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# New Boundaries of Justice in a World in Motion: Assessing the Impact of Global Citizens in the Irish District Court

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Submitted for the Degree of Doctor of Philosophy

University of Dublin, Trinity College

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## New Boundaries of Justice in a World in Motion: Assessing the Impact of Global Citizens on the Irish District Court


### Summary

Although empirical research lends little support for the perceived immigration-crime nexus, it is an enduring perception. This thesis considers the impact of immigration on the Irish criminal courts. Ireland experienced sustained and substantial inward migration from 1996 to 2008. The relationship between crime and immigration in Ireland cannot be accurately determined as nationality/residency status is not recorded by most arms of the Irish criminal justice system, but, the scale and rapid increase in the committal of non-Irish nationals to Irish prisons during the period 2001 to 2007, suggest the disproportionate presence of immigrants in the Irish criminal justice system. However, this thesis highlights the administrative detention of non-Irish nationals in Irish prisons which mean that committals to prison are not an accurate indicator of the extent to which non-Irish nationals are processed by the Irish criminal justice system.

This thesis steps back from the prison to the court to consider the criminal justice processes applied in the disposition of criminal charges. Research was located in the District Court which disposes of the overwhelming majority of criminal matters and is responsible for the majority of committals to Irish prisons. This thesis set out to consider how the presence of foreign defendants, who are defined as non-Irish and non-UK defendants, affects the work and organisation of the Irish District Court, and to assess the treatment of foreign defendants by the court.

The methodology adopted was quasi-ethnographic. District Court proceedings were observed for a period of two months in four different locations. Extensive field note extracts included in the thesis give layers of detail which provides a nuanced and detailed account of the court and its principal actors.

The thesis describes both the Irish and the foreign defendants observed. District Court defendants are presented as a diverse mass drawn from all sections of Irish society. However, the modal defendant is a young male of lower socio-economic status. This was found to be consistent regardless of the nationality of

defendants. The presence of defendants from the largest national groups in the foreign resident population was found to vary substantially. With the notable exception of immigration charges, the presence of foreign defendants in the Irish District Court was not found to be related to EU citizenship status.

The thesis presents evidence of widespread sentencing inconsistency in the District Court and attributes this to the broad sentencing discretion enjoyed by Irish District Court judges coupled with the absence of sentencing guidelines, or an overarching sentencing rationale. It is argued that sentencing inconsistency undermines the work of the court.

The thesis highlights the routine imposition of short term custodial sentences by the District Court and that the criminalisation of breaches of immigration legislation can lead to the differential policing of the immigrant population and of minority ethnic groups. The Roma population is identified as being especially at risk of differential policing.

This thesis considers the provision of interpreters to defendants with limited English proficiency and concludes that the standard of interpretation is not always adequate. The thesis also points to a reluctance to adjust court proceedings to accommodate the interpretation process.

In conclusion, this thesis argues that policing patterns and priorities result in the overwhelming majority of defendants in the District Court being of lower socio-economic class. The thesis contends that immigrants of lower socio-economic class face an especially high risk of criminalisation, but immigrants with high socio economic status do not face a high risk of criminalisation.

The local micro level observations presented by this thesis contribute to a nuanced understanding of variations in penal processes in capitalist societies and build on the materialist criminological perspective known as the political economy of punishment.

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# 1 Introduction

## 1.1 Sociological Perspectives on Punishment

This thesis presents an exploratory study of the presence and treatment of non-Irish nationals within the Irish criminal justice system. The thesis adopts a sociological approach and has been influenced by sociological understandings of punishment and the insights offered by key sociological perspectives on punishment. As this conceptualisation of punishment is at the core of this thesis it is explained, and the most influential sociological perspectives on punishment are outlined, before the substantive subject of the thesis is addressed.

Modern states use a variety of measures to regulate, control and discipline those within their boundaries. The most coercive sanctions are reserved for those who breach the criminal law and an array of systems and organisations exist to ensure that wrongdoers can be detected and sanctioned. How should such systems and sanctions be understood and evaluated? Penal systems and organisations are most commonly understood as measures used in response to crime. This technocratic and managerial view measures the success of criminal justice systems in terms of rates of crime and recidivism and the control of convicted offenders. Another common view of punishment is to consider it primarily as a moral issue. Punishment is evaluated by considering the moral justification for its use, and the appropriateness of the sanction. From this perspective the effectiveness of punishment is not the principal concern but rather whether the punishment imposed can be justified on moral and ethical grounds. It is argued that while both these understandings of punishment are relevant neither acknowledges the social determinants and the widespread ripple-like effects of punishment, and therefore they can provide only a partial explanation for our penal processes and their impact.

Conceptualising punishment as a social institution helps us to recognise that like other social institutions penal systems are an important and enduring feature of social life; they are embedded in the social, economic and cultural

fabric of societies, they shape and are shaped by other social institutions, and their range of impact extends far beyond the individual offenders that are punished (Garland 1991). A sociological view of punishment allows us to understand why efforts to control crime and responses to crime will not simply vary with the level and nature of crime, but rather will be impacted by factors such as political and popular discourse, economic resources, systems of production, industrial relations, and social and cultural mores and sensibilities, and to appreciate that changes in rates of crime may be a direct consequence of changes in penal practices or an indirect consequence of social, economic, or political change.

Theoretical perspectives of punishment provide us with the conceptual tools to interpret punishment and to understand its complexity; they give us the clarity and insight required to appreciate the social role and significance of punishment. Several theoretical strands have emerged within the sociology of punishment. Each of the major strands offers a different interpretation of punishment, and each offers insights which contribute to our understanding of modern penal systems. The brief outline presented below of the sociological perspectives on punishment associated with Durkheim, Marx, Foucault and Elias is largely drawn from the work of David Garland (1990, 1991).

Emile Durkheim's view of punishment is consistent with his emphasis on social solidarity and consensus. He considered that crimes which infringe the 'collective conscious' provoke a communal response which serves to re-affirm the moral code that has been violated (Durkheim 1964, 1973). Hence, punishment 'transforms a threat to social order into a triumph of social solidarity' (Garland 1991:123). Crime then is a force which, by inducing moral reprehension, strengthens the moral code and contributes to social cohesion. The ritual of punishment helps to produce this moral outrage and provides an arena for the 'ritualized expression of social values and the controlled release of psychic energy' (Garland 1991:123). Hence, Durkheim emphasises the expressive rather than the instrumental value of punishment. Durkheim's view of punishment as a rule-affirming force is best embodied in our criminal courts. As Rock notes, 'in societies

increasingly bereft of civic ritual, the criminal court is one of the rare secular institutions quite unambiguously intended to appear symbolically strong' (1998:588).

Durkheim's interpretation of punishment presumes the existence of a 'conscience collective' which will be repulsed by crime. It seems likely that this 'conscience collective' only exists in modern developed pluralist societies to a limited extent, and rather than there being a moral consensus which is encapsulated in the criminal law the criminal code may in fact largely represent the interests and values of the most dominant and powerful in society (Quinney 1970; Chambliss & Seidman 1971; Turk 1972). Criminal law and penal processes may therefore be vehicles by which values are imposed rather than affirmed (Garland 1991). Durkheim's view of punishment as a public ritual does not accurately reflect the nature of many modern penal measures; even the most public of penal processes which take place in our criminal courts often have a very limited public audience (Rock 1998). In addition, media reporting about crime may give more space to unresolved cases than to judicial pronouncements which affirm moral boundaries, so that public knowledge of crime may centre more on the infringements of our criminal code than on the process of punishment and the denunciation of wrongdoers (Rock 1998).

Marx did not address the issue of punishment directly, but his work has provided the inspiration for a range of neo-Marxist perspectives on punishment. Some analysts focus on the economic and political foundations of capitalist society and point to the link between modes of production and penal structures (Rusche & Kirchheimer 1939; Melossi & Pavarini 1981; Cavadino & Dignan 2006). Punishment is thus seen as a process which is intrinsically linked to the labour market. This perspective has been adopted by this thesis and is explored in greater detail below. Other neo-Marxist perspectives on punishment point to the manner in which the hegemony of powerful groups is protected by penal processes (Chambliss & Seidman 1971), or to the role of punishment in class struggles (Hay 1975). Punishment is therefore conceived as a force which legitimates and strengthens the power of the ruling class.

Marxist interpretations of punishment may overstate the influence of economic structures and understate the impact of political, social and cultural forces on penal processes. The depiction of punishment as a tool used in an ideological class struggle also overlooks the society-wide support that criminal justice processes command. Although neo-Marxist perspectives of punishment are open to criticism they provide a key contribution to our understanding of punishment by interpreting punishment as one element of a wider system which regulates and controls the urban working class. This interpretation therefore links punishment with other social institutions such as education, welfare and labour market policies.

Unlike neo-Marxist and Durkheimian accounts of punishment, Michel Foucault focuses on how punishment is actually implemented. While Durkheim emphasises the symbolic and expressive quality of punishment Foucault examines and interprets the increasingly carceral nature of modern penal institutions. He analyses the methods of surveillance, inspection, regulation and discipline of penal populations and the spheres of knowledge and expertise which underpin these methods.

Foucault uses his study of the prison as the basis for an exploration of power relations in the modern world. He contends that in the modern world physical manifestations of power are superseded and are largely replaced by a more insidious knowledge-based power which is applied and reinforced by repeated and ongoing interventions and corrections. Foucault sees the prison project as being primarily corrective rather than punitive with the ultimate aim being the production of compliant, conformist, rule-abiding individuals (1977). Modern prisons deploy disciplinary power through their physical form, which aids surveillance and conditions inmates to self-regulate their behaviour, and through the use of regulations which dictate and control the minutiae of prisoners' lives. Foucault argues that the prison has failed in its penological objectives but this failure is in fact a political success as 'the creation of a recidivist delinquent class is deemed to be useful in a strategy of political domination because it works to separate crime from politics, to divide the working classes against themselves, to enhance the fear of prison, and to guarantee the authority and power of the

police' (Garland 1991:138). Prison is therefore primarily a device which controls the working class rather than the criminal class.

One could argue that Foucault's interpretation of punishment neglects the wider political, cultural and moral context, and identifies punishment too closely with regulatory and disciplinary methods. Also, given the reduced prominence of the rehabilitative ideal in penal strategies it could be claimed that Foucault's emphasis on the power-knowledge relationships which are an integral part of rehabilitative regimes of criminal justice is not representative of modern penal institutions. Garland argues that despite the current lack of prominence of the rehabilitative ideal Foucault's interpretation of punishment as an institution ruled by expert rationalities, detailed routines and carefully crafted techniques of control has continuing significance for our understanding of penal processes and 'governmentality' (1991). However, as Fraser points out, in the current era of post-Fordist modes of production and globalisation, the boundaries and modes of social regulation have shifted, and Foucauldian ideas and categories need to be transformed to reflect new forms of self-regulation and transnational governance (2003).

The last perspective on punishment examined is that based on the work of Norbert Elias, and concerns the impact of the processes of civilisation on our sensibilities regarding acceptable forms of punishment and the treatment of offenders. Elias shows that the socialisation process that accompanied the transformation from a feudal to a market society brought about an increased moderation in public displays of emotion and heightened thresholds of sensitivity towards certain baser aspects of life which were removed to the private sphere. As human behaviour in the public arena became more refined and sanitised by this process of socialisation people developed a greater sensitivity to the pain and suffering of others (Elias 2008). So, punishment as a public spectacle gradually came to be considered unfitting and inappropriate, and over time the use of violence as a penal sanction came to be considered distasteful and not in keeping with the sensibilities of most modern societies (Spierenburg 1984). This change in sensibilities also justifies the containment of 'uncivilised' criminal

offenders in prisons away from the public arena. Societies that still use capital punishment disguise the violence of this sanction by refining the methods of execution and professionalising and medicalising the process (Zimring & Hawkins 1986). Indeed as Garland notes 'modern punishment is institutionally ordered and discursively represented in ways that deny the violence which continues to inhere in its practices' (1991:150).

This perspective on punishment points to cultural sensibilities as an influence rather than a determinant of penal policy. It suggests that changes in penal policy may be initiated and mediated by a range of diverse actors and institutions within society and that cultural context may be particularly useful in comparative and historical analysis of penal mechanisms and trends.

We can point to flaws in each of these theoretical perspectives but it is perhaps more important to appreciate what each one contributes to our understanding of punishment, and the particular relevance of each to different penal practices and policies. Informed by these perspectives we can readily reject a narrow, compartmentalised view of punishment and appreciate its wider social significance and impact.

### 1.1.1 Political Economy of Punishment

In recent years the burgeoning prison populations of most Western developed countries have provided the key stimulus for debate amongst those concerned with the sociology of punishment. Important and influential contributions have been made to this debate by proponents of a materialist criminological perspective known as the political economy of punishment (Wacquant 1999; Western & Beckett 1999; Beckett & Western 2001; Wacquant 2001; Sutton 2004; Wacquant 2005; De Giorgi 2006; Wacquant 2009). The weight afforded to these contributions has increased the influence of this perspective on punishment. The perspective stems from the work of Rusche and Kirchheimer (1939) who draw on the concept of 'less eligibility', which shaped the Poor Laws of 1834, to describe how capitalist societies secure a readily available supply of labour by

implementing penal structures which provide conditions of confinement which are inferior to the living conditions of even the lowest paid workers, and which therefore induce workers to prefer paid work and seek to avoid criminal sanctions (De Giorgi 2010). Rules regarding general social behaviour are also used to regulate the behaviour of the working class and lower the threshold of 'less eligibility' (Melossi 2003a).

#### *1.1.1.1Explanations for variations in penal punitiveness*

Building on Esping-Andersen's seminal work on welfare regime typologies (1990) analysts have pointed out, however, that while unfettered capitalism associated with neoliberal ideals, 'flexible' labour markets, residual means-tested social welfare provision, and an emphasis on individual rather than collective responsibility are associated with high levels of penal punitiveness, structures within many capitalist societies protect against penal punitiveness (Cavadino & Dignan 2006). Hence, the unconditional social rights and strong communitarian ethos associated with social democratic welfare regimes are linked with low levels of penal punitiveness, and efforts to re-integrate rather than exclude offenders. The status-maintaining, hierarchical, and conditional social rights associated with conservative corporatist welfare regimes are associated with consensual decision-making processes and are linked to moderate levels of penal punitiveness and to limited inclusivity.

Levels of penal punitiveness have also been explained by drawing on the 'varieties of capitalism' thesis developed by Hall & Soskice (2001). Hall & Soskice show that the strategic interaction of key institutional structures such as education and training systems, labour market regulations, and corporate governance mechanisms, play a key role in determining the orientation of capitalist societies and how they are coordinated.

Hall & Soskice divide capital political economies into two ideal types, liberal market economies (LMEs) and coordinated market economies (CMEs), but recognise that these ideal types represent 'poles of a spectrum along which many nations can be arrayed' (2001:8). They argue that LMEs are primarily

coordinated by competitive market arrangements. Businesses in LMEs are largely focused on short-term results, and require a flexible labour force to enable them to respond quickly to market signals and adjust levels of supply. This flexibility is provided by a large number of low-skilled workers who can easily transfer between employers. Levels of social support in such economies are residual as workers are expected to be able to move easily within the economy and so be able to quickly rejoin the labour force if they lose their job. In contrast, the institutional structures in CMEs produce workers with higher levels of vocational training; this facilitates the production of high quality goods. Firms seek to retain their highly skilled work forces and may be slow to respond to market signals. The income supports received by unemployed workers in CMEs also tend to be more generous than in LMEs in recognition of the difficulty of transferring between sectors.

The culture of corporate governance in CMEs is collaborative with an emphasis on long-term relationships and stability both within and between firms. Inter-firm collaboration advances the specialisation needed for the production of high quality goods.

Lacey (2008) argues that the large pool of unskilled workers produced by LMEs are at risk of being socially and economically marginalised. In LMEs the use of the penal system to regulate and control this pool of unskilled workers is consistent with the competitive, non-collaborative, institutional structures within the political economy. In CMEs, however, the institutional structures are more oriented towards inclusion than exclusion. The collaborative and corporatist systems also contribute to an extensive system of informal social controls and encourage moderation in the use of formal controls (Lacey 2008:61). However, 'outsiders' may lack the training and skills to fit in easily in CMEs whereas they may more easily be absorbed in LMEs. The presence of a large cohort of outsiders in CMEs may even undermine support for inclusionary social policies (Lacey 2008).

