 12 months) well within the maximum custodial sentence prescribed. In Denmark, ordinary theft is limited to 1.5 years custody under section 285 of the Danish Criminal Code.

[349] What is particularly noteworthy is the more negative view expressed by these 2 English lay judges towards Court Clerks as a limitation to deeper case law analysis, whereas the Danish equivalent, i.e.) the professional judges, were praised by 4 Danish lay judges for these same case law analysis skills.

lays) and L = 5 (2 professionals, 3 lays), and Danish lay judges, i.e.) M = 1 (1 lay) and L = 6 (2 professionals, 4 lays). This left a largely professional Danish and English ambivalent response in the remaining 4 English judges (3 professionals, 1 lay) and 5 Danish judges (4 professionals, 1 lay).

For the majority of 10 Danish (6 professionals, 4 lays) and 9 English judges (5 professionals, 4 lays) there was a negative dismissal of local judicial sentencing policy and training as having a high influence.[350] This was based on a similar judicial sentiment expressed in both Denmark and England that localised sentencing policy and training had particularly in the last 10 years been dramatically reduced in scope and thus its relevancy to sentencing theft offences had been significantly diminished. The source of this recent historical change was perceived to be the executive led (New Labour) drive for increased national and centralised sentencing consistency. The SGC was entrusted with this new drive for reform rather than the Court of Appeal which further weakened its influence. Local judicial sentencing policy and training was the principal focus area for national consistency reform. For the 9 English judges, the desire for centralised sentencing could be a danger to applying local common sense. Why? The judicial concern was that their discretion to create local sentencing responses to regionally specific thefts was limited by SGC detachment from their local areas and increased administrative bureaucracy due to an over centralisation of sentencing policy content and direction. There were however, different judicial sentiments specific to each jurisdiction as to the cause of this limited influence and support.

In England, the cause was the firmly identified by the 9 judges as the Sentencing Guidelines Council and the definitive theft guidelines it had produced. These judges all recognised that formal SGC approval was required for any local deviations in judicial sentencing policy and training. Despite the ability to justify their deviations in open Court based upon relevant and reliable local sources of information, i.e.) police and criminal justice board. There was limited judicial faith in being able to affect local

[350] What bolsters these numbers is the less critical, but still concordant sentiments of 4 English ambivalent judges (3 professional, 1 lay) and 4 Danish ambivalent judges (2 professionals, 2 lays).

sentencing policy and training change quickly using discretion so that sporadically appearing local crime fluctuations could be effectively dealt with. These judges negatively perceived that any attempt to consult with the SGC in order to get their approval for local sentencing responses or by going through the appeals process was unclear and difficult. This was based on a shared perception of an overly bureaucratic SGC consultation process that was too slow or completely unresponsive to local sentencing policy and training concerns.

While judicial training offered a valuable opportunity for judges to express their concerns, these judges pointed to a common trend for SGC theft guidelines to be primarily focussed upon. This left Appellate Court theft case law and local sentencing concerns as secondary training influences. As one English professional judge further explained;

> *"There is little local judicial policy on theft allowed anymore. Once you have objectively identified, defined and accepted a prevalent local theft issue and it is representative, then there should be no problem with the local bench reacting to this through their sentencing approach. This allows for prompt local sentencing flexibility. Unfortunately, this does not happen because the SGC don't appear to be listening and responding. It is difficult for specific local issues to get through the widely applied SGC consultation process where they are considered somewhat remote from national concerns. However, you must also be cautious of using subjective local influences such as the media and public when defining a local bench approach. Having said this I should be able to use my common sense to make local sentence deviations with well argued justifications for them. The concern however, is that the SGC guidelines are relatively new and deviations from them have yet to be thoroughly tested and supported by appeal decision precedent."*

In comparison, the 10 Danish judges who negatively dismissed formal local judicial sentencing policy and training as having a low influence commonly pointed to

the national consistency framework administered by the Danish Ministry of Justice. The Danish Ministry of Justice provided broadly defined theft sentencing policy and training which judges applied in a formally consistent locally using High Court theft case law. It was considered highly unlikely that regional Retspresidents (Court Presidents) would need to markedly deviate in any formal way locally. This was because Denmark was considered to be a small jurisdiction with a close knit judicial community that could listen to each other and respond to regional theft sentencing requirements as necessary using High Court judicial precedent. These judges commonly felt that the High Courts recognised and accepted some mild regional differences in sentencing approach in the lower Courts because the Eastern and Western High Courts also deviated slightly.

Whilst both the English and Danish majority judicial view recognised a low influence from formal local sentencing policy and training, there was a difference of perceived impact from informal local sentencing policy and training. Unlike, their 9 English judicial counterparts who felt they had been provided with a largely untested structured deviation approach which they feared would not support informal local sentencing discussions, the 10 Danish judges felt they could still discuss and apply their informal local sentencing discussions to their sentencing approach with High Court support.

There was a strong judicial respect and support expressed by 9 Danish judges (5 professionals, 4 lays) for the High Courts' continued recognition of mild regional differences as sometimes necessary. There was no Danish judicial mistrust expressed regarding a new guidance source which regulated their local approach much differently or imposed a structured deviation approach. Thus the two High Courts still allowed a certain amount of informal common sense to be applied as necessary. The 9 Danish judges similarly felt that District Court structural reforms in 2007 had not just streamlined the administration of lower Courts, but they had also continued to allow judicial peer networks to mildly and informally influence the sentencing approach. As one Danish professional judge further explained;

> *"Informal local policies in District Courts are still detectable. I have worked in many different District Courts and I have encountered local informal traditions of suspending sentences in violent theft cases to a much further extent than the official policy recommends. Whilst this is not a strongly influential guidance source and does not help national consistency, it is a social networking phenomenon which was more dominant before the District Court structural reforms of 2007. One very important effect of these recent reforms is that we have more judges and lawyers collected in fewer Courts. We still invariably influence each other. As professional judges we talk amongst ourselves about our theft cases and any general sentencing policies where we are in doubt to get advice on how to approach our sentencing. This high influence at an informal local level promotes uniformity as we remain respectful of and consistent with established High Court theft case law."*

A significant advantage of the more well established Danish regulatory approach through Higher Court theft case law is that national consistency is achieved through a mutually earned trust and respect between the Higher and Lower Courts. Whilst the SGC guideline approach is clear and structured, it cannot escape the negative perception that it is an external imposition of a new guidance regime that disrupts the bonds between the English Higher and Lower Courts.

For the remaining minority, 2 Danish judges (2 lays) and 3 English judges (1 professional, 2 lays) there was a similar positive support for and a moderate influence derived from local judicial sentencing policy and training. In England, this took the principal form of SGC guideline support with some peripheral appellate court case law discussion. In Denmark, training advice given by professional judges to lay judges in Court on how best to frame their subjective local common sense was the principal norm. Specifically, the remaining English professional judge showed faith in the structured deviation approach from the SGC in order to enhance national consistency. This judge confidently felt that relevant and reliable local information could justify a necessary local deviation which would mean a local sentencing policy could continue as necessary.

However, on further prompting, a cautious concern was still expressed regarding the potential danger of an overly fettered judicial discretion should deviation justification case law not develop freely.

F.) Comparing the influence from any further guidance sources on the English and Danish theft sentencing approach:

In order to capture all the sources of guidance on sentencing, the Danish and English judges were asked to further explain as they deemed necessary any other theft sentencing guidance influences. There was one shared English and Danish recognition of a low influence from regular emails sent from their local Court administration informing them of legal updates in legislation and case law, i.e.) 1 English lay judge and 1 Danish professional judge. The remaining theft guidance sources were specific to each jurisdiction.

In England, 1 lay judge positively praised probation service reports and the sentence recommendations they gave as moderately influential, i.e.) M = 1. At the other end of the scale, 1 English professional judge neutrally mentioned a minimal influence from academic publications and attended lectures which were most helpful when they highlighted and critically discussed sentencing policy and theft case law, i.e.) L = 1.

No Danish judge provided a significant guidance source outside the prompted list. However, at the other end of the influence scale, 2 lay judges identified political discussions about likely law reforms influential as reported within the Folketinget and the Media, i.e.) L = 2. For 1 Danish professional judge, extensive theft sentencing experiences which had developed common sense over time was regarded as having a low influence on the theft sentencing approach.

4.) Comparing Danish and English judicial conclusions on the most influential theft sentencing guidance sources:

Does the original source who has created the above theft sentencing guidance sources affect the degree of influence that each source has on your discretion?

Why? Have you noticed any significant changes over time?

Three additional questions were asked (as set out above) in order to further clarify and conclude upon what the guidance source balance was when sentencing theft offences. Spontaneously the most influential guidance sources were focused upon by the Danish and English judges when discussing this balance. Two very different preferred guidance source balances emerged.

For the English majority, (4 professionals, 5 lays) government guidance sources had a dominant impact, i.e.) legislation and SGC guidelines. Reforms to the sentencing approach were seen as primarily politically led through discussions in Parliament. In particular, the SGC theft guidelines were a legislative creation whose appropriate ranges had to be followed day to day. This meant that they were the most used and relevant theft guidance source. Particularly the 5 lay judges, concluded that Parliament and SGC consultation processes produced more comprehensive and evidentially supported sentencing approach guidance than Appellate Court judges setting case law precedents could provide.

For the English minority, (2 professionals, 1 lay) judicial guidance sources had a dominant impact, i.e.) theft case law and judicial precedent. Judge endorsed guidance reforms that maintained judicial discretion were considered to be the essence of common law evolution over time. For these judges, their independent ability to interpret political

reform was the best way to ensure common sense prevailed and sentencing experience mattered in sentencing.

For the Danish majority, (5 professionals, 5 lays) judicial guidance sources had a dominant impact, i.e.) High Court theft case law and judicial precedent. Judicial discretion, common sense and sentencing experience over time all primarily defined the law. Unlike their English counterparts, no significant political theft sentencing reforms had been created. The Straffeloven had remained relatively silent on the theft sentencing approach and no national guidelines had been introduced. For the 5 lay judges, the professional judge's interpretation of theft case law and appropriate ranges was the principal guidance that they followed day to day.

For the Danish minority, (1 professional, 1 lay) government guidance sources had a dominant impact, i.e.) legislation, political policy and public debate. Reforms to the sentencing approach and recommended range within preparatory addendum notes were considered to be important indicators of public opinion. These judges accepted that national consistency was best achieved by working closely with Folketinget legislative drafters and being receptive to politically recommended ranges.

5.) Comparing Danish and English judicial conclusions on how theft sentencing guidance sources have been re-balanced over time:

Judges were encouraged to reminisce[351] back to the beginning of their sentencing careers regarding changes in the balance of theft guidance influences over time. For all 12 English judges and 9 Danish judges (6 professionals, 3 lays) there were significant changes that had occurred over time. For a minority of 3 Danish lay judges, no significant change could be documented because their sentencing careers were shorter than 4 years. The judicial perceptions provided were either positive or negative and focused on power shifts towards either judicial guidance sources or government guidance sources. Three decades emerged from both the Danish and English sentencers, i.e.) 1980's, 1990's and 2000's. Within these decades, the changes in political interests greatly impacted the development of sentencing approach guidance in both jurisdictions.

In the 1980's, the 9 Danish judges commonly identified general preparatory guidance addendums within legislation.[352] Judicial sources, i.e.) Higher Court theft case law, were considered to be the only way to understand broadly defined legislation. Judges themselves shaped the sentencing law by filling in the gaps left by broadly defined legislative addendums.[353] Political interest was low and therefore had a limited impact on the sentencing approach. In England during the same decade, the 12 judges commonly identified a general judicial guidance structure led by the local bench and senior judicial peers.[354] Similarly, judicial precedent within theft case law was

[351] There is some doubt as to whether recollections of past events are an accurate and relevant depiction of the sentencing approach debate over time. However, judges were keen to provide their own thoughts in this area which made their inclusion important in terms of open representation as well as thought provoking to the reader.
[352] The general guidance from legislation about how to sentence theft within broad ranges is detailed within the Straffeloven (Danish penal code) at Chapter 10.
[353] For 2 professional judges, filling in the gaps during the early 1980's meant following the case law sentencing tradition that theft was punished severely. Theft gradually lost its severity of approach as other offences, drugs, alcohol, violence and sexual crimes attracted political interest. In addition, as Danish living standards and affluence improved and this combined with insurance becoming more widespread, this meant that the negative impact of theft offences on the public was felt to be less severe.
[354] The local bench guidance structure was criticised by 2 lays judges as operating closed selection procedures which were not transparent and properly accountable to the public.

considered to be the only way to understand broadly defined legislation. There were also some local guidelines in England beginning to emerge.

By the early 1990's, an online information age was improving communication networks. For the 12 English judges and 9 Danish judges a moderate political interest in sentencing was emerging.[355] In England, this reflected a political belief in custody, whilst in Denmark, reformative approaches were more in political favor. Specific preparatory guidance addendums in legislation were beginning to emerge in Denmark, subject to Higher Court affirmation. Principal theft case law guidance however, remained with judicial precedent. In England, there was a similar specific focus emerging with local sentencing guidelines giving way to the Magistrates' Association national guidelines and improved Higher Court judicial peer training. Importantly, in both jurisdictions at this time, there was no rejection of Higher Court judicial precedent principally defining the wide theft offence ranges set within theft case law. There was also no suggestion that judicial discretion at this time was being curtailed significantly.

In Denmark, from 1999 onwards there was significant political interest in popular punitive sentencing. This meant that a more specific and focused political pressure developed advocating the increase in longer custodial sentences and national consistency.[356] Due to the increased volume of clearly defined legislative addendums produced there was moderate judicial concern that Higher Court affirmations of these addendums into theft case law precedent were under strain. There was however, no significant reduction of influence reported by the 12 Danish judges in following Higher Court theft case law precedent. Judicial control over sentence type and lengths had only been slightly limited, primarily because the increase in Government theft range recommendations still had to firstly be affirmed by the Higher Courts. Theft sentencing

[355] Notably the Human Rights Act (1998) brought with it the specific need to provide sentencing reasons in open Court in order to ensure the right to fair trial.
[356] This was despite any objective academic arguments that harsher and longer custodial sentences had a deterrent, denunciatory or reformative impact on theft offenders.

guidance from the Higher Courts remained about comparing and sharing judicial experiences both with local fellow peers and national senior colleagues.[357]

In England, from 1999 onwards there was a similar increased volume of specific sentencing legislation and significant political interest in popular punitive sentencing. However, there were two significant differences.

Firstly, there was a specific Government desire to amalgamate sentencing guidance sources and clarify sentencing consistency of approach. This was achieved through the creation of the Sentencing Guidelines Council in 1999.

Secondly, the political belief in popular punitive custodial sentences had waned in favor of popular reformative non-custodial options which were significantly expanded, but still considered as similarly punitive. The significant increases in the English prison population from the late 1990's onwards became a growing political concern because of overcrowding, high costs and negative prisoner peer influences which were leading to high recidivism rates after release from custody.[358] The political and judicial loss of faith in custody as a reformative tool for theft offences was addressed by the Criminal Justice Act (2003). Specifically, section 177 brought in a breadth of community sentence types which could be combined flexibly using discretion to create a much more tailored punitive impact than custody. Custody was considered primarily fit for protecting the public with a clear focus on dangerous sexual and violent offenders whose rehabilitation was considered extremely problematic. In Denmark, the prison population has been less

[357] Interesting in terms of judicial peer influence there was a noted impact over time on the sentencing approach. For 10 Danish judges (6 professionals, 4 lays) and 8 English judges (6 professionals, 2 lays) there was a shared perception that over time they had become more lenient in their sentencing approach. This was due to the development over time of a greater empathy for theft offenders, a lower harm perception of theft and a rejection of popular punitive sentencing in favour of reformative sentencing for theft offenders (particularly highly recidivist individuals. For the remaining 2 Danish lay judges and 4 English lay judges there was an opposite shared perception that over time they had become more harsh in their sentencing approach. This was due to development over time of a gradual acceptance of punitive sentencing to deter and denounce rather than reform. These judges perceived that over time theft more commonly involved aggravating features such as violence, drug and alcohol abuse and higher recidivism rates.

[358] See further the conclusions of Lord Carter of Coles (2007 Dec). Lord Carter's Review of Prisons - Securing the future, Proposals for the efficient and sustainable use of custody in England and Wales. In H. o. Lords (Ed.) (pp. 1 - 64): HMSO - Ministry of Justice: London at p 58.

of a political concern due to less overcrowding, adequate public funds to cover rising costs and stronger political support for maintaining prison based rehabilitation.

The SGC guidelines introduced a significant blurring of government guidance and judicial guidance sources in England. For all 12 English judges there was a common concern that these changes had introduced a stronger Government influence through the SGC guideline formulation and consultation process. The political trend was towards promoting SGC guideline reform first and foremost rather than through legislative reforms first guided by Parliament and interpreted by the Judiciary. This inevitably significantly reduced the principal interpretation of legislation through comparing national judicial precedent from the Higher Courts and sharing local judicial peer sentencing experiences. Instead of Higher Court theft case law being interpreted solely by lower Court English judges, it was opened up to wider assessment from the Criminal Justice community.[359] Only after this process, were judges allowed to look at theft sentencing and adjust their discretion to the recommended theft ranges provided for them. One English professional judge clearly summed up the current judicial sentiments which these changes had produced;

> *"In the past, I remember the executive keeping a healthy distance away from the judiciary and sentencing issues, but those lines have long since blurred. It is difficult for the executive to resist and not cross the well established Diceyan lines*

[359] The wider consultation approach of the SGC and how information is shared with the public is governed by the Freedom of Information Act (2000) and the Office of the Information Commissioner. The SGC comes under the public body definition as an *'advisory non-departmental public body'* (NDPB). Given this, the Head of the SGC Secretariat is responsible for administering the SGC Publication Scheme and must release information to the public subject to whole or qualified exemptions. We can suppose a controversial question: **Can we find out if the SGC is indeed executive led through disclosure of government decision making?** The SGC may decide it is exempted from releasing information to the public if it is deemed not in the public interest or is prejudicial to law enforcement under section 31. Furthermore, the SGC may decide it is exempted from releasing information to the public on the formulation of government policy (section 35) and prejudice to the effective conduct of public affairs (section 36) if it is deemed not in the public interest to do so. Whilst there is Information Commissioner case law to further support disclosure in the public interest, i.e.) see the eleven principles on public interest and section 35 detailed in DfES v the Commissioner and the Evening Standard (EA/2006/0006). There is less supportive Information Commissioner case law on the issue of disclosing Cabinet conversations on the basis of preserving collective responsibility, i.e.) http://www.ico.gov.uk/upload/documents/decisionnotices/2009/fs_50117066.pdf See also the detailed specialist guides at www.ico.gov.uk.

protecting the sentencing approach and judicial discretion because they are attacked for it by the public. There is no problem with Parliament indicating how they see sentencing issues and even indicated a recommended approach, because they have the formal means to change the law based on democratic procedures. The trouble is when you create a public body such as the Sentencing Guidelines Council the actual boundaries between the executive and judiciary are unclear and frequently crossed. I don't think that anyone knows where the actual boundaries lie anymore. The Higher Court judges need to be able to ensure these boundaries in lower Court sentencing approach regulation are not pushed too far. This is why judicial discretion is a very important constitutional protection and why the Lord Chief Justice must continue to preserve it."

8.2) Comparing the judicial debate for and against wide judicial discretion in England and Denmark:

The debate for and against wide judicial discretion:

"Judges are given the difficult and complex task of interpreting the law of sentencing and then applying the most appropriate sanction options."

In light of this general statement regarding the sentencing approach, would your ability to apply the most appropriate sentencing sanction to a theft offender most benefit from:

A) keeping the current level of sentencing approach guidance, 12 11****

B) reducing the level, or

C) increasing the level? 1

(Blue denotes the English judicial response.)

(Red denotes the Danish judicial response.)

Are there any theft case examples that you can think of which support your choice?

The degree of contentment with judicial discretion (a measure of power through choice) was examined by looking at the level of sentencing approach guidance that was preferred in England and Denmark. There was a universal English and majority Danish judicial support for keeping the current level of sentencing approach guidance. This guidance took the focal form of the SGC guidelines in England and the High Court case law in Denmark. All 12 English judges referred to a number of reasons for maintaining the current status quo.

Firstly, the current level of sentencing approach guidance was positively viewed as supporting flexible and open judicial discretion.[360] This universal English judicial acceptance and confidence was dependent, however, on future deviation justifications from the SGC theft guideline ranges and sentencing legislation being receptively supported on appeal.[361] Secondly, the prescriptive and structured content of the SGC theft guidelines was particularly praised as being comprehensive, clear and well balanced. There was a judicial acceptance that their approach should be structured in a way that supported national consistency and certainty.

What judges did question, however, was the method by which this could be achieved. In terms of judicial discretion, the English judges agreed that changes made by the SGC in demoting Higher Court case law were too new to be judged conclusively. Instead, there was a desire to wait and see, to tolerate change and accommodate it. However, such judicial acceptance did not remove all concern. It was noteworthy that 6

[360] Wide judicial discretion was particularly helpful for repeat theft offenders whose problems, i.e.) alcohol and or drug abuse and mental issues, changed over time.

[361] For 2 Magistrates an important future deviation justification was required in relation to the fair application of fines to very impoverished theft offenders. Where a fine is applied, Magistrates are required to add a mandatory £15 victim support surcharge under Section 161A(1) of the Criminal Justice Act 2003. (See further: https://www.legislation.hmso.gov.uk/si/si2007/em/uksiem_20071079_en.pdf) According to the Sentencing Guidelines Council (Dec 2008). Theft and Burglary in a building other than a dwelling - Definitive Guideline (pp. 1 - 21): Sentencing Guidelines Council: London at p 17 a fine is the lowest in the range set for shop theft where there is "low level intimidation or threats or some planning e.g. a session of stealing on the same day or going equipped or some related damage." In a theft case, where there is some planning and a session of stealing, but in the case facts no victim support is deemed necessary and the theft offender is impoverished. In these circumstances, where a fine must be given this may not be a fair and appropriate sentence. Further, unfairness may be derived from the mandatory added payment of £15 for victim support which makes the fine even less likely to be paid. This is an example of how external sources of guidance and legislation can restrict judicial common sense in the theft sentencing approach.

English judges (3 professional, 3 lay) interviewed chose to repeat the same niggling concerns. Firstly, a fear of over-reliance on the SGC consultation process and definitive guideline ranges produced. The consultation process was considered too time consuming and inflexible to adapt to constant case law changes.

Secondly, this over-reliance meant that when the guidelines were updated the consultation process was not as fast and immediate as case law precedent. This could lead to potential unfairness and inconsistency whilst the guidelines were being updated. As one English lay judge further explained;

> *"I don't have a problem with keeping the current level of sentencing approach guidance as I think there is enough scope for me to go up or down tariff depending on the facts of the case. However, I think that certainly at the moment there is a need to update the SGC guidelines more quickly. We are now dependent on the theft ranges that we are provided. If it is not there, the consistent and structured approach is limited. If we must have consistent formats placing a page which says, awaiting SGC guideline or this is a blank page in the folder is not helpful."*

Thirdly, the strong influence of popular punitive politics of the day detected by judges within the guidelines and other court room actors presented a risk to their confidence in and the wider stability of judicial independence.[362] There was a salutary

[362] For 1 Magistrate a breach of trust theft case example was discussed involving a woman stealing £1,800 from her employer who had limited means. It was discussed to show how popular punitive politics infiltrated sentencing guidelines and other Court room actors, i.e.) probation. The lowest sentence range for theft in breach of trust of less than £2,000 is a fine. The maximum sentence is 26 weeks custody. A medium community order is the recommended starting point. (See further the Sentencing Guidelines Council (Dec 2008). Theft and Burglary in a building other than a dwelling - Definitive Guideline (pp. 1 - 21): Sentencing Guidelines Council: London at p 11.) The danger of fining such a theft offender of limited means is that they merely re-offend to pay the fine. To use custody stops the theft offender earning money to pay back the money stolen. This means a medium community order is often considered the only viable option. The Probation Service was originally relied upon to befriend and assist theft offenders with genuine psychological problems. The woman has financial problems only. This means that probation who organise and monitor community orders are not seen as a reformative support by politicians anymore, but rather as the new popular punitive measure that custody traditionally represented. Instead of probation addressing psychological problems, they are used more widely where fines simply cannot be paid and little psychological reform is necessary. Is this a good use of public resources?

reminder from these 6 English judges that the requirement to openly justify their use of discretion in open Court when deviating from SGC guidelines prompted an equal requirement that decision making within SGC consultations and meetings were openly justified and publicly scrutinized.[363]

For the majority, 11 Danish judges who preferred to keep the current level of sentencing approach guidance there were two similar and two dissimilar arguments provided in relation to their English counterparts. Interestingly, few negative concerns appeared to be expressed from these judges. Unlike their English counterparts, these Danish judges did not express concern regarding an over-reliance on Higher Court case law. They did however, worry about an increase in influence from popular punitive politics, but felt their Higher Court judicial peers could currently resist it effectively. The two similar arguments focused on a mutual contentment with and importance of retaining High Court theft case law as the current principal guidance source.

Firstly, the judicial precedent created from High Court theft case law was similarly considered to be open to flexible interpretation. Whilst there had been limited change to the sentencing approach towards theft offenders in Denmark, unlike in England,[364] there was a similar judicial confidence that through theft case law guidance judges could justify their deviations. This was similarly dependent however, on receptive support coming from their judicial peers on appeal.

Secondly, the broadly defined content of the High Court case law was similarly praised as being comprehensive, clear and well balanced. From time to time, these judges noted that prosecutors might decide to pursue within their sentence suggestions a new sentence range. These cases would normally be appealed and the High Court would then either support or reject the range with reasons. These reasons would form a properly justified and detailed basis for where the range stood and why at any given time.

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[363] This means that future SGC consultations are unlikely to become any faster or less costly.

[364] The SGC guidelines brought significant changes to how decision making was to be structured and ranges applied. There was no mention by these Danish judges of the need to tolerate these sorts of changes and accommodate them as little difference or external interference in how to interpret Higher Court case law had been experienced.

The two dissimilar arguments provided by the 11 Danish judges focused on the most positive aspects of judicial precedent defined case law. Firstly, the provision of up to date and relevant theft sentencing approach guidance provided through constantly changing case law was considered to be of high importance. The provision of up to date and relevant theft sentencing approach guidance was also considered important by the 6 English judges who feared an over-reliance on the SGC guidelines and consultation process.

Secondly, the 11 Danish judges supported their selection of similar case law for comparison as a long established and accepted sentencing approach. The comparison of similar fact case law ensured independent thought and fair judgment. The selection of similar fact case law for comparison became more refined with experience. At the same time, it also improved judicial confidence in their legal skills and promoted the wider stability of judicial independence. For the remaining lay Danish judge who felt an increase in the level of sentencing approach guidance was necessary an understandable reason was given;

> *"Personally, I would like to have more sentencing guidance and information from the Professional judge. Professional judges may question why this is necessary, but I would feel more confident in my sentencing duties with more legal skills training."*[365]

[365] This is a minority view, as the other 5 Danish lay judges were completely satisfied with the provision of sentencing guidance by the professional judge. It does, however, suggest that judicial training is a key regulatory tool in improving the sentencing approach.

8.3) Comparing the extent of political and economic pressures perceived by English and Danish judges:

"A political policy which advocates the application of harsher theft punishments consequently increases the severity of your own theft sentences."

To what extent do you agree with this statement on a scale of 1 - 5?

Strongly agree		**Not sure**		**Strongly disagree**
1	**2**	**3**	**4**	**5**
0	**0**	**1**	**4**	**7****
3	**0**	**3**	**5****	**1**

(Blue denotes the English judicial response.)

(Red denotes the Danish judicial response.)

How do you personally cope with political policies which seek to influence your theft sentencing?

A.) Comparing the influence from popular punitive politics on the English and Danish theft sentencing approach:

The influence of popular punitive politics on the sentencing approach was explored through the above deliberately controversial statement. There was no judge either English or Danish that disputed the present existence of popular punitive political policies in their respective jurisdictions.[366] What was queried and then further clarified during the interviews was that political policy meant the formulation of political intent, before legislation was formally passed. This is an important judicial distinction because after formal legislation has been passed it must be interpreted by judges. As all the judges acknowledged both in England and Denmark, the merits of legislation are unlikely to be challenged in the Lower Courts, perhaps though in the Higher Courts. The above scale initially suggested that there was a strong disagreement with the statement and rejection of the influence of popular punitive politics in England. In Denmark, there was moderate disagreement with the statement balanced with strong agreement and acceptance of the influence from the growth in popular punitive politics. A number of reasons were provided to explain why the judges felt as they did and what impact popular punitive policies were having on their theft sentencing approach.

No English judge felt that popular punitive policies before formal approval through new legislation had a significant influence on their theft sentencing approach. There was therefore a minimal acceptance of the statement and a low conformity and relevance perception with political opinions regarding acceptable sentencing severity levels.