If we compare the imprisonment rate in the United States in 2008 (756 per 100,000), to the imprisonment rate in countries such as Norway (69 per 100,000), Germany (89 per 100,000), or England & Wales (153 per 100,000), (Walmsley 2009) we can see that penal punitiveness varies greatly in modern developed societies. These more nuanced perspectives of the political economy of punishment therefore reflect the empirical reality that capitalist societies do not use the penal arm of the state in a uniform fashion and provide us with a framework for understanding the significant and persistent divergence in levels of penal punitiveness. Despite ongoing divergence in penal punitiveness there are also claims of convergence which are especially linked to the increasing globalisation of developed market economies and the dominance of neo-liberal economic policies. Those that warn of convergence use the case of the penal population in the United States as the archetype which other penal populations may converge towards.

#### *1.1.1.2Shift in economic structure and penal punitiveness*

Since 1972 the US prison population has increased more than sevenfold (Western 2006). Proponents of the political economy of punishment link the steep upward trajectory in the American penal population to the emergence of a post-Fordist economic structure in the late 20th century, and the hegemony of neo-liberal economic policies that promote open markets and deregulation, and provide the rationale for tightening access to state services and supports (Lynch 2007; Wacquant 2009). Economic restructuring in the US has resulted in the outsourcing of many manufacturing jobs and downward pressure on the wage rates paid to those employed in low skilled manufacturing and service jobs and has particularly impacted the African American community (Wilson 1996; Wacquant 2001; Pettit & Western 2004; Western 2006). While rewards for the elite entrepreneurial class have soared the economic marginalisation of the lower classes has increased.

It is argued that those who are economically marginalised, the 'less eligible' in society, are controlled by the state through a combination of workfare

and prisonfare (Wacquant 2009). Workfare is largely directed at single mothers while prisonfare controls hordes of young men, and in particular young black men, who cannot contribute to the surplus value of knowledge-driven economies. The disproportionate impact of greater penal punitiveness on young black men means that penal expansionism is buttressing negative perceptions of the black community and contributing to racial cleavages in American society (Pager 2007).

The scale of incarceration in the US and the massive over-representation of minorities, especially African Americans, in the penal population, can mean that differences rather than similarities between European and US penal patterns are more readily identified. However, evidence of penal expansion in some European countries in recent years has prompted claims that European states (and especially Britain, France and Germany) have embraced American economic neo-liberalism, and this embrace has provided the impetus for a contracted, less generous welfare state, and for greater penal punitiveness (Wacquant 2009).[1]

## 1.2 Immigrants and Penal Expansionism

Wacquant contends that the role of the penal system extends beyond controlling crime to controlling poverty and inequality. He claims that it is used to 'regulate the lower segments of the labor market and to hold at bay populations judged to be disreputable, derelict, and unwanted' (Wacquant 1999:216).

In the United States penal expansionism disproportionately impacts the black community, but Wacquant argues that in Europe it is foreigners who are unduly impacted by penal expansionism. Wacquant describes foreigners as the 'blacks of Europe' (1999:216) because like African Americans they are mainly concentrated in precarious low-paid jobs and they are viewed as being somehow less worthy of inclusion in society. Wacquant refers to the imprisonment of foreigners as a *'confinement of differentiation* or

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[1] Scandinavian countries are notable exceptions to this trend (see Pratt 2008a, 2008b).

segregation' (1999:218, emphasis in original) which is aimed at keeping them separate and facilitating their removal from society. In addition to serving their term of imprisonment foreigners may suffer a double penalty by being deported.

De Giorgi (2010) also argues that one of the significant drivers of penal expansion in Europe is the hyper-criminalisation of immigrants, and in particular non-European immigrants. De Giorgi (2010) points out that capitalist societies have historically sought to control the mobility and hence the supply of labour. He links this desire to control the mobility and supply of labour to efforts to control immigrants through border controls, through restrictions on access to labour markets and to social supports, and through criminalisation and incarceration. These measures are designed to ensure that immigrants provide a flexible source of labour which can be easily controlled, but they also result in immigrants facing a greater risk of economic marginalisation while also being subjected to greater police surveillance. The differential treatment of immigrants within European economic and criminal justice systems results in immigrants having a greater risk of being labelled criminal than the native population (Melossi 2003b), and indeed it has been claimed results in the hyper-criminalisation of immigrants (De Giorgi 2010).

### 1.2.1 Criminalisation and Socio-Economic Status of Immigrants

This thesis aims to provide a contribution to recent debates regarding the criminalisation and incarceration of immigrants. It argues that, despite the structural disadvantages faced by all immigrants, it is principally immigrants from lower socio-economic classes who face a higher risk of criminalisation. This is because law enforcement measures are primarily targeted at a limited sector of society. Law enforcement efforts are largely targeted at those who are unruly, who consume excessive amounts of alcohol or controlled substances, who cannot or choose not to engage in waged labour, who beg on the streets, or who resort to petty theft. It is these

people, whatever their nationality, who are most likely to be subject to control by the penal arm of the state. Little law enforcement effort is directed towards those engaged in less visible, and especially 'white collar', crime. Easily identified offences and easily targeted offenders are most likely to be processed by our criminal justice systems. This may be especially likely in countries such as the US, Britain and Ireland which include 'regulatory' offences within the realms of criminal law (Lacey 2008).

The narrow focus of the bulk of law enforcement efforts means that the immigrants who are criminalised will largely mirror those within the native population who are criminalised. Therefore, this thesis contends that the particular structural disadvantages faced by immigrants are only likely to result in the hyper-criminalisation of a limited section of the immigrant population. The majority of the defendants in the Irish District Court, and in particular persistent offenders, are unemployed or work in low-paid unskilled or semi-skilled jobs rather than being from the professional and managerial classes; this is the case for defendants of all nationalities. Therefore, it is the Irish bricklayer, the Polish agricultural labourer, or the unemployed Nigerian chef, rather than the American architect, the Irish IT specialist, or the Indonesian doctor, who are most likely to appear before the Irish District Court.

It should also be recognised that while the disproportionate presence of lower socio-economic class defendants is driven by different behaviour patterns and by the allocation of law enforcement resources, interactions with criminal justice actors and institutions are influenced and mediated by education and social class. Law enforcement officers may hesitate before arresting the articulate and urbane, regardless of their nationality.

## 1.3 The Presence of Non-Irish Nationals in the Irish Criminal Justice System

Until recently, discussions and debates regarding the presence and treatment of foreign nationals within European criminal justice systems

seemed to be matters which were of peripheral rather than central importance to the Irish criminal justice system. When Loic Wacquant contended in 1999 that throughout Europe, immigrants, and especially non-European immigrants, are policed more diligently and punished more severely than the native population we knew nothing about the presence of non-Irish nationals in the Irish criminal justice system. Wacquant's claims were of obvious relevance to the criminal justice systems of long-standing immigrant destination countries such as France, Britain and Germany, but appeared to have little direct relevance to the Irish criminal justice system. However, just a short time after Wacquant pointed to the over-representation of 'foreigners and quasi-foreigners' in European prisons (1999) it became clear that foreign nationals were in fact being committed to Irish prisons at a rate which greatly exceeded their presence in the resident population. Before examining the presence of foreign nationals in the Irish penal population the dramatic shift in the pattern of inward migration to Ireland which began in the late 1990s is briefly addressed. Migration patterns will be considered in greater depth in chapter 2.

### 1.3.1 Recent Inward Flows of Migrants

For many years the inward flow of migrants to Ireland was small and largely consisted of returning Irish emigrants. The non-Irish nationals who did migrate to Ireland overwhelmingly consisted of UK nationals (National Economic and Social Council (NESC) 2006). In 1996 over 75% of migrants in Ireland were UK nationals with the second largest group of migrants being US citizens who accounted for 6.2% of the migrant population (NESC 2006:16). Therefore, in 1996 the vast majority of non-Irish nationals living in Ireland were English speakers who for the most part looked very similar to the native population. However, during the period from 1996-2008 Ireland experienced substantial inward migration, and the origins of migrants to Ireland became increasingly diverse. Between 1999 and 2002 migrant inflows to Ireland of non-EU/non-US nationals increased nearly fivefold (NESC 2006), while in 1999 the number of returning Irish migrants peaked and then began to decline (Organisation for Economic Co-operation and Development (OECD) 2004). The socio-economic status of migrants has

also become more diverse. While most migrants to Ireland in the 1990s were skilled workers, since 2000 many migrants have taken up employment in less skilled jobs (NESC 2006:22).

From the late 1990s then, for the first time in Ireland's history, inward migration became a force which wrought significant changes in the ethnic and racial profile of the Irish population. Whereas in the past Ireland's migrant population constituted a small, and for the most part not readily distinguishable section of the population, the accents, languages, and appearances of many new migrants ensure that they are very visible in Irish society. The socio-economic status of migrants has also changed as more migrants are now working in unskilled or semi-skilled employment than was the case in the past.

### 1.3.2 Increase in Presence of Non-Irish Nationals in the Irish Prison Population

Although net inward migration flows from the late 1990s excited a great deal of comment and debate (see *inter alia* O'Sullivan 1998; Fanning 2001; MacÉinrí 2001a, 2001b; Immigrant Council of Ireland (ICI) 2003; National Consultative Committee on Racism and Interculturalism (NCCRI)/Equality Authority 2003a; Kelleher & Kelleher 2004), the absence of statistics regarding the nationality/residency status of persons processed by the Irish criminal justice system during the initial period of net inward migration meant that the presence of non-Irish nationals in the Irish criminal justice system was not measurable. This situation changed when the Irish Prison Service (IPS) incorporated details regarding the nationality of persons committed to Irish prisons in its Annual Report for 2001 (IPS 2003a). For the first time we had an indication of the scale of the presence of non-Irish nationals in the Irish criminal justice system. The statistics showed that roughly one in six of all persons committed to Irish prisons in 2001 were not Irish citizens. Successive IPS Annual Reports charted a rapid increase in this proportion so that by 2007 approximately one in three of all persons committed to Irish prisons were non-Irish nationals (IPS 2008), a

proportion which was greatly in excess of the size of the resident non-Irish population which accounted for just over 10% of the population in 2006 (Central Statistics Office (CSO) 2008a). We could now see that Wacquant's claims regarding the presence of foreigners in European prisons (1999) were of direct relevance in the Irish context.

### 1.3.3 Ireland's Political Economy and Immigrants

Before seeking to interpret the presence of immigrants in the Irish prison population it is useful to position Ireland's political economy in relation to the typologies already discussed, and to consider where immigrants fit in Ireland's political economy. Ireland's political economy does not fit neatly into any of the welfare regime typologies outlined by Esping-Andersen (1990), nor indeed does it match the ideal type of either the LME or the CME. Ireland's welfare state 'resists easy classification' (NESC 2005:140), and while some analysts have considered that it best belongs in the liberal welfare regime group, others have assigned it to the corporatist welfare family (Carey 2007:49-50). The Irish welfare state has at different times and in different policy areas been influenced and shaped by liberal, corporatist, and even social democratic ideals, but the weight given to these various ideals has not been constant in all policy areas. Hence, as O'Sullivan argues, 'part of the difficulty in interpreting the nature of the Irish welfare state lies in the historical trajectory of each area of policy that collectively made up the welfare state in the post-independence period. Different areas had very different influences and pathways' (2004:326 cited in Carey 2007:50).

Similarly, Ireland's institutional structures could be said to lack coherence, although the heavy emphasis placed on social partnership structures and consensual economic and social policy formation by the social partnership agreements since the late 1980s may have shifted its position on the spectrum between a LME and a CME in the direction of a CME. Certainly Ireland's moderate level of penal punitiveness[2] is more consistent with a

[2] In 2008 the rate of imprisonment per 100,000 was 76 (Walmsley 2009).

conservative corporatist welfare regime, and a CME, than a liberal welfare regime and a LME.

There are no restrictions on citizens from EU25 countries entering the Irish labour force. Other migrants require work permits and the opportunities for non-EEA (European Economic Area) citizens to get work permits have been restricted by recent legislation (Barrett & Duffy 2008; see also Employment Permits Act 2003, 2006). Due to minimum social insurance contribution requirements and the habitual residency condition (Department of Social Protection (DSP) 2010) migrants may not be entitled to income support or to the social services enjoyed by Irish citizens. Immigrants therefore face a greater risk of economic marginalisation than the native population. Immigrants in Ireland have more opportunity than the native population to breach the law because of the criminalisation of breaches of immigration legislation which for the most part apply only to non-Irish citizens. Immigrants in Irish society therefore face a higher risk of social and economic marginalisation and of criminalisation than the native population. However, it is not clear to what extent these structural disadvantages impact levels of offending or of surveillance.

### 1.3.4 The Need for Research

IPS statistics indicate that non-Irish nationals are over-represented amongst persons committed to Irish prisons. The simplest interpretation of this over-representation is that non-Irish nationals commit more crime than the native population. The IPS statistics may therefore appear to confirm a belief held by some that many 'foreigners' in our midst are dangerous and crime prone. It has been argued that social analysts are too constrained by political correctness to accept this explanation even though the 'man on the street' can see it is true (Solivetti 2005:323). Certainly this alluringly simple storyline fits in neatly with media reports of criminal activity by foreign criminals in Ireland. Accounts in the Irish media of Russian and Albanian 'mafia' activities (Cusack & Guerin 2003), of African cocaine traffickers (O'Keefe 2009), of dangerous Chinese 'snakehead gangs' (Bennett 2001), and 'Gypsy gangs' (Brady 2009) which link the immigrant population with

criminality, stoke up the perception that foreigners are dangerous, and make it almost natural to link criminality with foreigners and hence with immigrants. The 'amalgam of immigration, illegality and criminality' (1999:219) that Wacquant describes is deceptively easy to forge, and one suspects it may be very difficult to dissolve.

However, other explanations for the large and growing proportion of non-Irish persons committed to Irish prisons warrant investigation. The IPS statistics regarding the nationality of persons committed to Irish prisons in many ways provide us with more questions than answers. Do they reflect higher levels of criminality amongst the resident non-Irish population or do they perhaps indicate, as Wacquant suggests, that this section of our population is unduly targeted and harshly treated by our criminal justice system? We should also bear in mind that these explanations are not mutually exclusive. It is possible that non-Irish nationals in Ireland are more prone to criminal behaviour than the native population, and it is also possible that structural biases within the Irish criminal justice system result in higher rates of criminalisation, and of incarceration, of non-Irish persons.

The IPS statistics do not provide us with enough information to interpret the presence of non-Irish persons in the Irish prison population and indeed, as is explained in Chapter two, and Chapter eight, they do not provide a reliable indication of the involvement of non-Irish nationals in the Irish criminal justice system. Prison populations reflect the cumulative effect of decisions made at a number of different stages in the criminal justice system. The disproportionate presence of a section of the population in the prison population could reflect legislation, policing, or sentencing practices which are discriminatory, or which have a differential impact on citizens and non-citizens, or the combined impact of all of these processes. A comprehensive statistical database regarding the persons processed by the Irish criminal justice system could provide us with details of the scale of the presence of non-Irish nationals at the various stages of the Irish criminal justice system, which might identify particular areas of concern, but this is not available. Therefore, without appropriate research we cannot accurately

interpret the presence of non-Irish nationals among persons committed to Irish prisons.

## 1.4 What This Thesis Aims to Achieve

This thesis aims to address this gap in our knowledge. The thesis focuses on Irish criminal courts, and in particular the lowest tier of the Irish criminal courts, the Irish District Court, which deals with a high volume of offences and offenders. The Irish District Court is the initial point of contact with the court system for all persons accused of criminal offences. It disposes of more than 90% of criminal cases in the state, and is responsible for the majority of committals to Irish prisons. It is a vital part of the court and wider criminal justice system.

Unlike higher tier criminal courts the 'criminal' nature of some of the offences dealt with by lower tier courts may be ambivalent rather than clear cut. We may all understand that murder is a crime but consensus is less likely regarding what constitutes a public order offence, or what level of alcohol makes a driver a drunk driver. Ireland, like Britain and the US, includes many 'regulatory' offences (Lacey 2008) within the ambit of its criminal laws. These offences are *mala prohibita* rather than *mala in se* (Whitman 2003:201); they are crimes because they are forbidden by the state rather than because they are inherently wrong in themselves. These offences do not fit neatly into the predominant view of criminal law as being a 'quasi-moral normative system concerned with wrong-doing and culpability' (Lacey 2008:103), and by investing power in the police they may undermine the view of law as an 'autonomous system whose doctrinal standards place constraints on power' (Lacey 2008:102). In Continental European countries such regulatory offences are generally separated from criminal offences and hence from the power of the police. The offences dealt with by lower tier courts therefore tell us a great deal about how 'crime' is defined in a society, and also about how it is policed and controlled. For all of these reasons the District Court provides the ideal location for this research.

As is explained more fully in chapter four this thesis largely focuses on non-Irish/non-UK nationals, who are referred to as foreign nationals. This research approach recognises that the presence of UK nationals amongst District Court defendants is not likely to present the court with any particular difficulties. It also acknowledges the practical difficulty of accurately distinguishing UK defendants from Irish defendants, and reflects the fact that the steep increase in the presence of non-Irish nationals is not attributable to an increase in the proportion of UK nationals committed to Irish prisons.

The purpose of this thesis is to present an account of the work of the Irish District Court in relation to criminal matters, with particular emphasis on foreign defendants dealt with by the court. The thesis provides an assessment of the scale of the presence of foreign nationals before the court, describes the types of charges they face, and considers differences in the observed offending pattern of Irish and foreign nationals. It allows us to form a picture of the foreign nationals who appear before our courts, their residency status in Ireland, their country or area of origin, and their gender, age, employment status and socio-economic class. It also enables us to assess the procedures adopted by the court to ensure their fair treatment. The thesis also presents an assessment of the sentencing practices of the court, and in particular sentencing decisions in respect of foreign defendants. Sentencing decisions in respect of both Irish and foreign defendants are considered so that differential or discriminatory sentencing practices can be identified.

The District Court is the venue where the various pillars of the Irish criminal justice system have most contact. This has allowed the thesis to provide an insight into interactions between Gardaí and Irish and foreign defendants, and between the probation services and convicted persons.

### 1.4.1 Research Questions

The four central research questions that this thesis addresses are detailed below. The thesis firstly sets out to determine if the Irish criminal justice system incorporates measures and provisions which impact unevenly on citizens and non-citizens. Such measures may provide the rationale for the differential policing of foreign citizens, or may result in foreign nationals facing criminal charges which do not arise for Irish citizens. The thesis therefore sets out to answer the question, are there structural biases within the Irish criminal justice system which contribute to the criminalisation of foreign citizens?

The next question that the thesis addresses is what is the scale of the presence of foreign nationals in the Irish District Court and the nature of the offences they are charged with? The answer to this question will provide us with a basis for assessing the level and type of criminal behaviour of foreign nationals. A comparison of the charges faced by foreign nationals with those faced by Irish defendants may also assist in highlighting structural biases which contribute to the criminalisation of foreign citizens.

The legitimacy of criminal court decisions depend upon all accused persons receiving a fair trial. The procedures adopted by the court have to reflect the seriousness of the charges faced by the defendant and also the particular needs of individual defendants. So, some defendants may need to be provided with free legal aid to ensure that they receive a fair trial while defendants with limited English proficiency (LEP) may require the services of an appropriately qualified interpreter to ensure a fair trial. This thesis questions whether the procedures adopted by the Irish District Court ensure that all defendants are treated fairly.

Finally, the thesis considers the sentencing decisions of the court by looking at the factors which influence sentencing decisions for both Irish and foreign defendants. The thesis asks whether sentencing decisions are influenced by the nationality/ethnicity of defendants.

This thesis provides the answers to these questions, and in so doing greatly adds to our understanding of the presence of foreign citizens in the Irish criminal justice system. The answers to these questions also enable us to identify legislation and practices within the Irish criminal justice system which are potentially discriminatory.

## 1.5 A Brief Overview of This Thesis

Chapter two presents a detailed account of migration patterns in Ireland, with particular emphasis on migration patterns from 1996 when a sustained period of net inward migration began. This chapter also considers the changing composition of the Irish prison population.

Chapter three presents a review of literature. The literature reviewed concerns five key issues. The first issue explored is the link between immigration and crime. This is explored by considering both informal and formal historical practices which lend credence to the belief that immigrants are more prone to criminal activity than the general population, and the relevant empirical evidence which has largely not supported this belief. Perceptions of the immigration-crime nexus are explored and are linked to a general sense of insecurity which is also evidenced by increased fears around crime. The chapter then sets out and critiques key theoretical perspectives that posit how crime will be impacted by immigration. The review then proceeds to consider literature which has examined sentencing decisions in criminal courts. Literature regarding the impact of nationality/residency status is limited and the review considers literature which has examined the impact of a number of different extra-legal factors. To provide a more nuanced understanding of the processes and work practices in criminal courts qualitative research directed at key courtroom actors and courtroom-based research is reviewed. Finally, relevant research on the Irish criminal justice system, and in particular the Irish District Court, is considered.

Chapter four notes the constraints that ethical considerations can place on research methodology, and describes the ethical principles that have guided this research, and the process of gaining ethical approval. The quasi-ethnographic research conducted is located in relation to other qualitative research. The chapter explains the appropriateness of the research methodology adopted and sets out a detailed account of the extent of the work conducted.

As no transcripts are available of Irish District Court proceedings, and the limited research previously conducted in the District Court does not provide a detailed picture of how District Court proceedings are conducted, it was considered that the work and organisation of the District Court are not widely known or understood. This is addressed in chapter five which sets out a 'thick' ethnographic account of the court. This account provides the reader with an understanding of the roles of the various key courtroom actors and an appreciation of the manner in which matters are processed and the environment in which decisions are reached.

Chapter six presents a picture of both Irish and non-Irish District Court defendants. The range of offences dealt with by the Irish District Court ensures that the court deals with a broad cross section of Irish society. However, the modal defendant is a young male from a lower socio-economic background. This is the case for both Irish and non-Irish defendants. The non-Irish defendants observed are described and compared to the resident non-Irish population.

Chapter seven points out that Irish judges impose criminal sanctions without the assistance of an over-arching sentencing philosophy and without sentencing guidelines. This system ensures sentencing inconsistency. This chapter draws on courtroom observations to explore the factors which influence sentencing decisions and considers if and how nationality/residency status impacts sentencing decisions.

Chapter eight describes and critiques the legislative provisions which give rise to foreign defendants facing immigration charges in the District Court.

The chapter describes how these charges may be faced by persons gaining entry to the state and persons already resident in the state. The chapter draws attention to the possible adverse consequences of these legislative provisions and in particular their potential impact on policing practices.

Chapter nine addresses the procedures adopted in the District Court to ensure defendants with limited English proficiency (LEP) receive a fair trial. The chapter notes concerns regarding the standard of the interpretation services provided and the frequent failure of the court to adjust the pace of its work to accommodate the interpretation process.

Chapter ten outlines the key findings of this thesis and the contributions this thesis makes to existing knowledge. It situates these findings in relation to current debates about the criminalisation and incarceration of foreigners in European criminal justice systems and argues that for the most part only immigrants of lower socio-economic class will contribute to penal expansionism.

# 2 Migration and the Irish Prison Population

## 2.1 Introduction

The changes in the composition of Ireland's prison population discussed briefly in chapter one need to be understood in the context of the changes in the Irish population which have stemmed from a sustained period of net inward migration. In 1996 a period of net inward migration to Ireland began which was sustained for more than a decade. The level of inward migration during this period was on a scale which was unprecedented in Irish history and which was also very high by comparison to relative inflows in other developed countries. Recent inward migration has also been far more diverse than in the past and has introduced greater ethnic and racial heterogeneity to the Irish population. The analysis of recent patterns of migration to Ireland presented in this chapter ensures that changes in the Irish prison population are situated alongside wider societal changes.

The main driver of net inward migration to Ireland from the late 1990s was the high levels of growth in the Irish economy which resulted in a greatly increased demand for labour. Migrants were needed to meet Ireland's labour force requirements and migrants were 'pulled' to Ireland by the prospect of employment. Ireland's decision to open its labour markets to citizens of the ten EU accession states (EU10) in May 2004 also proved to be a policy decision which greatly increased inward migration (Barrett 2009).

This chapter begins by outlining Ireland's economic transformation from an economic laggard into a dynamic, rapidly expanding economy. The chapter then describes Irish migration patterns since the 1980s and charts migratory flows from 1987, when Ireland's economic fundamentals began to strengthen, until 2009 when the Irish economy was again back in recession. The chapter highlights in particular the extent and pattern of net inward migration from 1996-2008, and points to the importance of migration from EU10 accession states from 2004. Inward flows of migrants to Ireland are compared to flows of migrants to other OECD countries. This comparison

reveals that, relative to population, Ireland experienced the largest inward flow of migrants of any OECD country in 2006.

Inward flows of refugees and asylum seekers contributed to net inward migration between 1996 and 2008 although, as is explained in detail later in this chapter, the significance of this strand of migration has greatly decreased since 2004. The chapter provides details of the scale of refugee and asylum applications, and policy changes and changes in legislation which have impacted the level of applications.

The chapter then presents a detailed description of non-Irish nationals committed to Irish prisons from 2001-2009. This analysis shows that there has been no substantial increase in the numbers of UK or North American nationals committed to Irish prisons between 2001 and 2009, and it is clear that the substantial increase in the presence of non-Irish nationals in our prisons is accounted for by migrants from countries for which Ireland is a new destination state.

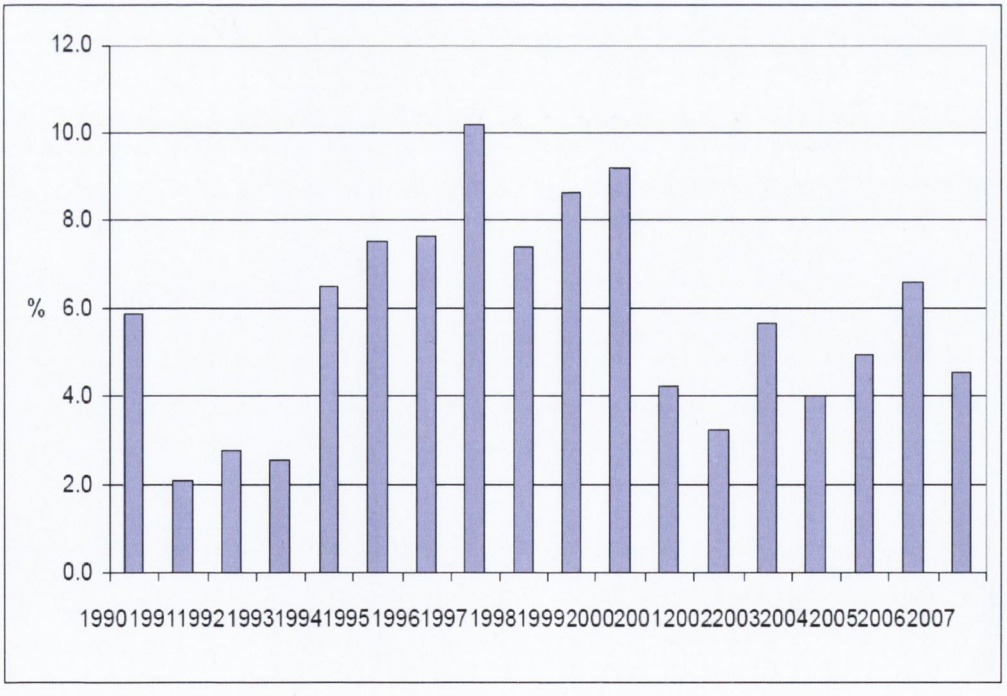
## 2.2 Economic Transformation

Ireland's transformation from an economic 'basket case' to an 'emerald tiger' (*The Economist,* 17th May 1997) provided the impetus for much of the inward migration from the late 1990s to 2008 when economic boom rapidly turned to economic recession. A period of sustained economic growth began in the late 1980s after tough budgetary measures were introduced to curb government spending and reduce the level of national debt. Ireland's economic growth relied heavily on its success in attracting high levels of Foreign Direct Investment (FDI) which was mainly directed at high-tech industries (Ferreira & Vanhoudt 2004), and was especially successful in attracting investment from US multi-nationals (Menz 2009). A range of grants and incentives, low rates of corporate taxation and a pool of well-educated workers made Ireland an attractive destination for investors. Ireland was also the beneficiary of substantial EU structural and cohesion fund investment which greatly contributed to economic growth. In addition,

from 1987 the successive partnership agreements negotiated by representatives of employers, trade unions, farming interests and the government largely ensured a stable industrial relations climate which added to the attractiveness of Ireland for investors. Economic growth was also bolstered by an unprecedented expansion in the construction industry. Activity in the construction sector has contracted sharply since 2007(DKM Economic Consultants 2010).

Figure 1 below charts the growth in GNP from 1990-2007. The peak period of economic growth was between 1993 and 2000 with the highest increase in GNP achieved in 1997 (Barrett 2009). The economic growth achieved quickly moved Ireland's GNP per capita from below to above average for EU15 countries. Since 2007 Ireland's economy has contracted more sharply than the EU average.

Figure 2: Real GNP Growth Rates 1990-2007




(*Source*: Barrett 2009:17)

### 2.2.1 Growth in Employment

While productivity increases above the EU and US average contributed to Ireland's economic growth, increased levels of employment also played a very significant role (Forfás 2006). Significant growth in employment began in the 1990s and continued until 2007. As Table 1 below shows, the numbers in employment increased by more than 45% in the decade between 1997 and 2007. By the end of 2009, however, employment had fallen back to 2004 levels.

Table 1: Total Employment in Ireland 1997-2009

| Year | Total in Employment (thousands) | % Increase |
|---|---|---|
| **1997** | 1467.7 | 100 |
| **1998** | 1547.7 | 105.5 |
| **1999** | 1649.8 | 112.4 |
| **2000** | 1713.8 | 116.8 |
| **2001** | 1762.6 | 120.1 |
| **2002** | 1777.2 | 121.1 |
| **2003** | 1826.1 | 124.4 |
| **2004** | 1899.5 | 129.4 |
| **2005** | 1995.1 | 135.9 |
| **2006** | 2076.9 | 141.5 |
| **2007** | 2138.8 | 145.7 |
| **2008** | 2054.6 | 140 |
| **2009** | 1887.7 | 128.6 |

(*Source*: CSO Database 2010 (Q4 figures used for each year))

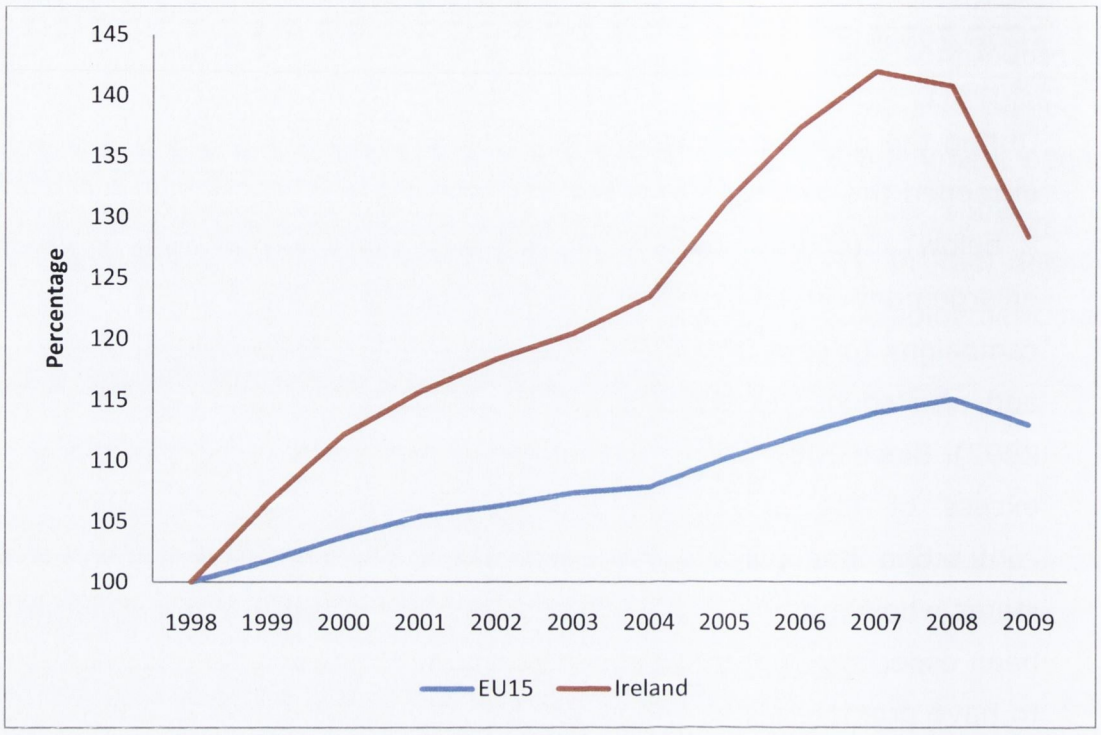
Employment in the construction sector was particularly buoyant from 2002 and employment levels increased by 40% between 2002 and 2008. In 2007 the construction sector accounted for 13% of total employment; this compares to an EU average of 8% (CSO 2008b:6). Employment in this sector has contracted significantly since 2007 due to the combined impact of the banking crisis and the recession. It is estimated that 17% of those employed in the construction sector in the fourth quarter of 2007 were non-

Irish nationals, and that almost three-quarters of those were EU12 nationals (CSO 2008b:7)

During the period from 1998-2007 Ireland's growth in employment greatly exceeded the average growth in employment in EU15 countries (see Figure 2 below). Ireland's demand for labour was so strong that prior to EU enlargement in 2004 Irish government agencies actively engaged in campaigns to recruit foreign nationals to fill key labour market shortages, and also sought to encourage Irish emigrants to return home (Corcoran 2002). Since 2007 Ireland's employment levels have contracted at a rate in excess of the average level of contraction in EU15 countries. This contraction has particularly impacted migrants from the new accession states who were heavily concentrated in sectors of the economy which have been especially impacted by the recession. Although unemployment is likely to have prompted some migrants to return to their country of origin, many non-Irish nationals are now included amongst the unemployed in Ireland, and in the second quarter of 2009 the unemployment rate of EU12 nationals was 19% compared to 11% for Irish nationals (OECD 2010).