In comparison, however, 5 Danish judges (3 professionals, 2 lays) in their responses were willing to accept the statement that judges followed a political policy advocating harsher sentences, before it became formal legislation. This was provided that the sentencing approach policy was thoroughly debated, was overwhelmingly

[366] In England the influence from popular punitive politics was commonly thought by the judicial interviewees to extend back 15 years, whereas in Denmark it was 10 years.

supported and was highly likely to be formally passed by the Folketinget into formal legislation. Whilst these judges displayed a high conformity and compliance with political policies which advocated acceptable sentencing severity levels, they also acknowledged that theft offences had not received much political attention. For the 3 professional judges, the level of positive support for political opinions expressed by the Association of Danish Judges was felt to be important. Affirmation and acceptance of political views from the wider general public further enhanced political influences upon them. As one Danish professional judge explained;

> *"The Folketinget has been debating what the sentences should be for particular crimes, i.e.) sexual, violent and drugs for the past 10 years now. They may not change the law, but if senior politicians are strongly arguing, in line with prevailing public attitudes[367] and the Association of Danish Judges, that harsher punishments should be given for particular theft offences and legislative change is coming I am sure we will follow the majority of the Folketinget and favorably react in our sentencing approach."*

The influence of popular punitive politics on the lower Courts was enhanced by politicians increasing targeting and criticizing lenient sentences provided by the two Danish High Courts. This had a knock down effect on the lower Court appeals that were bound and defined by High Court precedent. For the 5 Danish judges, there was moderate concern that political policies supporting higher sentencing levels, which were backed up by political pressure to change formal legislation were weakening the judicial resolve of the lower Courts to make appeals. This was because these judges felt that the High Courts would not sentence beyond the theft range set by legislation or challenge politically recommended sentences within new legislative addendums. With fewer appeals being made, this in turn further diminished the ability of lower Court judges to

[367] For one Danish professional judge, public opinion could impact prosecutor sentencing suggestion policy and the recommended sentence norm for a theft offence in the local area. This in turn was persuasive on the sentencing approaches of sentencing panels.

find different interpretations of increasingly specific, directive and escalating retributive punishments within new legislation.[368]

For 2 professional judges, there was a perception that politicians had increased the frequency and focus of popular punitive legislation to different offence categories in order to gain votes and show the public that they were responding to their concerns as they saw them first. It was then far easier to negatively criticise the Higher Courts, by often jumping on specific case examples, as being too slow in responding to their calls for harsher sentencing punishments. This was the political pressure by legislative change process in action. These judges felt that very little time was given to Higher Courts to change with the whims of the general public or that this was a wise course of action given that the merits of individual cases widely differ. The application of political pressure with little or no academic research justification, risked damaging the legitimacy, credibility and independence of the Higher Court judiciary to refine the sentencing approach guidance in Denmark.

The 5 Danish judges commonly felt that the sensitivity of the two High Courts towards political policies advocating harsher punishments could be directly observed in theft case law through the amount of judicial precedent available and whether its content supported the whole broad legislative range or primarily the upward and lower ends of the scale. Popular punitive politics in Denmark had caused a legislative preference towards the upper ends of range scales for various offences. These legislative preferences were produced so quickly that the Appellate Courts were not given the time to adapt. The Supreme Court was expected to follow new sentencing legislation rather than re-interpret and refine it. The political pressure on the Supreme Court to accept their recommended sentences was recognized by these judges as a working practice norm for them too. As one Danish professional judge further explained;

[368] In addition, whilst the breadth of the theft offence sentencing ranges had remained broad, these judges again repeated that they were increasingly subject to more specific legislative addendums (political sentencing recommendations) placing strain on judicial precedent.

"High Court case law can certainly encourage the upper end of the broad ranges set in legislation to appease strongly argued critical political policies. The Hojesteret (Supreme Court) however, still has the main power to change the case law within Denmark. So if you are too soft on sentencing theft, this cannot be permanently changed by the City Courts or Appellate Courts due to the hierarchical appeal process. It is for the Supreme Court to conclusively bind all the lower Courts by their guidance and precedent. If you really want to increase sentence approach severity in the lower Courts without changing legislation then the only way is through the appeals system.[369] *The Supreme Court judges only once in a while have the opportunity to affect change,*[370] *but when they do it may not be fast enough and in the way that the politicians will accept. I think that with the ongoing reforms of the Courts, the Supreme Court will not have as many cases as they had before. If they don't try more cases at the Supreme Court, then they will find it increasingly difficult to refine the appropriate sentencing ranges for each offence category. They will become more isolated from sentencing approach reform. If the government through legislative addendums recommend certain sentences or restrict the range available the judges have to follow that. It is only the Supreme Court now where the Danish judges can really get their own opinions across and influence society."*[371]

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[369] In England, the SGC consultation process has been used by the executive to more quickly affect sentencing approach change rather than more legislation being produced or relying on the Court of Appeal for change and guidance which takes longer.

[370] For the 3 professional judges, this may be due to some judicially perceived prosecutor reluctance to try many cases in the Supreme Court. Without regular appeals, the Supreme Court judges are unable to answer political criticisms of their sentencing leniency, nor justify their reasoning for decisions. They cannot then properly bind the lower Courts or fully inform the public of judicial sentiments towards various offence categories including theft. On being asked what could *counterbalance* the sentencing policies of the prevailing executive should they be overly harsh or misconceived 5 alternative power sources were mentioned, i.e.) Parliament, the Constitutional Monarch, public opinion through voting, the media and senior judges. It is important to consider these wider power sources in the judicial disempowerment debate. If judges are to become more pro-active in challenging political policies both before and after legislation, it is these wider power sources that are affected.

[371] For the 3 professional judges there were four case category examples which came to their minds where popular punitive political criticisms had been made in order to try to influence a harsher sentencing response from the Supreme Court, i.e.) spousal homicide, terrorism, sexual/violent offences and drink driving offences. It is interesting to note that theft offences were not mentioned as a case category example here.

For the majority 7 Danish judges, (3 professionals, 4 lays) there was disagreement with the statement and a strong affirmation of judicial independence. For the 3 professional judges the influence from political policies, before they became formal legislation was minimal. This was because theft case law and legislative interpretation by lower Court judges was the primary focus when understanding seriousness levels and selecting the most appropriate sanction. The 3 professional judges also spontaneously felt their selection by Judicial Appointments Council was sufficiently independent from political influences. The 4 lay judges specifically referred to their subjective common sense and the professional judge's expert guidance on interpreting theft case law and legislation during sentencing deliberations. The independent lay use of subjective common sense to interpret the professional judge's expert guidance gave the lay judges a strong personal feeling of remoteness from popular punitive policies, legislation and case law developments. This further judicial independence perception from popular punitive political debates through the use of subjective common sense was further explained by one Danish lay judge;

> *"Increasingly harsh sentencing policy has a limited impact. This is because I have to rely on my subjective common sense first and foremost. This is unlike the professional judges who rely on legislation that has been originally shaped by politicians who may have sought to increase the severity levels. I feel I am more detached from the influence of popular punitive politics because I lack the legal knowledge and skills to interpret legislation. I am the independent voice advocating public rather than political validation of sentencing approaches."*

Initially, the 4 lay judges strongly considered themselves to be independent products from a political selection process that balanced the interests of all the political parties in Denmark.[372] However, on being prompted to explain further there was an acknowledgement that a low influence on lay subjective common sense could come from

[372] Overall, 3 lay judges came from left wing political parties and 3 came from right wing political parties. The even split continued in the 4 lay judges who felt politically detached, i.e.) 2 were left wing and 2 were right wing.

popular punitive policies that were personally agreed with.[373] Despite this acknowledgement, the 4 lay judges felt they were still independent public servants who were paid publicly and were fully accountable to the public. When public support for harsher severity levels was high, these judges felt confident that they could independently disagree and justify more lenient sentences using case facts and the offender's background. Interestingly, the emphasis on listening carefully to political policies on the recommended theft sentencing approach was lowest amongst professional judges, i.e.) 5 judges (1 professional, 4 lays) disliked political interference, whilst 2 judges (both professionals) conclusively rejected it.[374]

All 12 English judges disagreed with the statement. Compared to Denmark, there was a lower emphasis on and acceptance of political policy upwardly influencing sentence severity levels for theft offences. For 5 judges (2 professionals, 3 lays) there was a dislike of political policy interference before becoming formal legislation.[375] However, these judges listened very carefully to political commentary on theft offences and actively assessed its relative merits when sentencing theft offences.[376] Like their

[373] The lay acceptance of political influences in sentencing in Denmark can be further explained due to their selection procedures. Lay District Judges are selected from public lists of political party members in the local Court administration region. The Court administration tries to appoint a balance between left and right wing political allegiances. In the answers by lay judges, it was noted that each judge felt closely aligned to their own political beliefs with left wing judges favouring reformative offender based approaches and right wing judges favouring custodial approaches to punish, deter and protect the public and victims of theft. This brings political representation and the public accountability into the lower Courts in a very clear and open way with local Court administrations and the Court President (Retpresident) ultimately determining the appropriate balance.

[374] The 2 professional judges specifically rejected the increasing political trend towards making public criticisms of concrete cases in Court. Such a political focus could influence future pending concrete cases damaging wider perceptions of judicial independence, respect and trust. It would also be a very limited basis on which to create new political policies that included recommendations about the sentencing factors and approach. Though it was rare for the political focus to been on individual theft cases, it had happened in the past in relation to more controversial violent, sexual, drug and drink driving cases. These judges felt that any legislative change required a reliable and comprehensive basis to ensure fairness based on Supreme Court case law, public opinion, judicial opinion and political opinion. All case facts and offenders were felt to differ, thus non-directive language must be built into legislation to allow for flexible judicial discretion.

[375] This political policy to legislation distinction is just as important in England as it is in Denmark. Once legislation has been passed, it has formal legal authority and must be followed according to all 12 English judges.

[376] Unlike in Denmark, according to these 5 judges, theft offences in England have received significant attention from the SGC's consultation process and production of definitive theft offence specific guidelines. The work of the SGC and SAP on theft offence sentencing guidance has also prompted some media and political interest that has not been prompted in Denmark according to the 12 Danish judges

Danish counterparts there was an acceptance that the reaction of the Higher Courts to public concerns was slower and less responsive than politicians. This was due to the appeals process which took more time to provide decisions, although when decisions were forthcoming they were much more comprehensive and logically reasoned.[377] There was a shared judicial recognition that popular punitive politics was inevitable as long as this time gap in Appellate Court judges' reactions to public concerns remained.[378]

For the remaining 7 judges (4 professionals, 3 lays), compared to their Danish counterparts there was a much stronger rejection of political commentary on sentencing of individual theft cases. These judges chose to ignore such commentary regardless of whether it was critical or laudable of their sentencing approach. Sentencing politics was considered as changing frequently, which if followed by judges would lead to unfairness, confusion and inconsistency over a long period of time. It would also seriously undermine respect and support for the continued independence of the wider judiciary. As one English professional judge further clarified;

> *"I believe that political policies may come from particular politicians within a particular constituency to bolster his or her popularity with their local constituents. In my sentencing career, I have noticed politicians are often misinformed and have taken the popular punitive side of an argument to show they are listening to the public and victims of theft. In doing so, they have incorrectly commented on my sentences and undermined my respect and authority in the local area."*

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interviewed. An example of political and media interest in England can be seen in Gibb, F. (2006, 25 Aug). *Shoplifters to avoid jail under new guidelines*. The Times, p. 22.

[377] For the 2 professional judges, there was a shared negative perception that the appeals process had little chance of weakening the relentless and fluid pressure from popular punitive politics because by the time judges had decided a different sentencing approach and justified it, the politicians had already vicariously manoeuvred themselves into a new position which was justified as more in line with public wishes. Politicians could further undermine new judicial decision making through a new SGC guideline consultation leading to a definitive and binding guideline.

[378] This all contributes to the 'out of touch' public perception of judges which can potentially undermine judicial decision making both in the Higher and Lower Courts. This is where regular community engagement as part of wider judicial training can play a valuable role.

There was a high emphasis and reliance upon the prescriptive content of the SGC theft guidelines from all 12 English judges. Whilst the judges similarly felt that the SGC theft guidelines had significant political input during their formulation, the consultation process was considered to be open to wide scale scrutiny. This helped to make final decisions by the SGC as comprehensive and as transparent as possible. However, this centralization of power relegated sentencing legislation,[379] subjective common sense[380] and Appellate Court theft case law[381] to a lower emphasis as conduits through which political policies could have an influence. This was unlike their Danish judicial counterparts, who primarily emphasized High Court theft case law and legislation as the conduits through which political policies could have an influence.

The SGC's theft guidelines primarily bind due to strong legislative support. For the English judges, this has also shifted the direction of popular punitive politics toward influencing new guideline formulation and consultation, rather than new legislative development and change. Due to the comprehensive and prescriptive nature of the SGC guidelines and perceived weakness of Appellate Court judicial precedent, there was some common judicial concern expressed by 8 judges (5 professionals, 3 lays) that they may be more susceptible to popular punitive politics influencing the sentencing approach. As one English lay judge further emphasized;

> *"We have the power to send the most serious theft offenders up to the Crown Court for sentence if we feel our sentencing powers are insufficient. This is important in coping with popular punitive policies pushing for harsher punishments which influence the specific ranges within the SGC guidelines. Crown and Appeal Court judges can guide us as to how we might best respond to such political intervention. This happens very rarely though which reduces the*

[379] Currently the Criminal Justice Act (2003) and the Criminal Justice and Immigration Act (2008), both of which were directly referred to by 7 English judges, i.e.) 4 professionals and 3 lays.
[380] This was directly referred to by 2 English lay judges when discussing the influence of popular punitive politics on their theft sentencing approach compared to 4 Danish lay judges.
[381] This was directly referred to by only 1 English professional judge when discussing the influence of popular punitive politics on their theft sentencing approach compared to a majority of 7 Danish judges, i.e.) 3 professionals and 4 lays. In this way, the lower impact of judicial precedent in re-interpreting legislation in England compared to Denmark was being reaffirmed.

influence of the Appellate Court judges in resisting popular punitive change through new definitive guidelines."

This susceptibility can also be seen as responsibility to majority public opinion. There is therefore a representative democratic logic which helps to justify a judicial allegiance to popular punitive sentencing policies. This remains a debate area. As discussed previously, such English judicial concerns about how the SGC *can* influence the sentencing approach from its position of power is very important. In particular, the judicial perceptions regarding their ability to make deviations and the later support of such deviations from the guidelines by the appeal Courts is very pertinent to this debate.