Ireland's economic performance from the 1990s to 2007, and in particular the substantial additional employment generated, therefore created the necessary conditions in which substantial numbers of migrants could secure employment in the Irish labour market. The expansion of the Irish labour market has now been replaced by contraction (CSO 2010a), and inward migratory flows are greatly reduced (CSO 2010b).

Figure 3: Growth in Employment Ireland and EU15 Countries 1998-2009




(*Source*: Eurostat database [ifsa_egan])

## 2.3 Pre-'Celtic Tiger' Migration Patterns

Until the late 1990s Ireland's migratory pattern was largely distinguished by outward migration. A short period of net inward migration experienced in the 1970s was overwhelmingly accounted for by returning Irish emigrants and was on a much smaller scale than the levels of net inward migration experienced since the late 1990s. Economic recession in the 1980s triggered a large wave of outward migration with around 200,000 people leaving Ireland between 1981 and 1990 (Dorgan 2006). Unlike earlier outward flows of migrants the outflow in the 1980s included many who were highly skilled (Lobo & Salvo 1998; Corcoran 2002). Lack of employment opportunities in Britain, the traditional destination for Irish emigrants, prompted many to head to the United States.

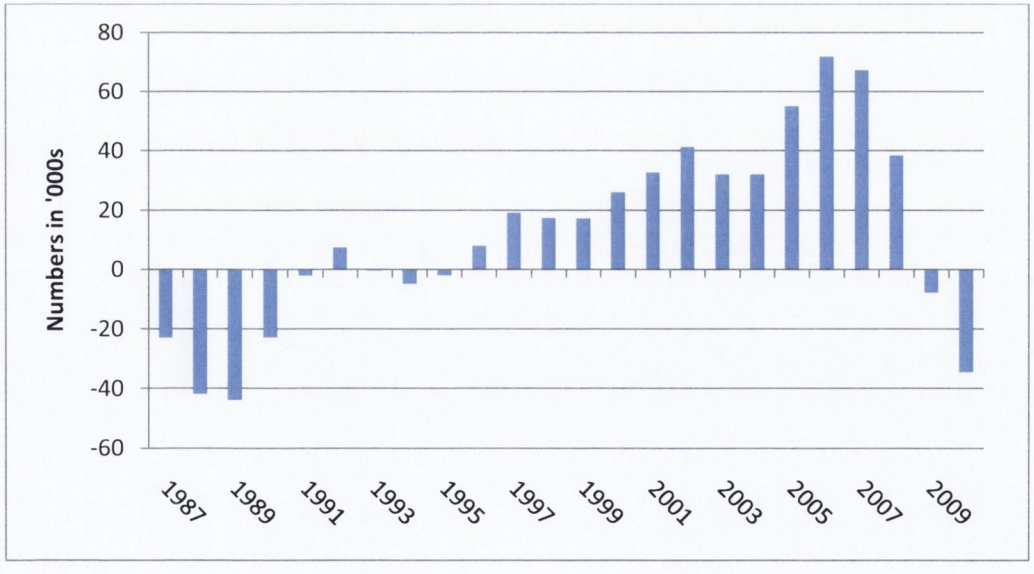
A significant number of those who emigrated to the United States in the 1980s did so without securing the visas and work permits required. This resulted in the emergence of a large population of irregular Irish migrants in the US. The residency status of many of these migrants was later

regularised by legislation (Lobo & Salvo 1998). However, despite several initiatives to provide irregular migrants with a means of regularising their residency status, a pool of irregular Irish migrants remains in the US, and representations by Irish politicians on behalf of Irish irregular migrants in the US have continued. In 2008 the then Taoiseach Bertie Ahern travelled to Washington to make a plea before a joint session of Congress on behalf of irregular Irish immigrants (Garland 2008).

### 2.3.1 Migration Patterns from 1990 Onwards

In the early 1990s there was no significant disparity between inward and outward migratory flows. From 1996 Ireland experienced a sustained wave of net inward migration which only came to a halt in 2008. The relatively modest net inward migration of the late 1990s was followed by more substantial net inflows in the early years of this century.

Figure 4: Net Migratory Flows 1987-2010



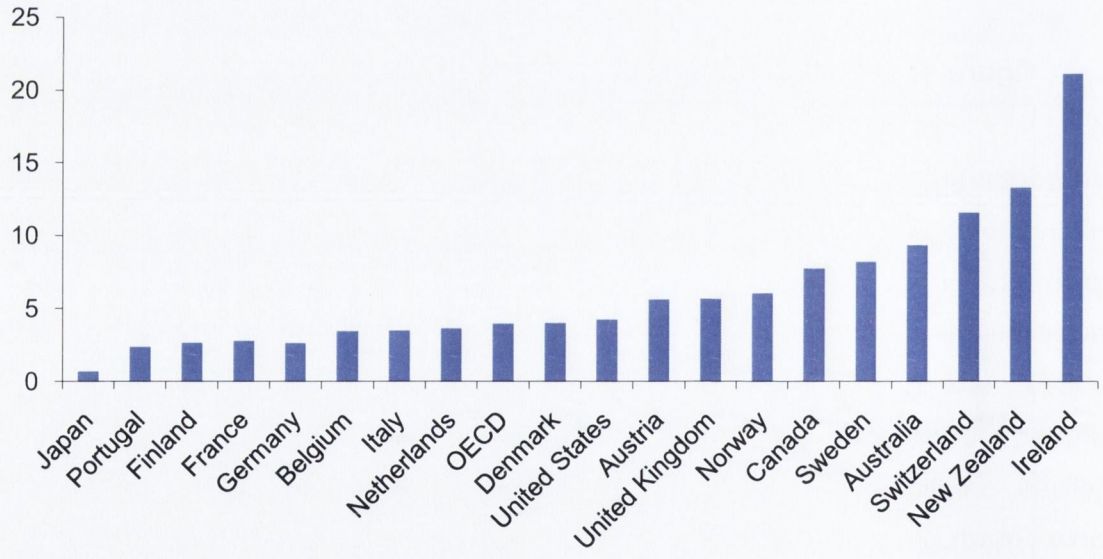

(*Source*: CSO Database 2010. Data for 2007-2009 is preliminary and data for 2010 is an estimate)

As Figure 3 above shows, net inward migration was particularly high between 2005 and 2007 with the highest net inflow of migrants in 2006. The OECD distinguishes between permanent and temporary migratory flows

in recognition of the different impact of such flows on both the country of origin and destination. In 2006 the inflow of 'permanent'[1] foreign migrants to Ireland was comparable in size to the inflow of permanent migrants to Japan and almost twice the number of the permanent migrant inflow to Austria (OECD 2008:29). Although the absolute size of permanent-type inflows to some other OECD countries was significantly larger than that experienced by Ireland, when inflows are standardised to take account of the population size of the host country it can be seen from Figure 4 below that the inflow of 'permanent' foreign migrants to Ireland in 2006 was significantly higher than the inflow experienced by any other OECD country.

Figure 5: Permanent-Type Inflows to OECD Countries 2006 (Standardised Statistics[2])

Number per thousand persons in the population




(*Source*: OECD 2008:32)

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1 "Permanent-type" migratory inflows are inflows into the resident population of persons with a residence permit that is either permanent or more or less indefinitely renewable. They do not include seasonal workers, international students, trainees, exchange visitors, etc. even if in some cases their duration of stay may be longer than one year (OECD 2008:30).

2 For information on the compilation of the standardised statistics see www.oecd.org/els/migration/imo2008

As Table 2 below highlights, net inward migration peaked in 2006 at just under 72,000. Migrant inflows into Ireland remained strong in 2007 and net inward migration only contracted slightly, but in 2008 net inward migration fell significantly as Ireland's economic performance declined causing migrant inflows to reduce and outflows to increase. By 2009 net migratory flows were outward (see Table 2 below; CSO 2009) and net outward migration has continued in 2010 (CSO 2010b). The largest group of emigrants during the period 2007-2009 was EU12 nationals (CSO 2009).

**Table 2: Migrant Inflows and Outflows 2006-2009**

| | 2006 | 2006 | 2007 | 2007 | 2008 | 2008 | 2009 | 2009 |
|---|---|---|---|---|---|---|---|---|
| **Origin** | Inflow | Outflow | Inflow | Outflow | Inflow | Outflow | Inflow | Outflow |
| **Irish** | 18.9 | 15.3 | 20 | 13.1 | 16.2 | 13.4 | 18.4 | 18.4 |
| **UK** | 9.9 | 2.2 | 5.9 | 2.3 | 7 | 2.4 | 4.4 | 2.9 |
| **EU13**[3] | 12.7 | 5.1 | 10.4 | 6.9 | 8.6 | 4.2 | 8.6 | 5.5 |
| **EU12** | 49.9 | 7.2 | 52.7 | 14.4 | 33.7 | 18.8 | 13.5 | 30.1 |
| **Rest of World** | 16.4 | 6.2 | 20.6 | 5.5 | 18.3 | 6.4 | 12.4 | 8.3 |
| **Total** | 107.8 | 36 | 109.6 | 42.2 | 83.8 | 45.2 | 57.3 | 65.2 |

(*Source*: CSO 2009)

### 2.3.2 Changed Pattern of Inward Migration

The pattern of inward migration to Ireland has changed greatly in recent years. As discussed below, the importance of traditional sources of inward migration have declined while new sources of inward migration have greatly increased.

Whereas previous inward migration was dominated by returning Irish emigrants, since 1999 this source of inward migration has declined (OECD 2004). The proportion of inward migratory flows accounted for by UK migrants has also greatly declined, particularly in the period since 2004 when large numbers of EU10 nationals migrated to Ireland. Ireland, Britain

[3] References to EU13 countries are to EU15 member states other than the UK and Ireland.

and Sweden were the only EU15 countries who gave free access to their labour markets to citizens of EU10 accession states immediately following EU enlargement in May 2004. Given the strength of Ireland's economy until 2008, and the small number of countries who granted EU10 citizens free access to their labour markets in May 2004, the inflow of migrants which followed EU enlargement in 2004 is perhaps not surprising (Barrett 2009). Census results indicate that the numbers of EU10 nationals resident in Ireland increased by more than eight times between 2002 and 2006, from 14,000 to 120,000 (CSO 2008a). However, during this period over 300,000 PPS[4] numbers were issued to EU10 nationals, suggesting that a significant number of EU10 nationals who came to Ireland between 2002 and 2006 only stayed for a short time (Barrett 2009:13). Large inflows of EU10 nationals were also recorded in 2007 and 2008, and Barrett estimates that in 2008 the total number of EU10 nationals resident in Ireland was around 200,000 or 4.5 % of the population (Barrett 2009:13).

Non-EU/non-US immigration increased very significantly between 1999 and 2002 but declined slightly in 2003. The rate of decline increased greatly in 2004. This decline reflects the intra-EU oriented labour market policy (OECD 2010:212) adopted by Ireland. The government's decision to open Ireland's labour markets to EU10 nationals in 2004 was accompanied by a more restrictive approach to the issue of employment permits to non-EEA workers (Barrett & Duffy 2008). The process of obtaining an employment permit is now more costly for employers and employment permits are only available for certain categories of jobs, and apart from exceptional circumstances only in respect of jobs with an annual salary in excess of €30,000 (see www.deti.ie/labour/workpermits).

The changed pattern of inward migration which is especially marked since 2004 has resulted in a change in the educational and socio-economic profile of migrants. Barrett and Duffy note that 'collectively immigrants in Ireland are a remarkably educated group' (2008:605). This is particularly the case for EU13 and US migrants (see Barrett & Duffy 2008:615). However, as a

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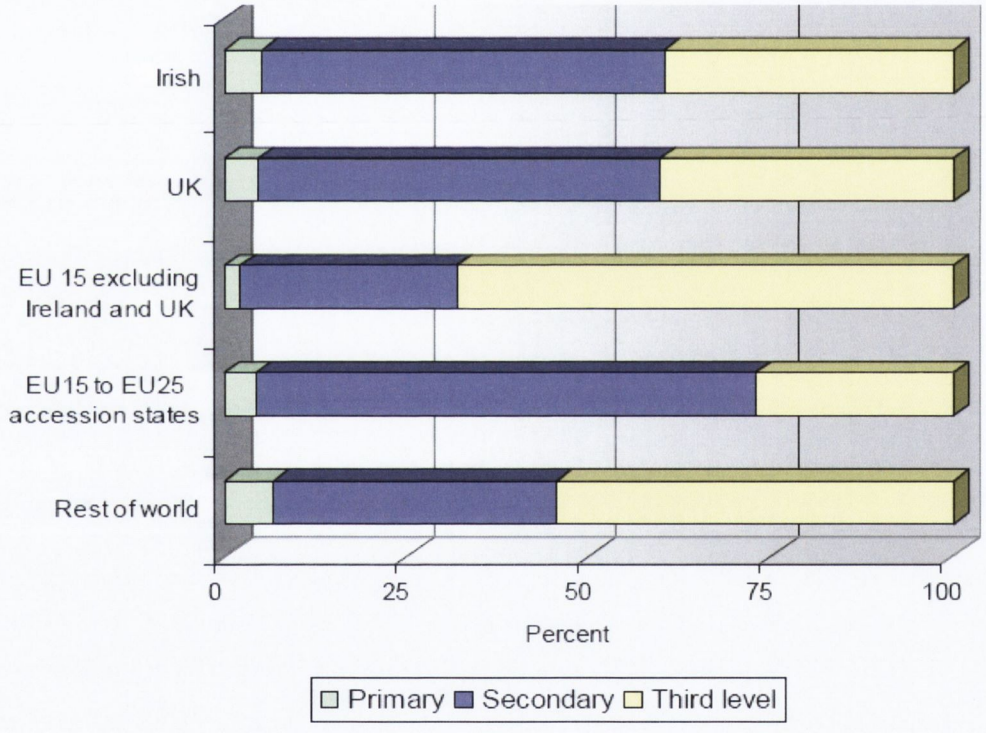
4 Personal Public Service (PPS) numbers are unique individual reference numbers used by Irish state agencies to identify individuals.

group migrants from new accession states have the lowest level of third-level education of all migrant groups (Barrett & Duffy 2008:615) and a lower level of education than the native Irish in the 15-44 age cohort (see Figure 5 below). This difference in education levels is reflected in the very different socio-economic profiles of EU10 nationals and EU13 and American nationals resident in Ireland (CSO 2008a). Only a very small proportion of EU10 nationals resident in Ireland were in managerial or professional occupations in 2006 (CSO 2008a), and in 2006 EU10 nationals included a bigger proportion of workers in unskilled and semi-skilled employment than any other group of migrants, or than the native Irish.