For the 3 Danish professional judges who disagreed with the statement there was spontaneous support for their judicial selection procedures as means of protection from the influence of popular punitive political interference. These judges perceived that their selection procedures, by the Danish Judicial Appointments Council were sufficiently independent from such political influences. The Danish Judicial Appointments Council unlike the English Judicial Appointments Commission is composed of 6 members as opposed to 15 with a higher judicial background and legal composition than their English counterpart, i.e.) 1 supreme court judge (chairman), 1 high court judge (vice-chairman), 1 district court judge, 1 lawyer and two representatives of the public.[382]

For the 4 Danish lay judges who disagreed with the statement there was a prompted acknowledgement that a low influence on lay subjective common sense could come from popular punitive policies with which they personally agreed. However, despite this acknowledgement these 4 Danish lay judges still went on to spontaneously

[382] The Judicial Appointments Council was created on 1 July 1999 and is funded by the Danish Ministry of Justice. It publicly recommends new District Judges to the Minister of Justice who has not yet refused to follow the Council's recommendations. The Minister of Justice appoints Council members based on the consultation advice of the Supreme Court, the high courts, the Association of Danish Judges, the General Council of the Danish Bar and Law Society, the National Association of Local Authorities in Denmark and the Danish Adult Education Association. Further website information on the functions and procedures of the Judicial Appointments Council can be found at: http://www.domstol.dk/om/otherlanguages/english/thedanishjudicialsystem/judicialappointmentscouncil/Pages/default.aspx

support their lay judicial selection procedures on the grounds of democratic accountability and local political representation from right to left wing.

In England, there was a comparatively higher judicial disagreement with the statement. There was also a comparatively higher spontaneous support for and faith in their judicial selection procedures. For all 6 English professional judges and all 6 lay Magistrates there was spontaneous mention of faith in their own selection procedures through the Judicial Appointments Commission.[383] The Judicial Appointments Commission was created under the Constitutional Reform Act (2005), part 2, section 61 and schedule 12 as a Non-Departmental Public Body (NDPB) funded by the Ministry of Justice. It has a lay Chairman and 14 commissioners (5 judicial members, 5 lay members, 2 professional members, 1 holder of a Lord Chancellor appointed office and 1 lay justice member) who are selected by the Lord Chancellor and the designates of the Lord Chief Justice within the Judges Council.

The Lord Chancellor and Lord Chief Justice are part of the selection process of panels of 4 members which also have a high lay background and non legal composition, i.e.) Chair (first member) is selected by Lord Chancellor and Lord Chief Justice and is from a lay background, second member is selected by the Lord Chief Justice, third member is selected out of the 14 commissioners by the chosen Chair and cannot be a member of the House of Commons, fourth member must be the lay Commission Chairman under schedule 12, section 8. The Chairman of a selection panel who has a strong say in final selection decisions is subject to questions under section 8 (11) of the Constitutional Reform Act (2005) which ensure his lay background and independence from politics.

Such recent and important constitutional changes appear to have filtered down to the judicial perceptions in the English Magistrates' Courts. All the English judges

[383] Further details of appointment powers by her Majesty and the Lord Chancellor in relation to District Judges and Magistrates can be seen in sections 5 and 11 of the Justices of the Peace Act (1997) Chapter 25 and section 22 (1) of the Courts Act (2003) Chapter 39. Further website information on the functions and procedures of the Judicial Appointments Commission can be found at: http://www.judicialappointments.gov.uk/about-jac/141.htm

confidently concluded that their judicial selection procedures strongly supported the appointment of independently minded and competent professional District Judges and lay Magistrates. Whilst there were 7 Danish judges (3 professionals, 4 lays) who disagreed with the statement and gave a strong affirmation of judicial independence, this compares with 12 English judges who did the same.

Strong legislative reassurance under section 3 of the Constitutional Reform Act (2005) gives a guarantee of continued judicial independence from the office of the Lord Chancellor and other Ministers of the Crown. Articles 62 and 64 of the Danish constitution guarantee the continued independence of all Danish judges.[384] In this way, the Danish and English governments both recognise the key importance of the judicial right to protect their judicial independence and discretion. Just how perpetual this guarantee is in the face of legislative reform is less uncertain and appears to justify continued judicial vigilance.[385] Empowerment of the judiciary politically can be achieved in three ways. Firstly it judges should have a right to protect their judicial independence from the Government within the constitution. Secondly, an equal balance of judge led and government led sources of sentencing guidance should be maintained.

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[384] This strong English lower Court judicial affirmation of independence is also reflected online at: http://www.judiciary.gov.uk/about_judiciary/judges_and_the_constitution/judicial_independence/index.htm [accessed Dec 2008] which notes that the Act of Settlement (1701) protected judges from being removed from office "unless by due cause of law". In more recent times the balance between judicial accountability and independence has been debated with the Judiciary of England and Wales erring on the side of caution with any form of direct Parliamentary involvement, i.e.) select committees unless absolutely necessary, see further:
-House of Lords (2007, July 26) *Relations between the executive, the judiciary and Parliament - Report with Evidence* - House of Lords Select Committee on the Constitution, 6th Report of Session 2006-07 (HL Paper 151) pp 1 – 232: available online at http://www.publications.parliament.uk/pa/ld200607/ldselect/ldconst/151/151.pdf [accessed Dec 2008]
- Judiciary of England and Wales (2007, July 26) *Response from the Judiciary to the House of Lords Select Committee on the Constitution report on relations between the executive, the judiciary and Parliament.* - House of Lords Select Committee on the Constitution report on relations between the executive, the judiciary and Parliament (HL Paper 151) pp 1 - 4: available online at http://www.judiciary.gov.uk/docs/const_committee_response.pdf [accessed Aug 2008]

[385] The Weimar Republic's constitution protected parliamentary procedure and the ability to legislate by a two thirds majority. In March, 1933 through the Enabling Act the German Chancellor Adolf Hitler transferred full dictatorial powers to the Nazi Party giving them legal legitimacy to dominate for the next 4 years. He never did give up this full power after 4 years. It was not until 1945 having left Europe war torn and millions killed and wounded that his suicide ended the Nazi Party's grip on power. Perhaps a more empowered German judiciary could have more effectively challenged his hold on power than the opposition politicians?

Finally, the preservation of flexible judicial discretion through broadly defined legislation should be sought.

B.) Comparing the influence of economic efficiency responsibilities on English and Danish judges during their theft sentencing approach:

"*Economic efficiency in dealing with theft cases quickly and closing them is the chief responsibility of judges.*"

To what extent do you agree with this statement on a scale of 1 - 5?

Strongly agree		**Not sure**		**Strongly disagree**
1	**2**	**3**	**4**	**5**
0	**5****	**2**	**2**	**3**
3	**1**	**0**	**2**	**6****

(Blue denotes the English judicial response.)

(Red denotes the Danish judicial response.)

Is your subjective discretion over a theft sanction choice ever impacted by the desire for economic efficiency?

The statement tested the importance of economic efficiency, i.e.) saving time and money, during theft trials and at the sentencing deliberation stage. It also asked who is responsible for such considerations, i.e.) judges or wider actors within the Criminal Justice system. The sub-question below looked to record any personal judicial reactions to the drive for economic efficiency within the Criminal Justice system. Overall, there was a higher English judicial preference shown for accepting the above statement than their Danish counterparts i.e.) 7 English judges compared to 4 Danish judges. This suggests that economic efficiency considerations are more pertinent and judicially focused in England than in Denmark. There was a higher Danish judicial preference shown for rejecting the above statement than their English counterparts i.e.) 8 Danish judges compared to 5 English judges. This suggests that saving time and money during theft trials and at the sentencing deliberation stage is less influential and further spread out to wider actors within the Criminal Justice system. Despite these overall differences in Danish and English perceptions of economic efficiency, there were striking similarities in the agreeing and disagreeing judges irrespective of their specific jurisdiction.

For 7 English judges (3 professionals, 4 lays) compared to 4 Danish judges (1 professional, 3 lays) there was agreement with the statement. There were two shared arguments provided by these judges to justify their support for the statement. Firstly, the presence and influence of economic efficiency was acknowledged and accepted. The influence of time and money concerns were considered to be unavoidable, but within acceptable limits by these judges. If further relevant information had to be adduced and an adjournment was properly justified in a theft case, then this over-weighed any time and cost implications. The pressure to close cases quickly came from a variety of different Court room actors who were used to the high volume and frequency of theft offenders, i.e.) efficiency target driven public court administrations,[386] alcohol and drug addicted highly recidivist theft defendants, high case load prosecutors and defense

[386] For 1 Danish professional judge there was recognition that whilst the appointment of new professional District Judges had increased after the District Court reforms (2007), there were new economic efficiency pressures created by this restructuring process. Firstly, professional District judges were now considered the universal gateway to the Danish legal system, thus increasing theft case loads. Secondly, more administrative duties had been placed on District judges beyond their case decision maker role. Thirdly, the use of Deputy District Judges (*Dommerfuldmægtig*) adjudicating in Court had lost Ministry of Justice favour. This placed greater reliance on the work schedules of officially appointed District Judges.

lawyers and finally highly sensitive theft victims. These judges considered it their duty to protect the trial decision making process from such pressure sources.[387] For one professional District judge the admission of economic efficiency pressures were thus defined;

> *"I do feel pressurized to be mindful of economic efficiency in my sentencing approach. Our resources are limited and appear to have become more so since the Court structure and administrative reforms in 2007. It is becoming more and more difficult to find the time to do your job as good as it should be done. Of course, I think and my judicial colleagues will agree that these growing resource limitations are not significantly affecting either the quality or outcome of our sentencing judgments. Nevertheless, such pressures can make a difference to the shape and form of sentencing outcomes produced where the sentencing approach faces a high case load and which restricts the depth of analysis possible in the finite time available."*

Secondly, both the agreeing English and Danish judges considered that any realistic assessment of economic efficiency entailed a balance between trial cost and time on the one hand and evidence quality and its thorough assessment on the other. Economic efficiency in sentencing was therefore largely determined by the offence type and case facts. Theft offence complexity ranged from simple to complex, but there was predominantly a high simple theft caseload in England and Denmark. Both agreeing English and Danish judges felt that this could create an expectation of a fast theft sentencing approach norm for most theft offences which could in turn influence higher case work load expectations from their respective local court administrations.[388] Whether

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[387] As 2 English professional judge noted, inefficient trial management denies fair and quality justice to the public.

[388] The majority of simple theft sentencing decisions in England and Denmark were considered to be for around 10 – 20 minutes, including the trial and sentencing deliberation process. Some estimation by court administrations is necessary in order to properly balance a judges' case load for a day in Court. In England, local court listings are administered by the nationally structured Her Majesty's Courts Service (HMCS) whilst in Denmark, local court listings are administered by the nationally structured Danish Court Administration. Both are independent, but have a board of managers that operate within financial budgets provided from public funds administered by the Ministry of Justice.

such higher case work load expectations for simple theft constituted a source of influence depended on the extent of and faith in judicial decision making freedom to counter this. In this regard, there was no agreeing English or Danish judge with an overall negative perception of feeling overwhelmed or overly pressurized by wider economic efficiency concerns.

For the 4 Danish judges (1 professional, 3 lays) who agreed with the agreement there was a specific negative concern regarding how adjournment requests and the appeal against sentence process could be misused by theft defendants and their defense lawyers.[389] These judges considered that evasion of their lower Court sentences in the search for sentencing leniency in the Higher Courts did not support wider economic efficiency. Instead, it caused a financial burden on limited public resources. This could justify judicial intervention to ensure that cases were dealt with as quickly as possible. There was much less English judicial support for using their discretion to directly mitigate such practices and potentially speed up the trial and sentencing process.[390] As one Danish lay judge further explained;

> *"I think it is very important to be economically efficient. I don't like it when the defendant says they are going to appeal my decisions in the hopes of evading custody for a further few months. We often warn defendants who appeal that they are likely to get a harsher sentence in the Higher Courts in order to dissuade them. The defense might have an interest in appealing and it might not always be in the interests of the defendant. In the past, the Higher Courts sometimes gave lesser sentences on appeal. Now this is much rare and appeal sentences are becoming much harsher and longer."*

[389] The expression of annoyance and frustration with the predictable behaviour of other Court room actors and theft defendants is a good example of how the desire for economic efficiency can be a subtle influence, particularly in the minds of Danish lay judges.

[390] Interestingly, only 1 English professional judge was similarly negatively concerned with such Court room practices by theft offenders and their defense counsels.

For the 7 English judges (3 professionals, 4 lays) who agreed with the statement there was a specific shared positive support for National Criminal Justice Boards' adoption of the CJSSS sentencing approach since 2007.[391] These judges were in favor of fast, proportionate and responsive sentencing decisions that were not just effective, but flexible to newly emerging public concerns. These judges felt a high individual responsibility for being efficient and skillful fact finders, properly testing evidence and then selecting the most appropriate sentence.[392] As one English lay judge concluded;

> *"Yes CJSSS has brought in a pressure ethos to the sentencing approach, but it has also brought in several practical measures to ensure cases are dealt with quickly. Firstly, by making sure the police and the prosecutors have the correct file for the correct theft offender on the trial day. Secondly, in restricting the amount of information that is needed from Crown Prosecutors where it is going to be a straight forward guilty plea. Thirdly, by getting defense solicitors to see their client and his or her papers before the trial day in order to avoid the need for adjournments on the trial day. Fourthly, through ensuring theft defendants are always told at the police station to seek legal representation straight away. Such practical measures importantly reduce potential reasons for delays once the theft offender is in Court before us."*

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[391] A government commissioned review of case management procedures led to the development of CJSSS (Criminal Justice – Simple, Speedy Summary) by the Department for Constitutional Affairs (2006 - July). *Delivering Simple, Speedy, Summary Justice* (pp. 1 - 46): DCA 37/06. Improving economic efficiency in the Magistrates' Courts was defined on p 3 as a tripartite focus on, "1) Simple: dealing with some specific cases transparently by way of warning, caution or some other effective remedy to prevent re-offending without the court process. 2) Speedy: those cases that need the court process will be dealt with fairly but as quickly as possible. 3) Summary: a much more proportionate approach still involving due process – for example dealing with appropriate cases the day after charge or during the same week (which would be a change in the way that cases are currently dealt with in the magistrates' court)." The increased use of police warnings and cautions may reduce case loads. However, it did not go unnoticed amongst these judges that such informal diversions from judicial discretion and oversight could be unfair and often merely delayed the application of later formal court theft trials.

[392] These judges felt support for "maximising judicial authority and problem solving in approach and outcome" was provided under CJSSS, i.e.) Department for Constitutional Affairs (2006 - July). *Delivering Simple, Speedy, Summary Justice* (pp. 1 - 46): DCA 37/06 at p 36. This had enabled them and other Court room actors to minimised excessive delays, had led to an increase in guilty pleas (through judicial warnings of the consequences in Court) and better streamlined the summary sentencing process.