Figure 6: Education Level 15-44 year olds




(*Source*: CSO 2008a:18)

### 2.3.3 Inward Flows of Refugees and Asylum Seekers

Refugees and asylum seekers also contributed to Ireland's net inward migration from the 1990s. Table 3 charts the number of first time asylum applications received during the period from 1997-2008.

Table 3: Number of First Time Asylum Applications 1997-2008

| Year | 1997 | 1998 | 1999 | 2000 | 2001 | 2002 |
|---|---|---|---|---|---|---|
| Number | 3355 | 4369 | 7673 | 10911 | 10316 | 11598 |

| Year | 2003 | 2004 | 2005 | 2006 | 2007 | 2008 |
|---|---|---|---|---|---|---|
| Number | 7483 | 4265 | 4303 | 4241 | 3933 | 3866 |

(*Source*: Department of Justice, Equality and Law Reform; cited in Joyce 2009a, 2009b)

As can be seen from Table 3 above the number of asylum applications grew rapidly between 1997 and 2002. It has been argued that Ireland was an attractive destination for asylum seekers seeking to gain entry to the EU during this period. The attractiveness of Ireland as a destination for asylum seekers was attributed to the constitutional provisions around citizenship, and a number of landmark legal decisions which determined that the parents of an Irish born child had the right to apply for leave to remain in Ireland (Kennedy & Murphy-Lawless 2003; Garner 2007). Changes in the Irish constitution in 1999, which were introduced as part of the Belfast Agreement and which gave a constitutional right to any child born in Ireland to claim Irish citizenship, further strengthened the case of asylum seekers with Irish born children as the right to Irish citizenship was not contingent on the nationality or residency status of a child's parents.

It was claimed that the legal framework for granting Irish citizenship, and for granting residency to non-EU parents of children born in Ireland, was enticing non-EU nationals to come to Ireland to have their children because parents of Irish born children could claim residency rights in Ireland, and therefore in the EU, and this was leading to large numbers of foreign national women arriving in Ireland in the late stages of pregnancy to have their babies (Kennedy & Murphy-Lawless 2003; Garner 2007).[5] Luibhéid claims that for some years childbearing was a more reliable means of gaining Irish residency than claiming asylum (2004:338).

[5] The right of a non-EU parent with an Irish born child to claim a right to reside in the EU was confirmed by the decision of the European Court of Justice in the *Chen* case (see European Court reports 2004 Page I-09925).

The controversy culminated in a change in both the Irish constitution and the law regarding citizenship and residency rights. A Supreme Court decision in 2003 found that it was constitutional in certain circumstances to deport the non-Irish parents of Irish born children (*Lobe v. Minister for Justice, Equality and Law Reform* [2003] IESC 3 (23 January 2003)). This was followed by a constitutional amendment in 2004 which provided that children born in Ireland to two non-national parents no longer have a constitutional right to citizenship (Garner 2007). Despite criticisms of the amendment it was passed by an overwhelming majority. It is likely that the change in the law around Irish citizenship and residency has lessened Ireland's attractiveness to some of those seeking asylum.

Provisions making carriers liable for transporting unauthorised migrants, and the implementation of a 'safe country of origin' concept whereby applicants from countries designated as 'safe' are *prima facie* presumed not to be in need of protection (Ruhs & Quinn 2009), are also associated with a decline in asylum applications. The decline has also been linked with increased restrictions on the right of asylum applicants to social welfare support, the use of Direct Provision centres (FLAC 2010; Ugba 2007), and the policy of fingerprinting resident non-EEA nationals (Ring 2008).

The number of asylum applicants in Ireland peaked in 2002 and declined rapidly in 2003 and 2004. Since 2004 the number of asylum applications has remained relatively stable but remains substantially above the EU average (Cahill 2009).

## 2.4 Changes in the Irish Prison Population

The very significant inward migratory flows Ireland has experienced since 1996 have brought about changes in all spheres of Irish society including the Irish criminal justice system. The Irish criminal justice system now has to deal with more non-Irish nationals than ever before and the origins of these non-Irish nationals are now global. Currently, the main source of information about non-Irish nationals in the Irish criminal justice system is

the Annual Report of the Irish Prison Service (IPS). Statistics on the nationality of persons committed to Irish prisons were published for the first time in the 2001 IPS Annual Report. Each subsequent IPS Annual Report has included details of the nationality of persons committed to Irish prisons. The information included in the IPS Annual Reports 2001-2009 is set out in Table 4 below.

**Table 4: Nationality of Persons Committed to Irish Prisons 2001-2009**

| *Nationality* | 2001 | 2002 | 2003 | 2004 | 2005 | 2006 | 2007 | 2008 | 2009 |
|---|---|---|---|---|---|---|---|---|---|
| ***Irish*** | 7806 | 7551 | 7194 | 7016 | 6501 | 6799 | 6447 | 7681 | 9330 |
| ***UK*** | 225 | 209 | na | na | 195 | 226 | 228 | 224 | 251 |
| ***EU*** | 64 | 70 | 272 | 215 | 474 | 785 | 1126 | 1227 | 1384 |
| ***Other European*** | 638 | 983 | 1321 | 845 | 653 | 618 | 311 | 278 | 218 |
| ***African*** | 448 | 446 | 503 | 374 | 424 | 550 | 612 | 757 | 587 |
| ***Asian*** | 131 | 257 | 253 | 217 | 264 | 483 | 611 | 512 | 390 |
| ***Australasian*** | 11 | 9 | 10 | 1 | 7 | 6 | 4 | 5 | 6 |
| ***Central/Sth America*** | 40 | 58 | 147 | 78 | 100 | 183 | 303 | 184 | 121 |
| ***North America*** | 12 | 21 | 14 | 17 | 13 | 19 | 18 | 21 | 20 |
| ***N/K*** | 164 | 112 | 100 | 57 | 55 | 31 | 51 | 39 | 32 |
| ***Total*** | 9539 | 9716 | 9814 | 8820 | 8686 | 9700 | 9711 | 10928 | 12339 |

(*Source*: Irish Prison Service Annual Reports 2001-2009)

The proportion of non-Irish nationals committed to Irish prisons peaked at just under one-third in 2007 having increased from just over 16% in 2001. The pattern of committals to Irish prisons changed significantly in 2008 and 2009. In 2008 committals to prison for non-payment of a court-ordered fine jumped from 1,335 to 2,520 or 18.6% of total committals.[6] In 2009 a further dramatic increase in the numbers committed to prison for non-payment of a court-ordered fine was recorded and committals in this category amounted to 4,806 and accounted for over 31% of total committals. The proportion of non-Irish nationals committed to Irish prisons fell in 2008 and 2009 to 29.4% and 24.1% respectively. It is not clear if the change in the pattern of committals has affected the share of total committals accounted for by non-Irish nationals.

Since 2003 the IPS has also disclosed the numbers of non-nationals committed to prison for breaches of immigration legislation. Non-Irish nationals committed to Irish prisons for breaches of immigration legislation account for between 73% (2003) and 23% (2009) of committals of non-Irish nationals to Irish prisons during the years from 2003 to 2009 (see Table 5). As is explained fully in chapter eight, persons committed to Irish prisons for such breaches include persons who are held in administrative detention and are not charged with a criminal offence. It is not possible to identify such persons from the published details but as chapter eight details it is thought that they may account for a significant proportion of those committed to prison in respect of immigration breaches. The statistics published by the IPS therefore suggest that non-Irish nationals have a greater involvement in the criminal justice system than is in fact the case.

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6 The number of committals is higher than the number of persons committed to prison as some people are committed to prison more than once in a year. In 2008, for example, total committals to prison were 13,557 but only 10,928 people were committed to prison. Similarly in 2009 total committals to prison were 15,425 but only 12,339 people were committed to prison.

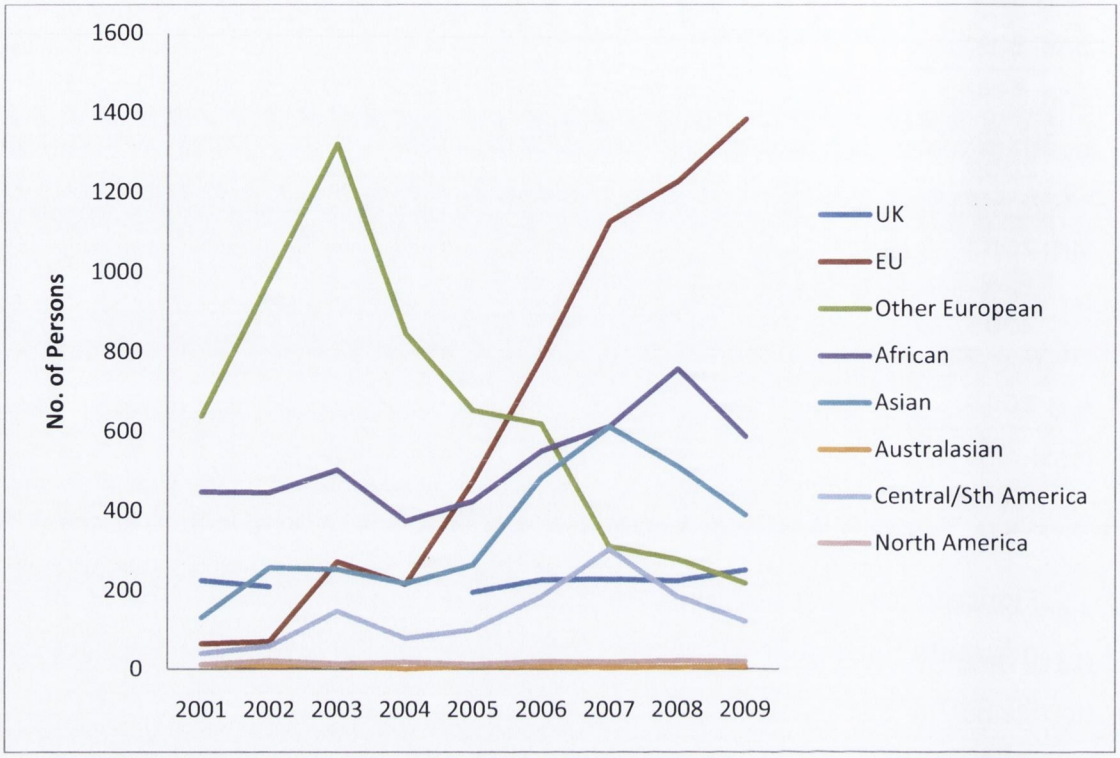
Table 5: Immigration Detentions as % of Total Non-Irish Nationals Committed to Irish Prisons 2003-2009

| Year | Total | Immigration Detentions | % of Total |
|---|---|---|---|
| **2009** | 2977 | 673 | 23 |
| **2008** | 3208 | 961 | 30 |
| **2007** | 3213 | 1145 | 36 |
| **2006** | 2870 | 1113 | 39 |
| **2005** | 2185 | 860 | 39 |
| **2004** | 1804 | 946 | 52 |
| **2003** | 2520 | 1852 | 73 |

(*Source*: IPS Annual Reports 2003-2009)

Figure 6 below highlights the pattern of committals for various groups of migrants since 2001. The very large increase in committals of EU nationals is partially accounted for by EU enlargement in 2004 and 2007. EU enlargement similarly explains the decline in committals of 'other Europeans'. Committals of persons of African origin increased significantly between 2001 and 2008 and declined in 2009. After very rapid increases between 2001 and 2007 the number of Asian persons committed declined in 2008 and again in 2009. We can see from this chart that there was no significant increase in the committal of UK nationals or American nationals during this period.

Figure 7: Pattern of Committals to Prison for Non-Irish Nationals 2001-2009




(*Source*: Irish Prison Service Annual Reports 2001-2009)

The proportion of non-Irish nationals in the stock of prisoners under sentence has only been indicated in IPS Annual Reports from 2006. The proportion of non-Irish nationals in the stock of prisoners under sentence in 2006 was 8%. This grew to 10.5 % in 2007 and has remained at a similar level in the period between 2007 and 2009. Although this proportion is significantly lower than the proportion of persons committed to Irish prisons accounted for by non-Irish nationals it should be noted that no details of the nationality of persons held on remand are provided. It is likely that a significantly higher proportion of non-Irish nationals is included in the stock of prisoners held on remand than is included in the stock of prisoners held under sentence (see Council of Europe 2009; Morgenstern 2009).

## 2.5 Discussion and Conclusion

After a period of very rapid economic expansion and a very significant increase in levels of employment the Irish economy has contracted sharply.

This contraction in employment has particularly impacted migrants who have experienced a higher rate of unemployment than Irish nationals. It is somewhat surprising therefore that the growth in the committal of non-Irish nationals to Irish prisons petered out as Ireland entered recession. It is also noteworthy that the proportion of non-Irish nationals in the stock of prisoners has remained very stable since 2007.

The contraction in Ireland's labour market and the consequent increased economic vulnerability of Irish migrants has not resulted in an increase in the proportion of non-Irish nationals committed to Irish prisons. In fact the proportion of total persons committed to Irish prisons accounted for by non-Irish nationals has decreased as employment levels in the Irish economy have fallen. How should this be interpreted? It seems clear that job losses will have prompted some migrants to return to their country of origin or to another destination. This seems a particularly likely option for those who do not have access to income supports. Migrants may also be more flexible and more adaptable than the general population, and be more willing to consider moving in response to the loss of employment. Economic vulnerability may therefore be addressed by outward migration. It may also be that non-Irish nationals committed to Irish prisons are not representative of the non-Irish national population because they are much less likely to have the strong history of attachment to the labour market which is so common amongst Irish migrants and particularly EU10 migrants. If this is the case then the contraction of the Irish labour market may not in fact contribute greatly to the numbers of non-Irish nationals committed to prison.

# 3 Literature Review

## 3.1 Introduction

In the introduction to this thesis it was noted that the expansion of the prison populations of the US and latterly other Western developed societies has been the source of much debate among sociologists of punishment in recent years. Those that adopt a critical materialist perspective of punishment have persuasively argued that penal expansionism is inextricably linked to shifts in the economic structures of developed western societies. A further contention that is linked to this perspective, and which is of particular relevance to this thesis, is that penal expansionism in Europe disproportionately impacts foreigners and immigrants (Wacquant 1999; De Giorgi 2006, 2010). This contention is explored below.

Proponents of the political economy of punishment link the processes of globalisation and consequent economic changes to the creation of a pool of labour which is surplus to the requirements of developed capitalist economies. Globalisation has meant that the industrial base of many developed economies has been eroded as manufacturing plants have been moved to cheaper remote locations, while the trend towards deregulation and open markets leaves economies more vulnerable to market fluctuations. Stable Fordist economies managed by Keynesian policies have been replaced by post-Fordist economies in which those with low skills and low levels of educational attainment can gain only a precarious foothold in the labour market and consequently are at risk of economic and social marginalisation.

As economic conditions have become increasingly competitive the political commitment to welfare state provision has attenuated. Evidence of a paring down of welfare supports is especially evident in the US where residual levels of support have been further reduced. In Europe there has been no abandonment of the welfare state project but there are signs, in some countries at least, of welfare shifting towards workfare (Kildal 2001; Handler 2004; Vis 2007). Proponents of the political economy of

punishment argue that states are relying less on welfare measures to control the working classes and are turning increasingly to the penal arm of the state to control what is essentially a surplus pool of labour. It is argued therefore that poverty and inequality are being managed by penality (Wacquant 2009). As penal punitiveness distorts the all-important economic performance of capitalist economies by removing those incarcerated from the numbers employed and providing employment to those working in the prison industry (Downes 2001), once embarked on political and economic considerations make it difficult to reverse.

Increased penal punitiveness has disproportionately affected ethnic minorities, and especially African-Americans, in the United States (Wacquant 2001; Western 2006). In Europe it is argued that penal expansionism particularly impacts immigrants. This is explained by reference to their economic vulnerability and structural factors which make them more likely to be subject to surveillance by criminal justice actors. Immigrants tend to be more vulnerable to economic marginalisation than the native population. On average, immigrants tend to have less security of employment because they are concentrated in sectors which have volatile rates of employment and because they are more likely to be in temporary employment than natives (OECD 2009). They may also be more likely to lose their jobs in a recession because the period of their employment tends to be shorter than that of native employees and they are disproportionately subject to selective lay-offs (OECD 2009). Therefore, in times of recession immigrants are likely to have higher rates of unemployment than natives (OECD 2009). This is the case in the current economic recession (OECD 2010), as unemployed immigrants, particularly recent arrivals, may not have the same rights to income support as natives and may therefore face a greater risk of economic marginalisation.

Lacey (2008) points out that 'outsiders' present particular challenges to Europe's coordinated market economies (CMEs) whose institutional structures provide high levels of vocational training and produce skilled workforces which are necessary for the production of high quality goods. Although CMEs have a complex set of interrelated institutions which

promote social inclusion and are associated with low levels of penal punitivenss they are likely to struggle to accommodate large numbers of unskilled new arrivals. Political support for generous and comprehensive welfare programmes in CMEs may therefore waiver if large numbers of migrants cannot be fitted into the labour force. Lacey highlights that Britain, a liberal market economy, has a lower proportion of foreign nationals in its prisons than is the case in the prisons of European CMEs (2008). She contends that the main challenge faced by CMEs in resisting a move towards penal punitivness is finding a way to integrate 'outsiders' or migrants.

De Giorgi (2006) has also pointed out that the legal status of migrants is increasingly dependent on their labour market participation. In EU countries this is particularly the case for non-EU migrants. Legal migrants may become illegal if they stay in the host country after their employment has been terminated or their work permit has expired. Irregular migrants cannot access the income supports offered to natives and cannot easily re-enter the formal labour market.[1] This may mean that irregular migrants may resort to criminality to support themselves. When breaches of immigration legislation are criminalised migrants are also more likely to be subject to police surveillance (Wacquant 1999) and their lack of ties in the jurisdiction can lead to disproportionate rates of pre-trial detention which in turn increases the likelihood of conviction (Junger-Tas 1997; Tournier 1997). We can see therefore that migrants who are surplus to the requirements of European labour markets may very quickly face a greater risk of coming under the control of the penal arm of the state than the native population and may not be dealt with in the same manner as natives.

However, it is argued that although the explanation offered by proponents of the political economy of punishment is persuasive, a number of different processes contribute to the increased presence of foreign nationals in European prisons. As this literature review highlights there is a long-

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[1] See Koser (2005:4-6) regarding the use of terminology relating to the status of migrants.

standing perception of a link between immigration and crime which has foundations in both formal and informal practices. This perceived link has strengthened rather than weakened in recent years. Modern insecurities about national and individual identity also contribute to negative views of immigration which help to perpetuate the perception of the immigration-crime nexus. In addition, increased rates of transnational and international crime fuel the belief that foreigners are dangerous and crime-prone. Widespread fear of crime has made crime and criminal justice processes more politicised than in the past, and linking crime to foreigners can be a convenient way of displacing state responsibility for crime. Increased suspicion and surveillance of immigrants in Europe may therefore be a product of these processes and not simply stem from their economic marginalisation.

In Europe, although the link between penal expansionism and the presence of foreign nationals in European prisons seems clear (see Van Kalmthout et al. 2007), we have not as yet adequately analysed the processes both within and outside the criminal justice system which have resulted in this change. This thesis steps back from the prison to the courtroom where the decision to imprison, or not, is made. This literature review considers and evaluates a body of quantitative and qualitative research which examines the impact of extra-legal factors on judicial decision making and criminal court processes from a number of different perspectives. Particular attention is given to research on Irish criminal courts and especially the Irish District Court. The review concludes by highlighting and discussing areas where there are critical gaps in the existing body of knowledge and thus identifies areas where further research is warranted.

The chapter is organised into five thematic sections followed by a summary and conclusion. The first section examines and questions the commonly perceived link between immigration and crime both historically and currently. Section two presents a number of theoretical perspectives which posit both positive and negative relationships between immigration and crime. Section three considers research on criminal court dispositions. This section explores how sentencing decisions are reached, and considers

evidence of disparity and discriminatory sentencing practices. Although little research has been directly targeted at immigrants, perhaps partially because of the difficulty in defining that term, research directed at ethnic and racial minorities is considered particularly pertinent. The fourth section reviews literature which presents qualitative research of courtroom and other legal processes. The qualitative research available is far less abundant than the large volume of sentencing studies that has been produced, but it is a particularly valuable means of exploring the impact of courtroom processes from a range of perspectives. Section five considers literature which relates to the Irish criminal courts, and in particular the Irish District Court, and reveals substantial gaps in our knowledge about the work of the Irish District Court. The chapter concludes with a summary and a discussion of key issues which impact the study of immigrants in the Irish criminal courts.

## 3.2 Understanding the Link Between Immigration and Crime

It is argued that the foundations for current understandings of the link between immigration and crime lie in historical practices which are explored below. It is also pointed out that current perceptions of the link between immigration and crime are also influenced by insecurity and fear of crime which are features of modern life.

### 3.2.1 Historical Origins of the Link between Crime and Immigration

> The theory that immigration is responsible for crime, that the most recent "wave of immigration", whatever the nationality, is less desirable than the old ones, that all newcomers should be regarded with an attitude of suspicion, is a theory that is almost as old as the colonies planted by Englishmen on the New England coast (Abbott 1931:23, cited in Moehling & Piehl 2007).

The purported link between immigration and crime has been in existence for a very long time, and indeed for even longer than the above quote suggests. By tracing this link back to its historical origins we can better understand why immigration and crime are so closely connected in everyday discourse and consciousness.

### *3.2.1.1 Transportation*

Although some recent commentators have referred to the link between immigration and crime as a 'myth' (Hagan & Palloni 1999; Rumbaut & Ewing 2007; Hagan et al. 2008; Rumbaut 2008), the origins of the immigration-crime link are not mythical or whimsical but derive from particular historical practices. Historically immigration frequently arose from expulsion rather than choice. Britain's colonial territories provided the British criminal courts with the space to adopt expulsion as a formal legal sanction. Hence, in the seventeenth century the British began to use their American colonies as a repository for reprieved convicts who were routinely transported there in large numbers. Transportation therefore created large numbers of 'criminal immigrants'.

Transportation succeeded in conveniently removing many who were considered maladjusted or malevolent from the British mainland while also providing a much needed source of labour to the colonial settlers (Abbott 1931). The practice of transporting criminals to the colonies was resisted by many early settlers. Hence, in April 1670 the Virginia House of Burgesses passed an Act which stipulated that 'jail birds' who 'deserved to die in England' could not land, as the peace of the colony was 'too much hazarded and endangered by the great number of felons and other desperate villains sent hither from the several prisons in England' (quoted in Abbott 1931:24). The indignation of the Virginian legislators did not halt the fleet of convict ships however, and English 'jail birds' continued to be transported to America until the American Revolution and American independence finally halted the British convict ships. After the loss of America as a repository for convicts Britain introduced the 'hulks' which provoked great contention, and

then turned to the 'desperate experiment' of founding a colony in the distant lands discovered by Captain Cook to exclusively house criminals (Lewandowski 1993:8).[2] Australia and Tasmania became the new destinations for Britain's unwanted convicts, and Britain's Eastern colonies continued to receive convict ships until transportation finally halted in 1868.

A number of other European countries instituted their own versions of transportation. Penal colonies were established by the Dutch in the East Indies, by the Portuguese in Angola, and by the French in Algeria, New Caledonia and French Guiana, and it was 1952 before the last penal colony finally closed (see Bender 1992; Toth 2006). So, well into the 20th century the practice of removing convicted criminals from the community continued; a practice which can only have served to support already existing suspicions and fears of foreigners and strangers.

#### *3.2.1.2Scapegoat rituals and informal practices of shunning and expulsion*

In addition to the misgivings and suspicions that surrounded the immigration of convicted criminals there was also a perception that many 'free' immigrants found themselves far from their homes because they were troublesome black sheep, unwanted by their families, and likely to cause trouble in their new homes. Hence Lord Sheffield's pithy comment in 1793 that emigration 'is the natural resource of the culprit' (quoted in Abbott 1931:28). This perception may stem from ancient scapegoat rituals and community practices of expulsion and shunning. Scapegoat rituals were believed to expunge collective guilt (Bremmer 1983), but they were also understood to be a means of damaging enemies who were foolish enough to embrace those who came with a 'burden of pollution' (Stern 1991). Foreigners were therefore understood as potentially dangerous contaminants who were to be viewed with suspicion. Community practices of expulsion and shunning were used as a response to individual deviant or

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2 Hulks were old merchant ships and naval vessels which were put into use as floating prisons.

abnormal behaviour in various cultures throughout history, and became a formalised sanction in ancient Rome and in certain medieval European kingdoms (Zippelius 1986; Vazsonyi & Killias 2001), and in a number of modern European countries as already outlined.[3] In addition, some countries operated an informal practice of 'encouraging' offenders to emigrate. Abbott notes that America continued to struggle to prevent the routine migration of criminals from the UK, Germany, and Switzerland until the end of the nineteenth century (1931:31). In Ireland expulsion was used on a sort of quasi-voluntary basis by offering the choice between prison and taking the boat to Britain to some of those coming to the attention of criminal courts (Russell 1964). This practice was not discontinued until 1973 when Ireland joined the EEC.

#### *3.2.1.3Official investigations of the link between immigration and crime*

Immigration continued to be a contentious issue in America long after the convict ships had ceased to sail. Immigration flows were substantial and associated in particular with concerns regarding public health, social disorder and crime. The widespread concern in American society about the tide of immigration in the late nineteenth century, and the increasing link between crime and immigration in public debates, prompted the establishment of a congressional committee on immigration in 1907, which became known as the Dillingham Commission after its chairman Senator W.P. Dillingham of Vermont. The Commission's voluminous report warned of the dangers to social order arising from 'new' immigrants from Southern and Eastern Europe.[4] The Dillingham Commission is attributed with prompting 'quota' legislation in the 1920s which placed limits on the number of immigrants allowed into the United States based on country of origin, and which shaped American immigration for more than 40 years

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[3] Shunning and expulsion are still used by religious communities such as the Amish and certain Orthodox Jewish sects. The Roma community also banish those who are considered 'marime'. The implications of being considered 'marime' are detailed by Weyrauch and Bell who equate the stigma of marime with social death (2001:47).

[4] The report was published in 1911 and consisted of 41 volumes and cost over a million dollars (Kaufmann 2001).

(Kaufmann 2001; Lund 1994). Although the Commission found 'no satisfactory evidence' (US Senate 1970/1911 Report of the Immigration Commission, Volume 36:1 cited in Moehling & Piehl 2007:5) of higher crime rates among the foreign born than the native born, it did recommend specific measures to ensure the exclusion of 'criminal aliens' (Moehling & Piehl 2007).

The issue of immigration and crime was again revisited by the Wickersham Commission. In May 1929 President Herbert Hoover established the National Commission on Law Observance and Enforcement, commonly referred to as the Wickersham Commission after its chairman George Wickersham, which examined and reported on a range of criminal justice issues. In Volume 10 (Abbott 1931) of the 14-volume report produced by the Wickersham Commission, the widespread perception that most criminals were foreign born was addressed. Like the earlier Dillingham Commission it failed to find evidence of higher levels of criminal activity amongst the foreign born leading Cohen to conclude that, 'the accusation of the foreigner for disregard of the law has been, in no small part, the expression of resentment against the newly arrived and ambitious stranger who has introduced new and unpleasant elements into the general competition for position and wealth' (1931:100).

A recent study has re-computed estimates of foreign born and American born criminal activity based on data used by these commissions, supplemented by more accurate population data, and with corrections for aggregation bias. The revised statistics substantially support the earlier findings. The results indicate that foreign born persons were incarcerated at slightly higher rates than the native born in 1904, but that by 1930 both foreign born and American born populations were incarcerated at essentially the same rate for violent crimes, while foreign born persons were incarcerated at a lower rate for non-violent crimes (Moehling & Piehl 2007).

### 3.2.2 Current Perceptions: Immigration and Insecurity

The perception that immigration fuels crime has persisted and is probably more widespread, and more firmly planted in the public consciousness, now than at any other time. Indeed, immigration is not only now linked to crime but is also perceived by some as a threat to national identity and social order.

Fluidity and motion rather than stability and immutability are features of twenty-first century societies which are shaped and moulded by the 'turbulence' of recent migration (Papastergiadis 2000). For many people the increased pace of change associated with migration is unwelcome and troubling. Migratory flows call for a re-definition of 'us' and 'them' which challenges and threatens some, and perhaps many, in society. Immigration policies seek to reframe our world into one of fixed and secure identities; they suggest that states can exercise perfect sovereignty (Pecoud & de Guchteneire 2006), and are invested with enormous symbolic capital (Franko-Aas 2007), even though despite these policies borders are permeable and migratory flows remain difficult to control. Concern about immigration is one of the factors identified as contributing to the increasing salience of national unity and national identity in political culture (De Koster et al. 2008:722). Insecurities in relation to national and individual identity are therefore linked to fears around immigration.

Political restructuring has contributed to this identity crisis and so added to fears about foreigners in our midst. Melossi (2003b) contends that Europe is at a time of crisis triggered by a process of rewriting and renegotiating political and national identities and economic restructuring. He argues that immigration has become the focal point of many of the insecurities and concerns which have resulted from this crisis. Young also argues that immigration is one of the principal causes of widespread ontological insecurity (1998); he contends that there is no longer any clear picture that we can conjure up of the 'other' or indeed of ourselves. Immigration is one of a number of profound global and social changes which engender this widespread insecurity and this insecurity may generate an increased fear of

crime which may not be linked to increased rates of crime (Gerber et al. 2010).

Even in America, a 'land of immigrants', immigration is increasingly seen as a dangerous and threatening phenomenon. Huntington sees immigration as a threat to the 'European, Christian, Protestant, English culture' which he claims is the source of the power and wealth of the United States (1999). The primordial view of culture that he espouses (Huntington 1996) equates immigration as a force which will dilute the potency of American and presumably other cultures. This view has been bolstered and gained widespread currency in the aftermath of terror attacks on various western countries by Islamic militants. It is somewhat ironic that these events which typify the global character of many modern day conflicts are linked to a revival of cultural essentialism (Franko-Aas 2007). As immigration, especially irregular immigration, is increasingly cast as a negative and dangerous social phenomenon, stemming the flow of irregular immigration has been described in militaristic terms as the 'war at home' (see Sampson 2008), thus spreading the perception that immigration is a force to be feared and to be battled against.[5]

### *3.2.2.1Fear of crime and fear of immigrants*

Fear of crime is a fear which reflects the insecurities of life in late modernity (Garland 2001), and the reality that crime has become part of the everyday fabric of our lives. State failure to expunge crime has resulted in a bifurcation in contemporary crime policies which simultaneously stress individual and community responsibility for crime prevention and detection while also supporting more punitive sanctions against those who commit crimes (Garland 2001). Crime has become increasingly politicised and fears about crime have been stoked by some politicians, particularly right-wing politicians, who have shaped the public discourse around crime in a

[5] Newt Gingrich, the former speaker in the House of Representatives, described immigration as the 'war at home' and claimed that it was a more deadly war than the war in Iraq.

'racialised' rather than a 'rational' form, and justified their anti-immigration stands by reference to concerns about increases in crime (Collins 2003). Associating crime with foreigners is consistent with a 'criminology of the Other' which creates an impression of criminals as distinct dangerous outcasts who bear no resemblance to 'us' (Garland 1996). Criminology of the 'Other' lends support to government policies which seek to limit and control 'foreigners', restrict asylum applications and remove foreigners who have been labelled as criminal (Hertz 2002). It is also politically expedient for governments to embrace this form of criminology, as if crime is perceived as largely stemming from outside the boundaries of the state, less responsibility for crime will attach to the state.

Criminal activity is increasingly transnational and international (Berdal & Serrano 2002). This fuels the perception that crime and 'foreigners' are inextricably linked. Crime, real and fictional, accounts for a large proportion of media content so that fears about crime are enflamed by media coverage. Crimes are of course always committed by the 'bad guys' and the perfect 'bad guys' are provided by criminal immigrants who make eminently 'suitable enemies' (Christie 1986; Wacquant 1999), or modern day 'demons' and 'devils' (Albrecht 2002). Demonising immigrants and attributing them with criminogenic qualities can serve to offset some of our own insecurities regarding our identity and allows us to affirm our own moral superiority, and therefore justify exclusionary immigration policies. It provides us with a means, however irrational, to separate ourselves from crime and those who commit it.