For 5 English judges (3 professionals, 2 lays) compared to 8 Danish judges (5 professionals, 3 lays) there was disagreement with the statement. There were two shared arguments provided by these judges to justify their rejection of the statement. Firstly, judicial responsibility for protecting the right to a fair trial under Article 6 of the European Convention of Human Rights was considered to be the first priority rather than ensuring economic efficiency. These judges firmly felt it was their chief responsibility to ensure evidence was properly tested and conclusive. In theft cases, particularly intention elements of the offence were considered to be complex and required judicial oversight. These judges were not content to be mere passive observers of trials, but felt it was their duty to actively engage with the evidence. In this way they perceived they were best supporting the interests of justice and protecting against unfair pre-determined financial and time constraints.[393] As one Danish professional judge commented;

> *"I think economic efficiency is not the chief responsibility of judges. It is most important that we as judges ensure there is a good information level in theft cases and that they are decided upon fairly according to their merits. If this takes too much time and money, then so be it. I don't feel pressurized at all. My president would never come and tell me I need to be more economically efficient."*

Secondly, the 5 English judges and 8 Danish judges who disagreed with the statement referred to the higher impact of economic efficiency considerations on the wider Criminal Justice system and particularly other Court room actors.[394] The time and cost of sentencing theft offenders was dependent on pre-trial processes, i.e.) potential delays in evidence gathering and case preparation before and during trial. This meant that the responsibility for dealing with theft cases quickly was spread out rather than being judicially focused. For these judges, trial delays could also come from a theft defendant's own attempts to retain their guilty plea in the face of overwhelming evidence.

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[393] Interestingly, there was a particularly strong personal rejection by these disagreeing English and Danish judges that they felt under any pressure to be economically efficient when sentencing theft offenders.

[394] These disagreeing judges referred to the working relationship between the police and prosecutors on evidence gathering, transfer and making charging decisions, the probation service/kriminalforsogen report drafting time and costs as well as defence lawyer information gathering and plea bargaining discussions with their clients.

This could be dealt with through early intervention and specific warnings in order to speed up the trial process. As one English professional judge further explained;

> *"If the case evidence is strongly indicative of guilt and there is a non guilty plea provided, I remind the theft defendant at the beginning of the trial that he may reconsider his plea now rather than go through a full trial."*

Chapter 9: Conclusions.

9.1) Identifying and critically discussing the judicial conclusions:

A variety of future predictions and final judicial remarks were provided by both the 12 English and 12 Danish judges. Three concluding questions were posed to the judicial interviewees, which will be addressed and analyzed in turn.

(The research prompts in red were provided to further define and clarify the concluding questions.)

In relation to your theft sentencing discretion, what future regulatory direction do you believe will happen? (More restrictive, less restrictive, unchanged)

A.) Comparing Danish and English judicial conclusions regarding the future regulatory direction in their respective jurisdictions:

No Danish or English judge concluded that the future regulatory direction of theft sentencing would be more flexible and less restrictive on the application of judicial discretionary choices. This left two options, a relatively static and unchanged future regulator direction or more restrictive limitations over time. For a minority of 4 Danish judges (2 professionals, 2 lays) and 2 English judges (2 professionals) there was a similar neutrally defined interpretation of the future. This was based on a shared feeling that there was little further scope for change beyond the current guidance sources adopted. The 2 English judges displayed a confidence in the dominant guidance source, i.e.) SGC guidelines, whilst their 4 Danish counterparts had a high degree of faith in theft case law. These judges also looked at the relative high wealth and community values of current Danish and English society and concluded that the majority public perception of theft as a predominantly common, minor and simple offence category would continue.

A negative shared interpretation of the future regulatory direction towards theft sentencing discretion was perceived by the majority 10 English judges (6 lays, 4 professionals) and 8 Danish judges (4 professionals, 4 lays). For these judges the future power balance between the executive (political elite), legislature (parliament/folketinget) and judiciary was uncertain and unclear. The dominant theft guidance source, i.e.) case law in Denmark and SGC guidelines in England were the focus of negative judicial commentary.

In England, the 10 judges concluded that there would be future increases in executive interference in shaping sentencing approach guidance.[395] This involvement would continue to be deferred to the SGC, (now Sentencing Council) whose powers would dominate sentencing guidance direction. This meant that sentencing guidance would remain centralized and nationally applied. Whilst consultations would be extensive, they would remain overly bureaucratic and complex. The prescriptive nature of SGC guidelines would remain in place, leaving deviation justifications based on previous case law and judicial interpretation of case facts undermined. This in turn disempowered the future influence of judges.[396]

For the 8 Danish judges, the loss of political support in judicially defined case law would lead to a similarly negative disempowerment trend as identified and experienced

[395] This extended to sentencing policy that was influenced by popular punitive politics. There was a shared judicial perception in both England and Denmark that the public's specific crime fears (with media misinformation) would be tackled by politicians through the adoption of increasingly harsher legislation in order to show the public that politicians were responding to public demands. The restrictions this placed on judicial discretion and free choice were acceptable due to an overriding allegiance to democratic accountability and legitimacy. The political elites' seeming reluctance or inability to re-engage with the electorate and defend unpopular politics on the sentencing approach was a shared English and Danish judicial concern.

[396] For one English professional judge, the empowerment of judicial influence in the future direction of sentencing approach regulation would be predominantly achieved through legislative interpretation and past case law application. Two past examples were given where judicial advice and opinions had not been properly heeded by politicians: "Firstly, the dangerous offender provisions were predicted by judges as leading to an increase in the prison population. The politicians had disagreed. The judges applied the law and the prison population did indeed increase as predicted leading to a change in sentencing legislation and policy. Secondly, the judiciary predicted future problems with unit fines and their fair application. Strict application of SGC defined provisions on fines has already led to unfairness and undermined judicial faith in the new SGC consultation and guideline creation processes.

by their English judicial counterparts. In Denmark, however, this would primarily be through legislative driven reforms, rather than a deferment of sentencing approach regulation to a Danish equivalent Sentencing Guidelines Council. As one Danish professional eloquently concluded;

> *"There are three kinds of interference on the future sentencing approach which vary in terms of the level of controversy. Firstly, the most controversial are the political remarks made about pending Court cases. Secondly, how the Parliament respond to specific sentencing outcomes in terms of new sentencing guidance legislation. Thirdly, the least controversial are the legislative responses to more general currents of public opinion within society over time. In all three kinds of interference, I think there will be more pressure created on judges to conform, threatening their tradition of constitutional independence. Disregarding the voice and expert opinions of Judges as sentencing practitioners means that politicians will be the dominant voice in sentencing issues. This is counter-productive. I accept that Judges should not dictate to the legislator what legislative choices should be made. However, it is equally unwise to produce sentencing legislation based upon day to day political practices. It is better to legislate and base future sentencing approach regulation on more long term judicial perceptions within case law that have stood the test of time and have shown continued public acceptance and support."*

There were six additional negative predictions provided by the 10 English judges (6 lays, 4 professionals) which were not shared by their 8 Danish counterparts about where their future regulatory direction would go. The common thread in all these judicial perceptions was that there would be an increased future political desire to save time and money within the wider Criminal Justice System through increasingly restrictive SGC guidelines and legislation, to the detriment of fair and comprehensive justice.[397]

[397] This was based on the current economic down turn and would be very much in line with established CJSSS principles, i.e.) criminal justice – simple, speedy, summary, which these 10 English judges felt would be applied with even greater rigour in the future.

Firstly, the statutory limitations placed upon custody usage in England for theft were felt to be a reflection of a continuing loss of political faith in the application of long term custodial sentences at Magistrates' Courts. The proposed increase in custodial sentence maximums under sections 154 and 155 of the Criminal Justice Act (2003), i.e.) 12 months maximum for one offence and 65 weeks for two or more offences, were unlikely to be implemented according to these judges. Instead, further future restrictions to Magistrates' sentencing powers were feared. Secondly, future theft offence sentencing discretion would be further bypassed through an increase in police cautions and fixed penalty notices for minor theft offences. Thirdly, more and more theft offences like the criminal damage offence would lose their triable either way status and become summary only. Fourthly, similar future economic efficiency drives within the police and probation services would limit the provision of comprehensive probation service reports and victim impact statements to judges in the lower Courts.[398] Fifthly, further future increases in the credit period given for theft offenders detained in remand were anticipated.[399] Sixthly, for 2 lay Magistrates there was a shared future prediction of more professional judges and less lay Magistrate panels making theft sentencing decisions. As one lay Magistrate concluded;

> *"I have a fear that we will go down a pro-professional judge recruitment line in order to speed up lower Court sentencing. I do question the praises of the Lord Chancellor and Lord Chief Justice when they decide to dramatically increase the number of professional District Judges from 90 to 160 in 4 years."*

[398] For 2 professional and 3 lay judges there was particular concern about the operational future of valuable police and probation rehabilitation programmes, i.e.) alcohol and drug support should inevitable funding cuts be made in the police and probation budgets.

[399] The current position is outlined in the Criminal Justice and Immigration Act (2008) under section 21 (4) which inserts after section 240 of the Criminal Justice Act (2003) a new section 240 A (3) which states: "The "credit period" is the number of days represented by half of the sum of
(a) the day on which the offender's bail was first subject to conditions that, had they applied throughout the day in question, would have been relevant conditions, and
(b) the number of other days on which the offender's bail was subject to those conditions (excluding the last day on which it was so subject), rounded up to the nearest whole number."

B.) Comparing Danish and English judicial conclusions regarding the future sentencing guidance support favored in their respective jurisdictions:

In relation to current theft sentencing guidance sources, what future support would you like to remain? Why? (Helpfulness, clarity)

The impact of the dominant theft sentencing guidance source was the focus for both the Danish and English judges. In Denmark, future support for retaining High Court case law was advocated by all 12 judges. These judges felt strongly that sentencing judgments and their approach to them should continue to remain within judicial hands. There were various arguments provided as to why they felt this way. Case law on theft was considered helpful, clear, transparent and comprehensive.[400] The comparison of similar fact theft case law was lauded as flexible and promoted judicial independence. It was recognized that judicial precedent and discretionary interpretation of it by judges primarily enabled the separation of legal power from state power which had confidently stood the test of time. As one Danish professional judge commented about the continued judicial selection of case law norms within broad legislative ranges;

> *"I have high hopes regarding future plans to create a global database of judgments within Denmark. I would like to continue to see the High Courts and the Supreme Court release their judgments uncensored in real time just after they have been made."*

In English judges' minds the dominant source of sentencing guidance that they would like to remain in the future was very different and not conclusively supported by all. For 5 professional judges and 3 lay judges, the SGC guidelines were supported, but this came with several reservations attached.

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[400] The reference sources for theft case law and practice mentioned were: (Books – *Dommi i Kriminel sager* by Thomson) (Online databases by Forlaget Thomson - *'Tidsskrift for Kriminalret'* [TfK] and *'Ugeskrift for Retsvæsen'* [UfR])

The first shared reservation of these judges included a reliance on regular updating and the economic inefficiency of the SGC's attempts to achieve this process. As part of the creation of new theft guidelines and the updating process, consultation attempts by the SGC were highlighted as too time consuming, overly prescriptive and costly.

Secondly, these judges had little confidence in and felt detached from a centralized and extensive consultation process that they had little time to individually read, understand and respond to extensively. This limited both the quality and extensive representation of judicial perceptions from the judicial feedback that was being provided. For these judges, there was a common general acceptance that restrictions to judicial discretion were nothing new. In testing such restrictions through sentencing practice over time, it was commonly felt that new guidelines issued would require between 5 to 10 years to be properly judicially interpreted. During this time the deviation allowances within the guidelines could be properly tested by judges in practice. These judges commonly concluded that a future enhancement of Appellate Court case law guidance influence and less frequent legislative developments in the form of Criminal Justice Acts would be beneficial. They also commonly concluded that more political trust in the future application of judicial precedent needed to be forthcoming. As one English professional judge concluded;

> *"Well, if there is any future changes in guidance, sentence types and ranges through new Criminal Justice Bills then we need to be more proactively involved. I would like to see more judicial guidance from the Appellate Courts to further interpret new guidelines. We need a period of consolidation where judges make sense of and properly evaluate the changes made and respond accordingly through judicial precedent."*[401]

[401] These majority English judicial sentiments by 8 judges (5 professionals, 3 lays) were shared by their Danish counterparts, but to slightly lesser degree, i.e.) 5 Danish judges, (2 professionals, 3 lays).

A variety of less dominant guidance sources were highlighted as important future support that was particularly worth retaining. For 2 English lay judges and 1 Danish lay judge there was shared support for a continued focus on community sentencing (samfund strafudmåling) made possible due to the efforts of the English Probation Service and the Danish equivalent Kriminalforsogen. The reports produced in Court for theft offenders which outlined how successful community sentences were, particularly in relation to alcohol and or drug reform, were considered to be very informative and persuasive. These judges felt that if the high recidivism rates in theft offenders were to be effectively tackled future financial support would need to be targeted to the long term reform of these individuals. In addition to early intervention to reform theft offenders, their educational and vocational training were considered to be the most beneficial long term sentencing aim to pursue.[402]

The remaining conclusions provided showed some slight and disparate differences in Danish and English judicial thinking regarding the best future guidance support. Firstly, for 2 Danish lay judges, there was some support for more time spent on analyzing pre-trial case law, i.e.) 3 – 4 similar fact cases, and reading the specific case facts before going into Court. Secondly, for 1 English lay judge, the legal advisor (Magistrates' Court Clerk) provided very helpful and clear guidance and should remain. Thirdly, for 2 English professional judges, their judicial training meetings were a particularly valuable opportunity to shared best sentencing approach practice and boosted judicial communication, support and morale. As one English professional judge further concluded;

> *"I meet with my colleagues at least once a year on a 3 day residential training course. I find this very useful because specific sentencing problems are set and you are expected to give reasons for your judgments. Your fellow peers then provide constructive criticism on your sentencing choices and approach. As I sentence on my own, it is nice to consult and compare with other District Judges*

[402] In particular, targeted government funding of offender reform services by the police and probation proven as successful together with continued visual community engagement was considered to be useful.

and gain valuable perspective. In terms of everyday sentencing I feel very confident and can always ask for further guidance from my judicial peers if I feel I need to."

C.) Comparing any further Danish and English judicial conclusions regarding their theft sentencing discretion:

Are there any other factors not mentioned today that influence your theft sentencing discretion? (Positive or negative)

The final judicial conclusions provided were as expected a repeated confirmation of the issues covered by the previous research questions asked and explored by the researcher and judicial interviewees. Without seeking to define or direct the judicial response in anyway, this last question posed provided the final opportunity for judges to openly discuss what they wished about their sentencing discretion. The future of judicial discretion and the likely impacts of the worldwide economic recession were the final two focus points for reflection.

In relation to the future of judicial discretion in England, all 12 judges were apprehensive about any future limitations to their discretion in theft sentencing, either through new Criminal Justice legislation or SGC (now Sentencing Council) theft guidelines. They felt further reforms to the dominant guidance source, i.e.) the SGC guidelines, without some time for judicial application and reflection, would be unhelpful. For a minority 3 English professional judges and 1 English lay judge, the future application of judicial precedent within case law to justify deviations from the SGC guidelines was sufficiently clear and they felt confident in interpreting section 174 of the

Criminal Justice Act (2003).[403] For 2 professional English judges the future creation of a USA styled sentencing grid in England would never be supported.[404]

In Denmark, the future of judicial discretion was looked upon with less apprehension and more certainty. For all 12 Danish judges there was confidence borne out of a significant consolidation period since the Danish Constitution (1849) of their continuing judicial independence. In ensuring their future independence, these judges felt that retaining their flexible and free use of similar fact theft case law to justify their sentence choices was very important. These judges also expressed a high degree of contentment with the panel approach of 2 lays and 1 professional judge as Chair in making competent and well justified theft case decisions given the nature and complexity of cases encountered daily within the Danish lower Courts. There was some concern expressed by 1 Danish lay judge regarding the limited diversity of cultural backgrounds which rural lay judges came from. However, this was countered by another Danish lay judge who praised the diversity of cultural backgrounds amongst his lay urban judicial peers.

The likely future impacts of the worldwide economic recession were more widely discussed by the English judges than their Danish counterparts.[405] For 4 English professional and 3 English lay judges there was concern that future economic efficiency drives by the Government would significantly limit the budgets of Her Majesty's Courts

[403] The remaining majority 3 English professional judges and 5 English lay judges were less confident and sought greater clarity in relation to how to understand and interpret section 174 of the Criminal Justice Act (2003) through case law.

[404] The mention of USA style sentencing grids was spontaneous and similarly reflects conclusion 9.3 by the Rt. Hon Lord Justice Gage, (2008). Sentencing Commission Working Group: Sentencing Guidelines in England and Wales - An Evolutionary Approach (pp. 1 - 45): Ministry of Justice: HMSO, Chapter 9, pp 31 – 32.

[405] For 2 Danish professional judges there was some future concern over the Danish Court Reforms (2007) that had reduced 82 District Courts down to 24. The aims of the reforms stipulated online at http://www.domstol.dk/om/otherlanguages/english/historicoutline/Pages/default.aspx were:
"1) Shorter case processing time,
2) Less vulnerable and more efficient courts,
3) More emphasis on leadership and management of courts, and
4) More uniform application of law by improved possibilities of knowledge sharing and specialization."
Due to future economic efficiency drives by the Government these judges felt there would be financial cuts to the budgets of the 24 District Courts. The reforms could then lead to *Danmarks Domstole* staff stress and illness due to increased work loads on less people.

Service, the Probation Service and the Prison Service. Any significant financial cuts in any part of the Criminal Justice System would damage wider morale and threaten the structural integrity and cohesiveness of the trial process. At the sentencing deliberation stage, the English judges felt particularly sensitive to the real life hardships that recessions caused in wider society. These judges predicted that as benefits were limited for the poorest in society this would lead to a spike in theft crime and a higher workload for judges at a time when their own budgets were being closely monitored and constrained. For 2 English professionals and 3 English lay judges, the imposition of fine grids for more offence categories was keenly disliked because their discretion was then severely limited. These same 5 English judges also acknowledged that the means testing on which fines were based was vulnerable to misinformation provided by theft offenders.

9.2) Identifying and critically discussing the research conclusions:

Introduction:

The conclusions that are discussed seek to provide an in-depth analysis of the common themes that have emerged from the judicial perceptions of their sentencing discretion in England and Denmark. Judges should be placed in their proper context as one of three significant State powers. It should also be remembered that in regulating the sentencing approach we are regulating not just our judges, but our entire society.[406]

A.) Future judicially preferred sentencing aims:

We start by concluding on the preferred sentencing aims when judges are dealing with theft offenders. Firstly, the reform of theft offenders and their deterrence from future re-offending were strongly supported in both England and Denmark. In this way, the judges of both jurisdictions were clearly choosing to place themselves as guardians of wider societal inclusivity, cohesion and support. The judicial consensus in both England and Denmark was towards developing better utility from long term reformative community sentences. In England, this involved a collaborative effort between the Police, the Probation Service, the Crown Prosecution Service and Defense lawyers to ensure that positive offender support structures were maintained.

Secondly, particularly in Denmark, the judges identified that a positive engagement with public emotions through denunciation and retribution was important. In

[406] The abolition of slavery in England was borne out of a historical period of increased social and cultural comparison, shared and common understanding and a growing desire for change and reform. As societal attitudes changed over time, the independence of the English judiciary and respect for and trust in judicial discretion was tested through case law, i.e.) *R. v. Knowles, ex parte Somersett (1772) 20 State Tr 1; (1772) Lofft 1*. In this test case, Lord Mansfield clarified the common law by ruling that he could see no statutory or legal justification for the slave, James Somersett being forcibly removed from England against his will. He was therefore released from remand. The judgment was narrowly defined and limited to the English mainland only, but it was an important turning point in the abolitionists struggle for legal backing. At this time, empowered and independent judicial personalities had to very carefully mediate between powerful political and economic interests and find common ground based on established legal principles. The gradual development of new judicial precedents through flexible interpretation of the law was and is still very important.

Denmark, denunciation was seen as a valuable shaming and warning tool. The fall in influence of denunciation in both legislation and practice within the English lower Courts was a significant difference. English judicial training could be used to enhance the influence of denunciation in the future so that its positive merits can be better utilized as the Danish judges had identified. In Denmark, retribution promoted a victim focus that was both individually focussed and extended into wider societal values. English judicial training could be used to enhance the influence of retribution by encouraging the development of greater victim empathy through judicial discretion. This emotional sentencing approach based on creative discretion could be used as persuasive reform tool. Judges by carefully explaining to theft offenders the negative dangers of social exclusion as was routinely applied in Danish Courts could thereby better promote the significantly different and positive aspects to the theft offenders' social re-inclusion and future reform. This persuasive reform through retribution, deterrence and denunciation is reliant upon well funded and supported probation led community sentences.

Thirdly, both the English and Danish judges identified a moderate impact from positive reformative custody. There was a higher faith in reformative custody in Denmark due to a structured rehabilitative release into society *after* custody focus. The English judges advocated a similar focus and were making an important point that positive reform *after* custody should be expanded and improved in the future. For this to happen, Her Majesty's Prison Service will require much more resources in order to achieve reform of those offenders in their care and who are due to be released back into society. This crucial time according to the judges is where most persuasive reform will make a true impact and deter future re-offending. By improving this area, significant judicial faith lost in using custody to reform would be gained.

Fourthly, the use of custody for public protection attracted a lot of judicial interest both in England and Denmark. The judicial debate focussed on the maximum custody lengths granted to lower Court judges for protecting the public from highly recidivist theft offenders. However, the judicial debate firstly suggests that there should be a wider political re-assessment of what a greater emphasis on positive reform *after* custody can

achieve. The prison service already identifies the problems that theft offenders have and can do much to alleviate these issues before and after release. However, there is a pressing need according to the English judges for more resources to be allocated to the prison service in order to properly tackle them. There is also a need for politicians to guarantee this funding on a long term basis into the future so that political faith in reformative custody is demonstrated.

Fifthly, the limitations of victim reparation schemes based upon expanding fines for theft offences were clearly identified by the English judges. In Denmark, the widespread expansion of theft insurance meant that victims were adequately compensated. The Danish judges saw no need for any enforced State provision of reparation to the victim other than to reform the theft offender and return any stolen goods, if practicable to do so. Theft offenders were too often from economically under-privileged backgrounds and were simply not in a position to compensate their theft victims. Furthermore, the English judges considered the overall means testing system in England for determining the level of fines to be highly problematic. This could be removed for theft offences and replaced with community sentences that were properly targeted on reforming the offender's specific behavioural and background problems.

B.) Improving future theft offender specific information gathering:

In terms of theft offender specific information gathering, all judicial interviewees agreed that who you sentence and the case facts is what really matters. Firstly, there was a particular judicial welcoming of a return to subjectivity and simplicity within the sentencing approach guidance provided. The English judges identified many theft offender factors *not* within the SGC guidelines' content which were influential. These judges were perplexed as to why there was such a focus on including numerous and specific factors within SGC guidelines when this could never be an entirely conclusive list.

Secondly, the English judges considered that any attempt to pre-select what is mitigating or aggravating was unnecessary and too simplistic. For example, the guilty plea guideline[407] provides structural consistency to the assessment of guilty pleas from 1/3 at the Police Station to 1/10 at the door of the Court. However, legitimate evasions of these rules still occur through police evidence gathering difficulties and defence lawyer evidence re-evaluations leading to offenders making changes to their plea. It was commonly felt that regular judicial training sessions on guilty plea assessment coupled with long term sentencing experience could promote national consistency and fairness just as well as any structured guideline development. The English judges also stressed their desire to freely determine both the legitimacy of the plea and the level of discount appropriate for themselves in the future.

Thirdly, during training the sharing of sentencing experiences through sentencing scenarios posed and the spontaneous creative debates this produced were considered to be helpful in England and Denmark. It promoted a more in-depth and consistent analysis of how to understand the theft offender. By ensuring future judicial training is collective, i.e.) professional and lay mixed panels working on sentencing scenarios and moving professional judges between localities, much more nationally consistent working relationships between judges can be developed. Collective training is meaningful because it encourages better judicial peer communication and creativity networks, particularly in England. As an example, Danish judicial mistrust toward defence lawyer mitigations was higher than in England. To counter this judicial mistrust and challenge misperceptions, collective training can be widened to include local prosecutors and defence lawyers in regional sentencing discussion meetings. This further re-enforces that the sentencing approach is about collective team work, quality information gathering, wide participation and enduring debate.

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[407] Sentencing Guidelines Council (July 2007). Reduction in Sentence for a Guilty Plea: Definitive Guideline - Revised 2007 (Vol. Original Version Dec 2004, pp. 1 - 10): Sentencing Guidelines Secretariat: London.

Fourthly, both English and Danish judges when gathering theft offender information mentioned their reliance upon Probation Service/Kriminalforsogen report writers for in-depth analysis. This places significant emphasis on these national systems to provide offender information that is up to date, clear and comprehensive. Some relief from this reliance can be achieved through more defence commissioned independent expert witness reports. For many English and Danish judges, there was room for a re-balancing of offender information gathering and provision in this way. In England, this could be achieved through collective training between the Probation Service and the lower Court judges. Part of this collective training focus should be on improving understanding in crucial working relationships. This would mean practising how to combine the judicial observations in Court of theft offender behaviour and their level of compliance with probation over time. The collective training should also focus on the effective use of probation reports. This would mean debating the judicial approach towards the content and investigatory remit, i.e.) what judges want to see and why. As Danish lay judges noted, there was a selective use of Kriminalforsogen reports by prosecution and defence lawyers which did not help them to assimilate the whole report and the efforts that had gone into writing them. This is where collective training can be a particularly useful tool both for national consistency and economic efficiency.

Fifthly, collective training on crucial working relationships in Court, i.e.) the defence lawyer and prosecutor sentence suggestions, were picked out by all the judges. In Denmark, they were perceived as positive consolidations of offender information, just before sentencing deliberations. In England, there were largely negative misperceptions shown by the judges towards these non-Probation led sentence suggestions. They were seen either as an impingement on judicial independence or as mere biased conclusions from adversarial lawyers.

Collective training in England could address these misperceptions between judges, the Probation Service, expert witnesses, prosecution and defence lawyers. By training these individuals together in meaningful client contact, information gathering and the sharing of this information both the consistency and quality of the approach

towards theft offenders would be improved. Such collective training where appropriate, could for example be extended to focus on crucial working relationships that involve witness selection, pre-Court handling, victim impact statements and witness testimony in Court. This training approach could particularly enhance the theft offender's empathy levels towards their victims because all Courtroom actors would be focussed on working together to achieve this.

Community engagement with judges could be enhanced if judges and their crucial Court room working relationships were more at the centre of drives for sentencing approach reform. As trust develops between all Court room actors as a result of collective training there is a danger of over familiarity in working relationships. However, there is no intention for such training to blur the lines between the formal roles of Court room actors. Instead, there is an intention to promote independent thought, distinctive roles in Court and developing a shared and informed understanding of how best to improve future theft offender information gathering.

C.) Reforming the sentencing deliberation process in England:

There was a noticeable alienation between the English lay and professional judges interviewed, which was perhaps unsurprising. Nevertheless, the negative judicial commentary and continued sense of judicial alienation between professional and lay judges which was provided in this research points to the need for a change in current working practice norms.[408] There is academic commentary about Magistrates' Court reform, but it is rare to find independently collected qualitative data from judges themselves to support why reform is necessary. Robson recently notes that in the lay Magistracy there is unhappiness about the growing use of District Judges, police cautions and a cumbersome allowance system.[409] Notably, she suggests that expanded training has given Magistrates a false sense of professional status. What is important to reiterate

[408] The working practice norm is either sentencing panels of 3 lay judges or a sole professional judge in the English Magistrates' Courts.

[409] Robson, Glenna. (2010). Magistrates' Courts: A Hybrid Too Far? *Criminal Law and Justice Weekly,* April, available online at http://www.criminallawandjustice.co.uk/index.php?/Analysis/magistrates-courts-a-hybrid-too-far.html [accessed May 2010].

is the positive value of Magistrates as local volunteers and how best to incorporate their efforts into the current expansion of District Judges.

In terms of the wider judiciary, collective training can help to bring together the lay and professional judges, making a more close knit judicial community. This can reduce divisive in-fighting and strengthen the collegiate ethos, mutual support and respect between professional and lay judges. An important aspect of future sentence deliberation training should be in promoting creative judicial thinking that fosters wide spread judicial debate. The wider judiciary, which includes Crown Court Judges, can provide more effective social support networks that are crucial for morale, understanding and the transfer of advice on sentencing approach best practice. This particularly plays to the strengths of the English and Danish professional judges whose extensive sentencing experience and case law knowledge is highly valuable.

What would happen if the Danish model for sentencing panels and the working relationships within them were adopted in England? Thus we would have sentencing deliberation panels of 3 judges, i.e.) 1 professional District Judge as Chair and 2 lay judges. Firstly, as noted by the Danish judges, we would have to develop a judge-led positive negotiation and consensus approach. This would be required in order to ensure high levels of professional and lay judge agreement over sentence choices occurred as the Danish interviewees recognised. The professional judge would be the authoritative legal knowledge source. It would be his or her role to guide the lays through similar fact case law comparisons and promote a relationship of cooperation and team work. The lay judicial debate within panels would reflect current public concerns to the professional Chair person. His/her roles would be to communicate sentences, provide legislative and case law support and foster panel sentencing debate as *'primus inter pares'*. In this sense the concerns of the Magistrates' Association that mixed panels would undermine their worth and authority would be addressed. They would have no loss of power in sentencing panel debates due to the ability to overrule the professional judge by 2 to 1. This would not only enhance the sentencing deliberation process, but could improve the

connection and cooperation between professional District judges and their local community through the lay Magistracy.