The increasing proportion of foreign born persons in the prison populations of developed countries is seen by many as proof of the immigrant-crime nexus, rather than a reflection of restrictive immigration policies and flawed social policies which exclude and marginalise rather than integrate (Wacquant 1999; Lynch & Simon 1999; Newman et al. 2007; De Giorgi 2010). Immigrants of particular nationalities or specific ethnicities are considered by some to be especially crime prone (Karydis 1998), so that criminal stereotypes are constructed which attribute crime, and even specific types of crime, to ethnic rather than social or individual features

(Angel-Ajani 2003). When breaches of immigration legislation are treated as criminal offences this means that foreigners have a greater chance than citizens of committing a criminal offence, and hence being labelled a criminal. Controls around immigration also lead to higher levels of surveillance directed at foreign born persons (Angel-Ajani 2003). In addition, some decision making processes within the criminal justice system take account of community ties (Albrecht 1997) which can place immigrants at a disadvantage. These factors have led Melossi to claim that discrimination against immigrants is built into the fabric of criminal justice systems (2003b).

#### *3.2.2.2Public perception of link between immigration and crime*

Surveys of public opinion report that significant proportions of the population in all countries surveyed believe that immigration increases crime (Simon & Lynch 1999; Simon & Sikich 2007); and in all countries surveyed apart from the United States the proportion that believed immigrants increase crime increased between 1995 and 2003 (Simon & Sikich 2007). Survey results indicate that there were substantial changes in the opinions of Irish people regarding the link between crime and immigration between 1995 and 2003. In 1995 13.1% of Irish respondents indicated agreement with the assertion 'immigrants increase crime rates'. In 2003 the proportion agreeing to the same statement had increased to 39.6% which suggests a significant increase in negative attitudes towards immigrants in Ireland (Watson et al. 2007:222).

#### *3.2.2.3Are perceptions accurate?*

Is popular sentiment borne out by empirical evidence? The evidence does not provide a compelling answer. Immigrants are not generally separately categorised within criminal justice statistics. Even those apprehended in respect of immigration offences may be non-resident foreign born persons rather than immigrants. Citizenship may not be an accurate indicator of a person's immigration history as in some countries immigrants can opt to be

naturalised. Ethnicity may be an indicator of immigration status but not reliably so. Statistics may capture foreign born persons but not children of foreign born persons who are normally considered to be second generation immigrants.

The evidence from research is limited and inconclusive. A body of American research has emerged which suggests that immigrant offending rates are not higher than those of natives and that immigration may suppress crime rates (see reviews in Lee & Martinez 2009; Martinez & Lee 2000; Yeager 1996). Studies that have assessed the impact of immigration on macro levels of crime (Reid et al. 2005; Ousey & Kubrin 2009) indicate that immigration does not increase crime and may be associated with a reduction in crime (Reid et al. 2005) and violent crime (Ousey & Kubrin 2009). Lee et al. (2001) point to the importance of local rather than cultural influences on criminal behaviour, and suggest that immigration may be a stabilising force that suppresses violence. Sampson (2006, 2008) also argues that immigration may in fact reduce rather than increase crime. Sampson contends that immigration provides a powerful social force for reinvigorating non-violent social values and cites a Chicago-based study to support his claim that higher proportions of foreign born persons may be linked to lower levels of violent crime (2008).[6]

The studies referred to in the previous paragraph are mainly based on American statistics and largely refer to Hispanic immigration. The limited evidence available from European research presents a rather different picture. Early studies found lower levels of crime rates among first generation immigrants (see review in Francis 1981), but more recent research suggests that in the late 20th century criminal offending increased amongst immigrants, and especially among immigrant youths, so that at least some groups of immigrants now have higher rates of criminal offending than natives (see review in Sun & Reed 2007).[7] Sun & Reed

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6 This view is echoed by Lee & Martinez (2009) who refer to an 'immigration revitalization perspective'.

7 While Sun and Reed contend that this increased rate of criminality is observable from the early 1970s, Killias charts an increase in the rate of offending behaviour by immigrants from the early 1980s (2009).

explain higher offending rates by contending that the 'contentment subculture' that previously existed amongst immigrants has gone. Killias (2009) points to evidence of higher criminality amongst migrants in Switzerland and contends that an increasing share of foreign nationals, and especially asylum seekers, come to Switzerland in search of criminal opportunities. A study of self-reported delinquency attributes increasing crime rates in Switzerland, and especially increasing rates of violent crime, to increased offending rates among juveniles and in particular immigrant juveniles (Vazsonyi & Killias 2001).

Earlier reviews of literature carried out by Killias also suggest higher offending rates amongst immigrant juveniles but note that offending rates vary between immigrant groups and between host countries (1989; 1997). The importance of host country characteristics on immigrant offending rates is also highlighted by Solivetti (2007). The lower rates of criminality amongst second generation migrants in Sweden also suggest that host country characteristics and policies may influence offending rates (Martens 1997). Martens (2007) claims that research findings have irrefutably established that in Sweden crime rates are higher amongst immigrants than natives. Martens (2007) suggests that the higher unemployment rates experienced by immigrants may account for their higher involvement in criminal behaviour.

The empirical evidence available therefore suggests that immigration in America may be contributing to an observed reduction in crime rates whereas in Europe immigration may be driving up crime rates. The disparity in research findings suggests that this is an area worthy of further scholarly attention.

We can conclude that the commonly perceived link between immigration and crime has firm historical roots. Changes in flows and patterns of immigration have increased concerns around immigration and its impact on social stability and crime. Surveys indicate that the proportion of people

who believe that immigrants increase crime has increased. Overall, the evidence that is available is not sufficient to confirm or disprove the immigration-crime nexus but rather suggests that the relationship between crime and immigration will vary temporally and according to the characteristics of both host societies and immigrants.

## 3.3 Theoretical Perspectives

Until recently theoretical explanations for the immigration- crime nexus set out to explain why immigrants are more likely to engage in criminal offending than natives. Immigration was therefore understood as a social force that contributed to crime rates. A variety of theoretical stances explain an assumed positive relationship between immigration and crime. The most influential theoretical perspectives are set out below. The positive relationship between immigration and crime that older theoretical perspectives assume has been challenged recently, and a number of commentators have presented perspectives on immigration which suggest that immigration may be a social force which may in fact reduce crime rates. Lee & Martinez (2009) have referred to 'an emerging scholarly consensus' that immigration reduces crime. The proposition that there is consensus that immigration reduces crime must be rejected,[8] but theoretical explanations which suggest that immigration might be linked with lower levels of crime are considered below.

### 3.3.1 Explanations that Suggest a Positive Immigration-Crime Relationship

#### *3.3.1.1Cultural perspectives*

Beginning with Thorsten Sellin (1938) a number of different theories have been developed which seek to explain how discord can arise between legal norms and conduct norms when society is composed of heterogeneous groups. Sellin argues that the law embodies and reinforces the cultural

[8] See for example Killias (2009); Martens (2007); Vazsonyi & Killias (2001).

norms of the dominant group in society. Therefore, immigrants may find that the legal norms of the host society clash with their cultural norms. However, while it is clear that the process of law making will be contested it does not necessarily follow that those who lose out in this process will support or value criminal behaviour (Bernard 1989). Clashes between social and legal norms will not necessarily mean that legal norms will not be respected.

Sutherland built on Sellin's cultural conflict theory to develop a theory of differential association which provides us with a model to understand how individuals exposed to negative acculturation experiences may fail to develop the social bonds normally linked to social control and instead acquire alternative social bonds by association with delinquent peers (Sutherland & Cressey 1978). Differential association theory emphasises how individuals' day-to-day experiences with their peers shape their cognitive processes and how they define right and wrong (Liska et al. 1989:9). Delinquent values are normalised as the intensity and length of association with the delinquent peer group increases and conventional social controls weaken. Individuals may thus learn to adopt criminal behaviour if it is consistent with the norms and patterns of behaviour of their peer group.

Sutherland's theory provides a model to explain why immigrant youth may be particularly likely to become disaffected with the norms and values of their parents and engage in delinquent behaviour. Decker et al. (2009) highlight the importance of micro-level cultural conflict in the formation of ethnic gangs; they point out that although structural factors may create the necessary conditions for gang formation, a combination of economic disadvantage and negative interactions between the local indigenous population and other ethnic groups also underlie ethnic gang formation. Although cultural conflict has been principally used to explain the behaviour of immigrants in developed Western societies it has also been referenced to explain increasing crime rates in some less developed countries as a result of the dissemination of high crime Western and particularly American culture (Arsovska & Verduyn 2008), and through the deportation of convicted criminals (Jones 2002; Barnes 2009; Blake 2009).

Theories of social disorganisation highlight the major impact structural factors play in determining rates of delinquency among social groups. Shaw & McKay's study of delinquency (1942/2006) asserts that rates of delinquency are high in socially disorganised areas characterised by bad housing, poverty, disproportionate levels of persons with mental disorders, high rates of population change and a high proportion of immigrants and ethnic minorities. Hence, effective social bonds and informal social controls are hampered by the largely transitory population that Shaw & McKay identify. Therefore, by contributing to population instability immigration reduces social bonds and informal social controls and contributes to delinquency in socially disorganised areas. If immigrants largely locate in poorer areas where they can access cheaper housing this theory suggests that delinquency levels will tend to be higher amongst immigrants than amongst the general population.

### *3.3.1.2Criticisms of 'Chicagoan' theoretical perspectives*

Valier (2003) is critical of theories of cultural conflict, differential association and social disorganisation which she collectively terms 'Chicagoan' theories. She argues that: 'Chicagoan concepts have played a part in the forging of modern interconnections between racialization, criminalization and national citizenship' (2003:2). She views these theories as 'orientalist ' (Said 1993, 2003) in that they are rooted in a Western world view which regards western culture and values as more enlightened and morally superior than other cultures and value systems and hence, they do not seek to incorporate the self-representations of the 'other'.

Valier considers that the ethnocentric perspective of these theories has served to perpetuate rather than challenge the link between immigration and crime. She contends that the overall effect of Chicagoan scholarship has been to essentialise foreigners and immigrants as marginal and displaced (2003:7), and she argues that the pertinence of these theoretical stances has diminished due to the complexity and diversity of modern patterns of migration. This essentialism derives from a flawed

understanding of culture and community as fixed rather than as contested and evolutionary, and an assumption, which Valier considers unfounded, that identity is irrevocably linked to place. She considers that the emphasis in Chicagoan scholarship is on the adaptation of immigrants to the culture, language and norms of the host society with no recognition that culture and even language will evolve and change over time to take account of the presence of a changed collective. She contends that it does not consider the possibility that the norms and values of immigrants might even be preferable to those of the host society or that immigrants can successfully be part of 'here' and 'there'.

### *3.3.1.3Strain theory*

Strain theory (Merton 1968) suggests that the overall rate of crime in a society will be a function of the cultural value attributed to monetary success, whilst the distribution of crime will be dependent on the distribution of legitimate opportunities throughout society (Bernard, 1989:144). So, if the opportunities offered to immigrants through the formal economy are largely limited to low wage precarious positions, then this theory suggests that in societies which measure status primarily through material means immigrants will be more likely than the native population to resort to criminal behaviour in an effort to appropriate the monetary resources which are status enhancing.

If, as has been claimed, occupational advancement is more problematic for new waves of immigrants in 'hour glass' or post-Fordist economies in which high levels of human capital and access to social networks are necessary pre-requisites for high skilled managerial and professional jobs (Morenoff & Astor 2006), levels of frustration among immigrants over limited job opportunities may be higher now than in the past. Consequently immigrants may be more likely now than in the past to turn to crime.

Strain theory looks to the structural conditions in the host society to explain immigrant offending (Wortley 2009). It presumes that the desire to achieve material wealth will supplant cultural and religious norms. It does not provide an explanation for differential patterns of criminal behaviour

amongst immigrant groups and its explanatory power is largely limited to property-related crime and not to violent or sexual crimes.

### *3.3.1.4Demographic transition*

Another perspective that links immigration to increases in crime is based on the likely change to the demographic structure of immigrant-receiving countries arising from immigration. Criminal behaviour is especially linked to specific age cohorts with the highest offending rates found amongst teenagers and young adults (Hirschi & Gottfredson 1983). Men are also significantly more likely than women to engage in crime, and especially violent crime (Farrington & Painter 2004). Hence, if the immigrant population includes a higher proportion in the key age cohorts for criminality and/or a higher proportion of men than the native population, the resulting demographic transition is likely to increase crime rates (Ousey & Kubrin 2009). However, it should be noted that the gender and age distribution within immigrant groups may vary significantly which may mean that aggregate demographic statistics may not be a good indicator of likely changes in crime rates.

### *3.3.1.5Conflict theory*

Conflict theory predicts that in complex societies the norms recognised by the formal legal system will seek to protect the interests of the most powerful in society and criminal justice processes will not treat all persons equally (Chambliss & Seidman 1971). Chambliss & Seidman argue that law enforcement agencies will find it easy to prosecute people with little or no political power, whereas prosecutions against those with political power are more likely to be contested and will therefore place a strain on their resources. They argue that the lower the social status of an offender the greater the probability that he will be sanctioned, and that the most severe sanctions will be imposed on the lowest strata of society (ibid:475).

Hawkins has expanded conflict theory to incorporate race-specific concerns (1987). His expanded model takes account of the race of the offender and the victim, and the size and degree of segregation of the non-white community. He argues that crimes will be ranked in a hierarchy of seriousness which will be determined by the race of the offender and the victim, the most serious crimes being crimes by a black offender on a white victim and the least serious being crimes by a black offender on a black victim. Hawkins also argues that spatial variations in patterns of racial discrimination can be explained by the size and degree of segregation of the non-white community.

Conflict theory therefore suggests that because immigrants lack economic and political power they will be unduly targeted and punished by the legal system which is primarily orientated to protecting the interests of the dominant and powerful in society (Chambliss & Seidman 1971). If we draw on Hawkins' expanded conflict theory it suggests that the seriousness of a crime may depend on characteristics of the offender and the victim so that crimes by an immigrant offender against a native victim may be viewed as being the most serious of crimes.

### 3.3.2 Explanations that Suggest a Negative Immigration-Crime Relationship

#### *3.3.2.1Selection effects*

A growing number of social commentators have claimed that immigration may be a social force that reduces rather than increases crime rates (Hagan & Palloni 1999; Hagan et al. 2008; Lee & Martinez 2009; Martinez & Lee 2000; Sampson 2008). The first argument to consider concerns the characteristics of immigrants. Sampson (2008) points out that immigrants are a self-selected group distinguished by their ambition and their motivation to succeed. Immigration requires an investment of time and resources, and those that commit to that investment will be determined to ensure that in the long run it pays dividends. This will mean that they are likely to be hard-working and to actively seek means of advancement.

These characteristics suggest a low propensity towards criminal offending (Butcher & Piehl 2005; Ousey & Kubrin 2009). Therefore, increased immigration is likely over time to reduce the proportion of those in the population likely to be oriented towards criminality.

### *3.3.2.2Revitalising perspectives and increased informal social controls*

Lee and Martinez argue that immigrants can be a stabilising rather than a disorganising force. They point to the strong attachment that immigrants have to the labour force, enhanced job opportunities which stem from 'enclave economies', and the strength of their familial bonds (Martinez & Lee 2000; Lee & Martinez 2009). They contrast these immigrant characteristics to those of African Americans who have low levels of participation in the workforce and high levels of fractured families. Immigration may therefore be associated with a revitalisation of poor neighbourhoods and an increase in informal social controls which reduce crime rates.

Like Martinez and Lee, Sampson sees the different cultural norms that immigrants subscribe to as a force for positive social change, rather than a factor likely to increase crime rates. He suggests that 'selective immigration in the current era may be leading to the greater visibility of competing non-violent mores that affect not just immigrant communities but diffuse and concatenate through social interactions to tamp down violent conflict in general' (2008:33).

Ousey & Kubrin (2009) suggest that reductions in violent crime may stem from increased immigration due to the more intact and traditional family structures of immigrants. Ousey & Kubrin found that changes in family structure were an important indicator of changes in levels of violent crime. Higher rates of divorce and single parent families are associated with higher levels of violent crime and are negatively associated with levels of immigration. Increased levels of immigration are therefore associated with fewer divorces and single parents which may result in higher levels of informal social controls.

### 3.3.3 New Theoretical Framework Required

Migration patterns have become increasingly diverse and are influenced by a complex combination of 'push' and 'pull' factors which vary temporally and spatially. Given the diversity of migration streams, and the multiple factors that can influence crime rates locally, nationally and internationally, it may be that to explore the immigration-crime relationship comprehensively a composite theoretical framework needs to be adopted which adopts a neutral view of the potential impact of immigration on crime.