By following the Danish mixed panel model there would be a likely reduction in the significant dominance of and current reliance in sentencing guidelines in England. Instead, a return to case law precedents and legislative interpretation would enable the flexible value of subjective judicial discretion to operate with greater freedom. If such changes in England were made, the legally trained Court Clerk, who has valuable sentencing experience should be transferred to aid the collective training of judges. They should be joined by Crown Court judges whose own professional development would benefit from being included in training their lower Magistrates' Court peers. These changes would be a significant change to current English sentencing panels and the working relationships within them. However, both professional and lay English judges need to be very clear that they are highly content in working together in order to provide a nationally consistent sentencing approach.

It is acknowledged that the increase in District Judges within England was to improve economic efficiency in case handling and sentencing. However, if mixed panels were to be considered the additional cost of recruiting and retaining more District Judges to sit in such panels would need to be properly assessed and justified. A pilot scheme through training and the application of sentencing examples to mixed panels would be a prudent first step. If this worked well then after extensive discussions between the Magistrates' Association and the Government a gradual agreed implementation could begin. The benefits of having mixed panels is a more cohesive lower Court professional and lay judiciary whose variety of sentencing decision making knowledge and skills is pooled together. The drawbacks are that this option is unlikely to provide additional economic efficiency savings at a time of recession. However, the importance of mixed sentencing panels was very clear to both the professional and lay Danish judges interviewed. Further research should delve deeper into this option.

D.) Learning from the influences of wider society in order to better understand the English sentencing approach:

There should be no doubt that judicial independence does not mean judicial disengagement from society. In current times, it is getting ever more unimaginable that our judges can escape the wealth of communications that surround us all. Instead, judicial independence is a subjective assessment by judges of how they may support society and their reaction to societal influences.[410] Both the Danish and the English judges noted the low influence from the media highlighting local community concerns. Within the media effort the concerns of the local government, i.e.) local councillors and the police, academics and independent public members were highlighted as credible and responsible sources. These influences should be incorporated into collective training on local community awareness and engagement. The lay judges in the lower Courts should take a leading role in this aspect of training.

The continuing media support for popular punitive politics and the sensationalised approach to reporting sentencing issues in both Denmark and England has left judges distrustful and wary. There was no shortage of judges able to reflect on misinformed media reports designed to shock the readership and gain their attention, i.e.) violent theft gangs. This was seen as an inevitable product of a reactive rather than an informed media agenda. Judges felt they should keep a healthy distance from media reporters, but thankfully not academics. However, with a more judicial led sentencing approach being advocated there is merit in collective training on clarifying the sentence justification process on which the media passes judgement. This would involve a clarification of how one may justify using similar fact case law examples and the level of detail necessary to ensure the media and the local public by proxy are properly informed. In this way there is a link being made between clarity of approach on the one hand and confidence on the other. Judges need to be confident to justify their decisions and seek clarification from their peers on their sentencing approach in uncertain situations. By encouraging

[410] A good example of this is how judges exercise their judicial mercy or denounce theft offenders in Court.

confident and divergent thinking and ensuring that Higher Court judges are receptive to the lower Court judges' attempts to deviate from SGC guidance where they deem it appropriate to do so this provides an important empowerment of judicial discretion and free choice from within their own community. Having a collegiate and conservative ethos within the judiciary has stood the test of time as supporting judicial integration and independence.

The English and Danish judges considered themselves to be local public servants. In particular, the lay judges were highly influenced by what the prevailing public concerns were. There was a shared English and Danish judicial agreement that regular public meetings involving local Government officials, the Police (Politi), the Probation Service (Kriminalforsogen) and the Judiciary should occur. In such meetings, the public should be given the opportunity to listen to and debate the current public crime concerns. Such regular public meetings would promote mutual understanding and a united Criminal Justice System front. After such meetings, follow up public emails and internet blogs should be listened to and publicly responded to.[411]

Particularly, in England the judges advocated a future expansion of visible public work schemes for those theft offenders serving community sentences. This would show the public that something was being done to re-construct the damage done to the local community. There was also significant support for future expansion of rehabilitative drug and alcohol therapy to those addicted theft offenders who found it hardest to motivate themselves towards their own reform.

The importance of judicial creativity based upon regular sentencing scenario debates within training sessions was recognised by both the English and Danish judges. Morality and ethical analysis within collective training was a particular focus for lay judges and female judges. By discussing examples of judicial mercy, both individual values and general empathy norms could be compared. An example of this valuable

[411] Such data would be particularly helpful to Government officials and Academics seeking to monitor and understand those regionally specific differences in public sentiment.

comparison process could be through increased religious and cultural diversity awareness training. For most lay judges and all the professional judges interviewed in both England and Denmark there was a secular dominance to their sentencing approach and moral beliefs. This is a reflection perhaps of society, but it is also desirable for judicial awareness of all aspects of morality and religious teaching to be supported.

Can our judges understand themselves better and thus better understand their own sentencing approach? The answer is of course yes. The deliberately controversial nature of many of the research questions posed to the judicial interviewees is one way to encourage greater self-introspection of those established norms that one develops over time. For the Danish and English judges there were three areas which they identified as established norms worth further collective debate. Firstly, the meaning of conservative family values should be clarified. Secondly, the potential impact of different professional and lay judge vocational and educational choices should be understood. Thirdly, as most judges, particularly in England, identified themselves as having a working class lifestyle, the influence of this common perception should be investigated. The collective training can take the form of group based learning with different perspectives based on the above three norms being discussed.

The significant value of sentencing experience was recognised by both the English and Danish judges. In-service training through observing the sentencing of theft offenders was considered to be the most helpful. The shadowing of experienced judges by less inexperienced judges further supported a collegiate learning environment. Judicial mentoring was considered to be important because judges felt that sentencing experience was a principal way to increase their confidence in effective information gathering and during sentencing deliberations in making well justified sentence choices. By enhancing the transfer of sentencing experience, common law in service training becomes more effective over time in promoting national consistency. It allows useful judicial re-evaluations of what best sentencing approach practice is. A good example of this beneficial knowledge transfer in action is when experienced professional judges

explain the importance of safeguarding trial fairness through the monitoring of procedural propriety to less experienced professional or lay peers.

E.) Reconciling future judicial empowerment with the desire for national consistency:

The dominant impact of the SGC guidelines was particularly noted by 8 English judges (3 professional, 5 lay) interviewed. They were controversially perceived as 'executive led' despite this not being the case. The majority of English judges noted a significant extension of broadly defined legislation had occurred though a close succession of Criminal Justice Acts. The relatively recent introduction of national sentencing guidelines had resulted in ever more specifically defined guidance as to how to structure the sentencing approach and how to apply pre-selected sanction ranges. However, despite the guidelines being considered clear and promoting national consistency, there was some English judicial uncertainty as to the potential deviation possibilities from these guidelines in the future. At the other end of the spectrum of influence on the sentencing approach, it was particularly noted by the 12 English judges that Higher Court case law and judicial precedent had lost favour. What this had created was a negative judicial perception in the lower Courts of England that their Higher Court judicial peers no longer primarily led the development and future reform of sentencing approach guidance.

On the other hand, in Denmark, High Court case law guidance through judicial precedent had been retained and national consistency driven sentencing guidelines had not been introduced. Despite this difference, there was still a less emphatic but similarly negative judicial perception that the High and Supreme Court judges were under increasing political pressures to sentence as the executive wished, negating the need to formally change legislation. For the Danish lower Court judges, their more senior High Court judicial peers were facing ever more specifically defined legislative addendums defining what the politically recommended sentencing approach in different offence categories should be. This had an undermining effect on the formulation of their case law

precedents which the lower Court judiciary primarily used to interpret their own sentencing approach.

In England, the relatively new dominance of the SGC guidelines and the increasing tendency towards specifically defined legislation were the two main sources of expanded executive control over their sentencing approach. If these are accepted as disempowering, then the question of whether these two sources can be reconciled with judge led sources of sentencing guidance, i.e.) purposive legislative interpretation and judicial precedents laid down in case law, is crucial to answer. **It is possible to achieve a re-balance of judicial power in England in three ways.**

Firstly, a reduction can be sought in the creation of specifically defined legislation. Instead, legislative drafters can entrust much more purposive interpretative powers to judges through more broadly defined sentencing legislation.

Secondly, the valuable work of the SGC (now Sentencing Council) can be incorporated into informing and supporting judicial collective training. There was significant judicial dislike of over consultation and centralised bureaucracy in new SGC guideline formulation. A more inclusive way to do this could be through collective training sessions where debate as to where the sentence approach can be improved encourages judges to think and make choices for themselves about their own sentencing approach. Thus the work of the SGC becomes an important information provision tool within training rather than a specific and prescriptive guidance source made compulsory through legislation.

Thirdly, the use of specifically targeted training led by Higher Court Judges with a focus on case law and legislative critical analysis skills for professional judges is important. English professional judges, like their Danish professional counterparts, should guide mixed sentencing panels. This best utilises their valuable and vast sentencing experience and legal knowledge skills.

If English professional judges proactively interpret sentencing legislation and case law, there is a greater distinction made between executive policy, parliamentary legislation formulation and Appellate Court judicial precedent. This greater distinction enables judicial self regulation to have more breathing space to develop on its own through flexible judicial interpretation of sentencing case law guidance. Such a three fold approach to reform firmly establishes Appellate Court influence and judicial precedent in the lower Courts. It is a judicially led way of encouraging national consistency in the sentencing approaches of English lower Court judges.

In Denmark and particularly England, the judicial interviewees shared similar concerns about the encroachment of overly prescriptive sentencing guidance. This was premised on the basis of ensuring greater national consistency in how sentencing was approached. It was commonly felt by lower Court judges in both jurisdictions that political trust and faith in their self-regulation had diminished. This had led to more concerted political debate where a preference for certain sentencing approaches and in particular certain sentencing outcomes had emerged. In order to counter such emerging political preferences the combination of broadly defined legislation with a high political tolerance for purposive judicial interpretation could be helpful. However, this presents a very difficult combination for politicians to accept, considering the increasingly frequent media and public pressures placed upon them to continually reform sentencing policy.

Whilst the 12 Danish and 12 English judges interviewed reported the same wider societal pressures, they crucially have different sentencing experiences and legal cultural backgrounds. Danish and English lower Court judges are not voted into office and are therefore not reliant upon public support over time. However, as this research highlights, judges are very sensitive to how their sentencing is perceived by the local public. They do not appear to require a direct vote of support in order to display this sense of local public affinity. In this sense, conservative judicial values together with a firm independent spirit have quietly helped to balance the governance of both English and Danish modern societies.

If, in England, lower Court judges were encouraged to primarily follow their High Court judicial peers and focus upon their case law precedents, what would their future collective training need to ensure? There would need to be a development of expert judicial search and comparison skills to support a high reliance on similar fact case law. There are online databases in England and Denmark that could streamline such case law searches, but could still leave the detailed comparison of offender and case facts to the ultimate discretion of judges.[412] High Court judges would need to produce well reasoned and justified sentences entered directly into an online database. There would be little difficulty in lower Court judges flexibly interpreting the similar fact case law precedents of their High Court colleagues provided there were broadly established legislative sentencing ranges for different offences. The structured approach of the SGC (now Sentencing Council) guidelines could be retained, but as a sentencing training aid rather than a practice necessity. Over time, sentencing experience in searching and applying similar fact case law would lead to a more pro-active and engaged lower Court judiciary.

The limits of collective training of English judges are that it can be considered too costly and time consuming to implement. Therefore, if the Danish sentencing deliberation model were to be adopted in England with the professional judge as Chair person and as the authoritative legal knowledge and guidance source to the 2 lay judges during sentencing deliberations, there would be a need to specifically target the primary training effort, i.e.) the professional District Judge. The secondary training effort target, i.e.) the lay Magistrate, could therefore receive less collective training. As in Denmark, English lay judges are very valuable in reflecting wider public opinions and thus only need a short introduction to legislation and case law analysis within their training sessions.

The specific targeting of professional and lay judge training helps to respect the different legal and vocational knowledge levels of professional and lay judges. There is

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[412] In Denmark, these online databases include: *'Tidsskrift for Kriminalret'* [TfK] and *'Ugeskrift for Retsvæsen'* [UfR] which are both provided by Forlaget Thomson.
In England, these online databases include: Westlaw UK (http://www.westlaw.co.uk/) provided by the Thomson Corporation and LexisNexis (http://www.lexisnexis.co.uk/) provided by Reed Elsevier (UK) Ltd.

no assertion that collective training is always appropriate. However, it is asserted that it *can* encourage better working relationships between English professional and lay judges in the future. It *can* help English lay Magistrates to be more informed and understanding of their professional judicial peer's expertise and experience in sentencing panel debates. Collective training reveals how professional and lay perspectives *can* compliment each other. It should respect individual difference and promote judicial debate. Currently, local English professional judges run a great deal of Lay Magistracy training which takes them out of Court. By using more Court Clerks to run collective training sessions more sentencing time is free to deal with the high volume of cases day to day.

Such a balanced and flexible approach also ensures that the collective training sessions remain economically efficient. In England, there is significantly more potential for developing pro-active lay judges through training because of their long term sentencing experience. This research suggests that sentencing confidence increases over time. In Denmark, lay judges are limited to a 4 year sentencing period which can be and usually is renewed. It is not suggested that English Magistrates should be limited to a four year service. They receive extensive and valuable training and their retention is very important. For those that argue for greater representation and diversity amongst the lay Magistracy, this can be better developed through initial selection rather than renewal procedures.

If English professional judges are encouraged and supported in their training on legislation and case law critical analysis by the Crown and Appellate Court judiciary themselves, there are two further advantages. Firstly, with frequent communications and direct interactions between the Magistrates' and Crown/Appellate Courts on legislation and case law critical analysis, best practice can be widely debated. In debating and coming to a common understanding there is a reduced likelihood that appeals against sentences from the Magistrates' Courts will be successful. A close knit judiciary across all echelons could well enhance morale and the collegiate ethos that has allowed judges to retain their independence over Centuries. When appeals to the Crown Courts are deemed necessary, there is less likelihood of any misunderstanding between what Crown

Court judges define and Magistrates' Court Judges interpret. Secondly, ensuring that training on legislation and case law critical analysis is led by the Crown and Appellate Court judiciary promotes judicial independence.

National consistency led sentencing guidance which openly tolerates a local judicial interpretation is a sign of judicial creativity being respected and judges being empowered. Thus within panel deliberations where a consensus has been reached through positive negotiation, any disagreements to the majority view stated in open Court should be a focus for future collective training. This promotes flexible debate and discussion between Magistrate and Crown Court judges. In this way, over time a relatively untested and new deviation system put in place by section 174 of the Criminal Justice Act (2003) is debated widely.

It is important to ensure national consistency through legislation whilst also empowering judges to interpret it widely. For lay judges, particularly in Denmark who considered legislation to be a significant sentencing guidance source on national consistency, there was some support for collective training with professional judges on legislative interpretation.[413] Extensive sentencing experience regarding similar fact case law comparison and legislative interpretation plays to the strengths of professional judges within collective training sessions. In Denmark according to the research data, the professional judges were commonly viewed by their lay counterparts as the consistent guidance standard. This was due to their established role as the authoritative legal knowledge source.[414] Developing a similar lay perception in England through collective training could overcome the judicial alienation noted by this research data. It would also be an option that accommodates the separate working practice norms of English professional and lay judges.

[413] Legislation was a highly influential guidance source on national consistency for 4 Danish lay judges and 2 English lay judges.
[414] The average years on the bench for all 12 English judges was 15.3 years compared to 12.1 years for all 12 Danish judges.

The development in Court of a familiar understanding of the problems of repeat theft offenders and their trial and error reform was commonly reported by all the judicial interviewees. Developing a judicial familiarity with and a deeper understanding of offenders was similarly perceived in both jurisdictions as a positive aid to their eventual reform. In terms of national consistency, it might appear that non-judge led sentencing guidance would be required to ensure consistency in this area. However, judicial interactions with those they sentence are unique and spontaneously develop. Thus judicial self-review of what reforms are necessary to ensure national consistency in sentencing approaches remains highly important. The Court Administrations in England and Denmark can of course impact the influence of judicial familiarity by listing repeat theft offenders with the same judges.

Finally, as particularly noted by the Danish lay judges, the long established sentencing deliberation approach of positive negotiation, consensus panel decision making and similar fact case law has not created sentencing disparity concerns. There was an acceptance amongst the Danish judges that regional variations existed, were inevitable and reflected local justice. In England, it was widely acknowledged that the SGC guidelines dominated how the sentencing panel deliberated. The guidelines pre-defined what the objective structure and focus of the sentencing deliberations would be. There was a clear vision for national consistency ending regional variation, but there had been little time for judges to openly debate what local justice now meant. The confusion amongst English judges over sentencing disparity concerns was noted by the researcher. Judicial justification of deviations from the guidelines and subsequent appeals could remove this uncertainty and confusion. However, it was commonly considered by the English judges to still be too early to tell.

F.) Redefining the future offence seriousness scale in England:

By acknowledging that the SGC guidelines dominate the English sentencing approach, how best to re-balance this becomes a crucial question to answer. It is clear that specifically targeted collective judicial training on developing pro-active case law

and legislative interpretation skills is important. However, is there more that can be done to re-define how offence seriousness is assessed? Firstly, legislative reform placed SGC guidelines as a primary focus. By changing section 172 of the Criminal Justice Act (2003) it is possible to remove the word 'must consider' and replace with 'may consider'. The rules on deviations under section 174 could also be simplified or even removed completely. This would encourage the pro-active judicial use of more guidance sources such as case law developments, online databases and aspects of best sentencing approach practice revealed within collective training sessions.

Secondly, widening the seriousness ranges by increasing the maximum sentencing powers in the Magistrates' Court for theft offences is a legislative option. However, the English judges were clear that to support an increase in custody lengths and usage in the future would require additional investment in custodial reform programmes. This is because the judicial interviewees in England favoured reform to deter future theft recidivism. Low judicial faith in the reformative value of custody can be reversed, but the real question is should it? Given that the time taken to properly treat drug and or alcohol addicted theft offenders in custody can be both lengthy and costly, it is likely that the current mix and match community sentencing options will be significantly extended.

A common consensus amongst Danish and English judges alike was that means tested fine usage and required lump sum victim compensation for theft offenders was almost meaningless. This was because theft offenders rarely had the financial means or were consensual in supplying their financial history in order to properly comply with such sentences. This left reform through unpaid work, drug and alcohol abuse rehabilitation and vocational education as the sentence types that had most judicial faith and support. This reflected a judicial desire to see sentences as long term reform, rather than short term measures that were not cost effective over time.

In redefining the offence seriousness scale, a number of judicially perceived advantages emerge. Firstly, in expanding the sources of guidance on the sentencing approach the extensive choice of guidance available is properly utilised. Any judicial

misperceptions are countered if there is the freedom to explore and debate different guidance sources both judicial and non-judicial within collective training sessions. Secondly, new consultations and amendments to the offence seriousness scale risks political and public intervention. This can make the redefining process overly bureaucratic leading to judicial alienation and a blurring of the lines between the executive and judiciary. The independence of the judiciary is required in order to impartially referee between the public's concerns and the political desire to address them expediently. If this does not happen, legal interpretation becomes unstable and arbitrary. It is very difficult for the public and politicians who lack legal expertise and extensive sentencing experience to create a sentencing approach that is well defined, measured and conserves a continuity of thought over time. On the other hand, an independent and life appointed judiciary have the valuable skills and experiences necessary to safeguard legal norms and maintain legal debate. However, it is important that lower Court judges can rely on their Higher Court peers to provide reasoned sentence choice justifications that keep stimulating the debate on sentencing approach best practice.

G.) Curtailing the influence from popular punitive politics in the future:

The influence from popular punitive politics depended on the political climate, the nature and focus for political commentary and its frequency. In England, there was a universal and robust judicial rejection of popular punitive political policy influence before formal legislative status had occurred. This was because until royal assent was given, no political policy was considered to be influential let alone binding. This was because such popular punitive policies focussed on the sentencing approach were considered to be too inconsistent and misinformed.

On the other hand, some of the Danish judges interviewed, expressed slightly more influence from popular punitive politics that pre-empted legislative change than their English counterparts. The lower Court Danish judges were highly influenced by the case law of their High Court judicial peers. Thus if their High Court judicial peers appeared to be sensitive to more and more frequent political commentary on their

sentencing approach and outcomes this could have a corresponding influence on the lower Court sentencing approach. As the increased political use of legislative addendums in Denmark shows, there is a danger to judicial independence from political commentary that is specific, directive and quickly created. The pressure to show understanding of the political commentary within High Court sentencing approaches and outcomes could be passed down in judicial precedents for the District Court judges to follow.

There is a three-fold solution to address the danger of increasing popular punitive political commentary. Firstly, judicial independence is predicated on enhancing their faith and confidence to resist political commentary, however frequent it may be. Judges can gently remind and persuade politicians through their sentence justifications that case facts are inevitably complicated. To achieve impartial and fair sentencing only a judge-led interpretation is properly independent. As English and Danish judges, particularly lays, focus on public validation of their sentences, they must remain extra vigilant that they serve all public concerns and not just popular ones. Secondly, Higher Court judges can set an example for Lower Court judges by properly debating the merits of popular punitive political policy influence before formal legislative status has occurred. This encourages independent judicial thought. Thirdly, collective training is an important way for judges to debate and formulate a shared response to political pre-legislative policy drives. Even once such popular punitive politics become formal legislation, they can and should be reinterpreted through case law and legislative critical analysis.

H.) Reforming future judicial responsibility for economic efficiency:

Despite the current recession and limited resources, there was a robust rejection of economic efficiency pressures by both the English and Danish judges. There was a shared English and Danish judicial perception that the responsibility for economic efficiency was shared. This was because, despite judicial control of the Court room, judges in both jurisdictions remained reliant upon their local Court administrations for trial listing expediency. Furthermore judges in both jurisdictions remained reliant on other Court room actors, i.e.) theft offenders, Police, Prosecutors, Defence lawyers,

witnesses, victims and the Probation Service (Kriminalforsogen) for the provision of detailed information on the offender and the offence facts. The responsibilities in English and Danish judicial minds were clearly linked to primarily in-trial and some specific post-trial processes.

This principally meant the pursuit of information on the offender and case facts, adjournment requests and any post trial misuse of appeals. It was similarly perceived that English and Danish Lower Court judges must be mindful to protect both the integrity and depth of quality analysis into case facts and each offender's background to ensure the trial process remained fair. This was balanced with trial and sentencing deliberation time and costs, but interestingly this did not extend to high cost sentence choices, i.e.) long term community mix penalties and rehabilitation of addicted theft offenders. Both the English and Danish judges did not feel responsible for in-trial inefficiencies such as poor advocacy and delays in either the provision of offender background information and delayed guilty plea submissions.

A pro-active approach whereby English judges seek to challenge the sources of economic inefficiency during in-trial processes could be beneficial. Once the source of the economic inefficiency is found English judges are well positioned to seek pragmatic compromise between the prosecution, defence and probation. However, this is dependent on lower Court judges being kept at the epicentre of the Criminal Justice System and receiving collective training which encourages pro-active intervention and resolution. Such collective training in England should be guided by the Crown Court judiciary in order to develop a close knit judiciary and a supportive collegiate ethos.

I.) The future format of sentencing guidance sources:

For both the Danish and English judges there was an emerging shared preference for electronic sentencing guidance resources. This was because they were easy to access and most importantly easy to search in a focussed manner to gather relevant results. In England, there was a low influence from regularly updated case law databases within the

Court room itself. This was because of low accessibility and awareness of electronic case law databases. However, there was some English judicial recognition that such electronic sentencing guidance sources were the most beneficial future format. Currently, there is procedural and sentencing guidance provided in book and electronic format within Archbold Magistrates' Courts Criminal Practice, Stones Justices' Manual and Thomas Current Sentencing Practice. Judicial familiarity with the electronic versions of these established Courtroom resources should be encouraged.

There are further electronic databases such as Lexis Nexis[415] and Westlaw[416] which could enhance and widen professional and lay judicial knowledge. They contain regularly updated information on legislation, similar fact case law search and comparison, Higher Court precedents and academic arguments. It is important that extensive electronic database training is given, especially to English professional judges particularly if they become the authoritative legal knowledge source to their lay peers within mixed sentencing panels.

Additionally within training on finding sentencing guidance resources there should continue to be a wide range of influences and formats. Thus there should be no desire to amalgamate all information together into one format or to pre-structure its significance to judges, other than perhaps through date order. This is because if judges are to lead their own sentencing approach, it is desirable that within training sessions a wide variety of sentencing guidance formats are available. These sentencing guidance formats should be collectively discussed and balanced by the judges themselves. The positive negotiation techniques of the Danish judges during panel deliberations which led to wide debate before a final common consensus was reached was highly valued. This is because it gave lower Court Danish judges a feeling of freedom and independence.

[415] The LexisNexis online electronic database (http://www.lexisnexis.co.uk/) is provided by Reed Elsevier (UK) Ltd and includes primary, i.e.) legislation and case law, and secondary resources, i.e.) academic articles and case commentary.
[416] The Westlaw UK online electronic database (http://www.westlaw.co.uk/) is provided by the Thomson Corporation and includes primary, i.e.) legislation and case law, and secondary resources, i.e.) academic articles and case commentary.

J.) The sentencing guidance source mix over time – Lessons learnt from sentencing experience:

The historical reminiscences of the English and Danish judges are important. This is because they reveal what judges think of changes to their sentencing approach over time. There are numerous lessons to be learnt from these perceived changes made to the sentencing experience over time in England and Denmark. Firstly, in England a negative judicial perception that the high influence derived from Appellate Court case law precedents had been gradually eroded over the last 30 years was developed. This had been reinforced by increasingly frequent executive and legislative encroachments into the sentencing approach guidance in order to redress frequent public concerns.

However, in Denmark, there had been little encroachment until around 15 years ago through legislative addendums that attempted to address changing public concerns. The Straffeloven had remained relatively silent on the theft sentencing approach and no national consistency driven guidelines had been produced. In the last 30 years, the professional judges' role as the authoritative legal knowledge source for the lay judges on case law developments had continued unchanged. In future, the executive and legislature should refrain from redressing frequent public concerns by attempting to change guidance on the sentencing approach.

Secondly, in Denmark there was a positive judicial perception that the significant influence derived from High Court case law precedents had remained in place over the last 30 years. In England, the most experienced judges interviewed noticed a gradual disconnect from the Appellate Court judicial precedents as a guidance source. This was partly due to national consistency driven guidelines, legislation and repeated training sessions that promoted them. It was also in part due to infrequent and broadly defined case law that was not easy to search, interpret and structure, especially for lay Magistrates. In order to re-connect the Appellate Court case law and increase its influence as a sentencing guidance source, five important future changes may be considered.

Firstly, there can be a renewed emphasis on sentencing case law and legislation analysis skills. This helps judges to feel more confident that they can justify deviations in open Court. It also encourages judicial pro-activeness and intellectual engagement through a more direct and open dialogue with their Higher Court judicial peers.

Secondly, national consistency driven guidelines can be better balanced with other sources of guidance by maintaining judicial faith in creativity and diversity and judicial independence. The future development of judicial training should encourage an inclusive approach with Appellate court case law, SGC guidelines and legislation viewed as cooperative and mutually supportive equals.

Thirdly, it is possible to reduce an overly bureaucratic consultation reliance that merely diffuses responsibility for and disengages with lower Court judges. Instead, a human touch within collective training and encouraged peer debate is far more likely to gain important feedback from lower Court judges who lead extremely busy working lives.

Fourthly, more future investment and research into Court room accessible databases should be backed up with collective training to ensure judicial communication and self guidance on this new information technology works effectively both vertically, i.e.) professional and lay as well as horizontally, i.e.) Higher Court judges and local community engagement.

Fifthly, it is noteworthy that English and Danish judges remained overall fairly confident and adaptable to change. If their judicial discretion is unduly restricted many will no doubt creatively seek ways to challenge this. This judicial spirit of independence and free choice is important and should be promoted. The reward for raising judicial faith and confidence in their own self regulation is that they will instinctively look to each other first for support and guidance. This means that the merits of any non-judge led sentencing guidance sources will be assessed collectively during training. In this

way, our lower Court judges feel they are a trusted team who can debate new influences using their valuable sentencing experiences gained over time.

The executive, legislative and judicial power balance is subject to continual flux according to the proponents of Heraclitus. This presents a paradox as to whether one can ever resolve that which is subject to constant change. There have been repeated historical trends towards conflict and unity within the State power balance. Judges have lost and gained power and there is no reason to think that this will not continue. However, whilst there is no absolute resolution to changes in the State power balance there is a way to help our judges retain their power and preserve their own independence and discretion. In this sense, the key matter in the power balance is the extent of discretion you want judges to have in order to regulate others, i.e.) to what extent *should* you regulate the regulator? The three power regulators being the executive, legislative and judiciary.

The judicial interviewees in both England and Denmark clearly answered this question. They acknowledged the inherent complexity of sentencing their fellow members of society. They then similarly pointed to the importance of free choice (identity, personality, humanity) in order to sentence. Defining what the sentencing ideals of fairness and consistency were through structuring was helpful, but precision and clarity was not necessary. Judges are more than capable of flexibly interpreting legislation, case law and more recently national consistency driven guidelines. It is this very capability that we most need to protect in what is an inevitably uncertain future.

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