## 3.4 Research on Criminal Court Dispositions

Having considered the link between immigration and crime, and a range of theoretical perspectives on the link between immigration and crime, literature that has reported on the decisions of criminal courts will now be reviewed. In the absence of any significant body of research targeted at immigrants or foreigners, particular interest has been focused on research which examines how ethnic/racial minorities fare as criminal defendants. While Melossi's warning regarding the dangers of conflating race and migration is noted and considered apposite (2003b), research on minority ethnic/racial groups is considered to be especially pertinent in the absence of any substantial body of research on immigrants' treatment in criminal courts.

Why has research interest focused so strongly on ethnicity/race rather than immigration status? Ethnicity/race is an enduring and generally visible characteristic which may facilitate research. In addition, in some societies, and especially in the United States, race-based cleavages have provoked much research interest. However, as some European countries do not permit the collection of statistics that delineate on the basis of race/ethnicity, statistical deficits may constrain research in this area.

The limited research to date on immigrants in criminal courts may reflect difficulties in defining and identifying immigrants. Immigrant status may be

considered a status that is time limited and which can be revoked by a process of naturalisation, or may be considered a status that can be inherited and impact several generations.[9] If court statistics do not routinely record details such as nationality/residency status/place of birth, research on court dispositions which compares immigrant outcomes to those of the general population may not be possible, or may at the very least be fraught with difficulties.

### 3.4.1 Verdicts in Criminal Courts

Criminal courts produce two types of decisions, verdicts and sentences. The verdict is the finding as to the guilt or innocence of the accused person. Legal definitions of culpability do not usually allow for ambiguity; verdicts must be unequivocal. The binary delineation of action as legal or illegal means that accused persons can usually only be judged to be guilty or innocent.[10] The responsibility for deciding on the verdict in criminal cases rests with the jury or, when offences are tried summarily, with the presiding judge/magistrates.

Who is perceived as doing the better job, judge or jury? Although very few criminal cases are tried by jury, research in the United States has indicated that juries are perceived by lay people as doing a more accurate and thorough job than judges, with a very sizable majority of respondents indicating that they would prefer a jury to a judge if they were a defendant in a criminal trial (MacCoun & Tyler 1988). More recently, however, research has suggested that views on juries are strongly influenced by race, ethnicity and level of acculturation, with less acculturated groups indicating

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9 Newman et al. (2007) suggest that 'foreign born' is a more reliable means of categorisation than citizenship, which is not always reliably reported. They note that an immigrant's country of birth often remains as a signifier of exclusion even if the individual becomes a citizen (2007:33). 'Foreign born' persons, if they can be identified, will include tourists and other non-residents, and therefore this form of categorisation is not without problems.

10 Some jurisdictions do allow defendants to enter pleas of 'partially guilty'. This indicates that the defendant recognises he has behaved illegally but disagrees with the charge. A plea of 'guilty but insane' could also be interpreted as a plea of partial guilt in that the plea indicates that the defendant's comprehension of his actions and ability to control his actions were reduced and hence his degree of culpability is reduced.

a clear preference for a judge rather than a jury (Rose et al. 2008). However, the race/ethnicity of the judge does not appear to be central to perceptions of fairness as research has indicated that minorities' trust in the fairness of judicial decision making did not increase in line with increased numbers of minority judicial appointments (Overby et al. 2005). It may be therefore that the summary justice dispensed by the Irish District Court will be viewed more favourably by immigrants than by the native Irish population.

Unlike sentencing, very little research attention has been directed at the verdicts of criminal courts (Gould 2002). Why has research generally not considered criminal court verdicts? We must remember that the accuracy of verdicts cannot normally be objectively verified, making research on the accuracy of verdicts a challenging, if not impossible, task. The lack of research may also reflect confidence in the appeals processes built into the legal system to correct miscarriages of justice, or indeed it may reflect the fact that in a large number of criminal cases the guilt of the accused person is not contested, so that in most cases the court process is not an adversarial process, and is essentially concerned with sentencing (Levin 1977).

### 3.4.2 Sentencing in the Criminal Courts: Some Caveats Regarding Previous Research

The sentencing decision, then, is the second stage in the output process of a criminal court, and only comes into play after the verdict has been reached, and only in respect of those defendants found guilty. A great deal of research attention has been directed towards the analysis of sentencing decisions. Meaningful analysis must distinguish between discretion, disparity and discrimination in sentencing. Research in the past has not always successfully delineated these concepts (Hagan & Bumiller 1983). Sentencing discretion is the discretion provided by law to sentencers, whereas discriminatory sentencing is a pattern of sentencing which is unfair and prejudicial in origin (Hagan & Bumiller 1983:9). Sentencing disparity may

also be unfair and disadvantageous, but lacks the systematic quality of discrimination. Many studies have pointed to general evidence of sentencing disparity (Gaudet et al. 1933; Mannheim et al. 1957; Hood 1962; Hogarth 1971; Austin & Williams 1977; Tarling 1979; Parker et al. 1989; Tarling 2006) but, as will be outlined in greater detail below, research findings in respect of discriminatory sentencing have been inconsistent and inconclusive.

The lack of clarity that surrounds this body of research has been compounded by the use of a variety of research methods and statistical devices and the inconsistent operationalisation of variables. This latter point can be illustrated by considering the differential treatment of prior criminal record, a variable that is generally considered to be relevant to sentencing decisions. We can point to studies that code this variable as dichotomous (Tarling 1979); define it using a combination of information on previous offences and previous sentences (Hood 1962; Brown & Hullin 1992); classify it based on the number of times the offender has been previously sentenced to prison for more than one year (Spohn & Holleran 2000); calculate an offending score based on current offence and previous criminal history (Crow & Simon 1987); or indeed, take no account of it at all (Tarling 2006). Similarly, there is no consensus amongst the research community on how the critical dependent variable, 'sentence', should be operationalised. Sentences have been simply categorised between those that result in immediate imprisonment and those that don't (Clarke & Koch 1976). More differentiation has been sought by taking the length of a custodial sentence into account (Chiricos & Waldo 1975; Hood & Cordovil 1992); comparing the use of various sentencing options (Lyons & Hunt 1988); and devising a scale to rank all sentencing options (Uhlman & Walker 1980). It is therefore not at all surprising that the mass of research that has accumulated only allows one to draw tentative rather than definitive conclusions.

### 3.4.3 Discrimination and Disparity in Sentencing

As outlined above both discriminatory sentencing practices and disparity in sentencing are problematic. Both can undermine the legitimacy of the

justice system by eroding perceptions of impartiality and fairness. Criminal defendants are not evenly dispersed throughout society; they are disproportionately comprised of young males from disadvantaged backgrounds. Some, but not all, minority groups also have greater rates of contact with the criminal justice system. It is easy to see therefore that there may be doubts about the nature of the justice dispensed by our criminal justice systems.

#### *3.4.3.1Gender*

It has been frequently claimed that female defendants are sentenced more leniently than male defendants. Research results are mixed and Dowds & Hedderman (1997) point out that sentencing decisions cannot be readily understood by isolating one variable such as gender. It has been suggested that sentencing decisions for females are influenced by a different set of factors than those that impact male defendants (Lyons & Hunt 1988; Farrington & Morris 1983).

#### *3.4.3.2Socio-economic status*

The results from research that has examined the impact of socio-economic status on sentencing decisions have been somewhat inconclusive. After reviewing the sentences imposed on more than 10,000 inmates in three states Chiricos & Waldo (1975) found no support for the proposition that there is a correlation between socio-economic status and sentencing disposition. Clarke & Koch (1976), however, found that income did affect the likelihood of imprisonment. Crow & Simon (1987) found that unemployment made the imposition of financial penalties less likely. This had an uneven effect on outcomes as at times tariffs were adjusted upwards, and at other times tariffs were adjusted downwards. Spohn & Holleran (2000) argue that a constellation of factors, which include male gender, unemployment, and minority status, when combined, result in individual defendants being considered particularly troublesome, and increase the likelihood that a custodial sentence will be imposed.

### *3.4.3.3Foreigners/immigrants*

To date research on court dispositions has rarely examined whether the nationality or immigration status of accused persons influences outcomes. Secondary analysis of statistics from a number of Austrian District Courts found that foreigners were not more frequently accused or convicted and were not more likely to be subject to incarceration than native Austrians (Hanak et al. 1984 cited in Killias 1989:27). A study of juveniles in the Swiss criminal justice system found that there was no significant difference in the dismissal rate or severity of penalties imposed on native and immigrant youth (Queloz 1986 cited in Killias 1989:32). Wandall's study of decisions to impose immediate sentences of imprisonment in Danish courts found that an offender's status as 'immigrant' rather than 'Danish' did not have a significant effect on the decision to imprison. Wandall also found that decisions to imprison were not significantly impacted by the offender's status as a foreign national (2008:48).[11]

### *3.4.3.4Ethnicity/race*

A great deal of research attention has focused on the question of whether those who sentence discriminate on the grounds of race. Research in this area originated in the United States where there was particular concern about the disproportionate numbers of blacks convicted of capital crimes and sentenced to the death penalty. The continuing over-representation of blacks and other ethnic minorities amongst accused persons in the American criminal justice system has ensured that research interest in race-based discrimination has not waned. The over-representation of racial/ethnic minorities has become a feature of the criminal justice systems of most other developed countries, making the question of racial/ethnic discrimination in sentencing, and indeed in all criminal justice processes, especially pertinent.

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[11] Defendants' nationality was coded as a binary variable; Danish and Foreign. Defendant's immigration status was coded into three categories; Danish origin; Immigrant and Successor to Immigrant. The source of this information was Statistics Denmark (see Wandall 2008: Appendix Two).

To review the literature in this area it is helpful to refer initially to a number of meta-reviews prepared in relation to research findings in the United States. Hagan (1974) reviewed 20 studies of sentencing patterns in order to establish the impact of a number of extra-legal attributes on sentencing decisions. His central finding was that 'there is generally a small relationship between the extra-legal attributes of the offender and sentencing decisions' (1974:375). However, Hagan did find evidence of differential sentencing in inter-racial capital cases in the Southern American states, and some evidence of a modestly statistically significant relationship between sentence and the race of offenders with prior convictions in non-capital cases.

Kleck (1981) presented a comprehensive review of studies designed to test for racial discrimination in sentencing of criminal offenders. The most important weakness he pointed to was a failure to control for prior criminal record. As research has indicated that black offenders have on average more serious prior criminal histories than white offenders (Wolfgang 1958), and prior criminal record is an important predictor of sentence severity (Hagan 1974), Kleck argues that failure to take account of prior criminal record resulted in a large number of studies incorrectly concluding that there was evidence of racial discrimination in sentencing. While Kleck's analysis does not support the suggestion of routine racial discrimination in sentencing it does highlight that discriminatory sentencing may occur in certain social contexts, and at certain times. In particular Kleck points out that there is evidence that the death penalty was imposed in a discriminatory fashion on black offenders convicted of homicide in Southern states, whereas elsewhere black offenders were less likely than white offenders to receive the death penalty or be executed.

Hagan & Bumiller's review of sentencing research (1983) draws attention to the importance of structural and contextual influences on sentencing. In their review of sentencing research they found that the proportion of later studies (post 1969) reporting findings consistent with racially discriminatory sentencing was twice that of earlier studies. Hagan & Bumiller explain this by suggesting that increased sensitivity has allowed researchers to identify,

and target for study, structural contexts in which racial discrimination is most probable (1983:31).

Zatz (1987) divides sentencing studies into four waves which have each yielded conflicting conclusions with regard to the discriminatory sentencing of minorities. The first wave includes studies up to the mid 1960s which largely supported the hypothesis that there was overt racial/ethnic discrimination in sentencing patterns. Early studies were prompted by the widespread social prejudice that was evident against non-whites and foreign born persons; a prejudice that was believed to be shared by the American judiciary (1987:71). Zatz provides evidence of judicial prejudice by quoting the following statement made by Judge Chagrin during a Juvenile Court hearing in which the defendant was a Mexican boy:

> We ought to send you back to Mexico. You belong in prison for the rest of your life for doing things of this kind. You ought to commit suicide. That's what I think of people of this kind. You are lower than animals and haven't the right to live in organised society - just miserable, lousy rotten people....Maybe Hitler was right...(Quoted in Zatz 1987:72).

The findings of Wave 1 studies did not prove robust due to methodological failings and poor research design. Wave 2 studies reassessed and largely discredited earlier research. Zatz claims that, apart from findings in respect of capital cases in the South, the Wave 1 findings with regard to racial discrimination 'were an artefact of poor research designs and analyses' (1987:70).[12]

Third wave sentencing studies are distinguished by more sophisticated statistical analysis and research designs. Wave 3 study findings have been diverse rather than consistent. Some studies have found evidence of direct or overt discrimination while other studies failed to find evidence of race

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[12] Zatz includes Hagan's 1974 study and Kleck's 1981 study in this second wave but points out that they should not be simply characterised as 'anti-discriminatory' as they did not blithely dismiss the notion of discriminatory sentencing.

having a direct impact on sentencing but did find indirect or interactive effects consistent with more subtle forms of discrimination. These mixed findings lend credence to Hagan & Bumiller's (1983) assertion of the central importance of structural and contextual influences on sentencing.

The shift from the third to the fourth wave of sentencing studies that Zatz identifies was triggered by the introduction in many American states of sentencing guidelines and mandatory/presumptive sentences which limit the discretion of judges and ensure that sentencing patterns are subject to tighter control, thus strengthening the formal legal rationality of the sentencing process, and reducing the potential for discrimination in sentencing. Zatz points out that the reduction in judicial discretion associated with the shift to the fourth wave of sentencing has increased the discretion of prosecutors whose activities are more 'back-stage' and therefore less open to scrutiny than the sentencing decisions reached by judges. As determinate sentencing legislation and sentencing guidelines have become more common in the United States research interest in discriminatory sentencing has been somewhat displaced by concerns about plea bargaining processes, pre-trial detention and the differential impact of legislation, particularly legislation with regard to crack cocaine (Weitzer 1996).

Zatz writes from an American perspective, and the changes she identifies are changes in American sentencing legislation and sentencing patterns. Similar changes have been introduced in a number of other jurisdictions. Reforms have been criticised on the basis that they are driven by an auditing and managerial culture which unduly constrains judicial discretion and prioritises sentencing conformity (Franko-Aas 2005). However, these changes are not universal. Although legislation with regard to presumptive sentences for specific offences has been introduced in Ireland, there has been no real attempt as yet to constrain judicial discretion or to institute systems for monitoring judicial decisions.

The final meta-review considered is that conducted by Chiricos & Crawford (1995) who analysed 38 studies on sentencing, all dated post-1975.

Influenced by Hagan & Bumiller (1983), they sought to identify specific structural contexts in which race particularly affected sentencing decisions. They found that race directly influenced decisions to imprison, but had no significant influence on decisions regarding sentence length. Their analysis revealed that non-whites were at a significant disadvantage 41% of the time with regard to the decision to imprison and this disadvantage increased in Southern states (53%); in places where the black population was large (50%); and in places where the level of unemployment was high (58%). The results suggest that a combination of features result in particular defendants being judged especially troublesome, a finding that was later affirmed in the research carried out by Spohn & Holleran (2000). Chiricos & Crawford suggest that the combination of a number of potentially destabilising conditions such as a large minority population and high levels of unemployment may be regarded as so threatening as to engender a 'moral panic' (1995:301) which would influence sentencing decisions.

### *3.4.3.5Research on the impact of race/ethnicity on sentencing decisions in European criminal courts*

We may wonder whether these results have any significance outside America where issues of race have had a long and troubled history. Does European research indicate that race/ethnicity impacts on sentencing? This is not a straightforward question to answer given the limited information available. We cannot simply compare American research results to Europe as there is no uniform policy in European countries with regard to the recording of the nationality/residency status/ethnicity of criminal defendants. Many countries are reluctant to record information about the race/ethnicity of those processed by the criminal justice system.

Neither Germany nor France record the race/ethnicity of accused persons but both identify foreign nationals in criminal justice statistics (Albrecht 1997; Tournier 1997). In Germany the residency status of foreign nationals is also generally recorded (Albrecht 1997). The Netherlands collects criminal justice data on 'ethnic minorities', a term which refers to groups which are

specifically targeted by government policies due to their low socio-economic status, and which are a mixture of Dutch and foreign nationals (Junger-Tas 1997). This policy has been criticised on the grounds that it infringes the right to privacy and the right to be free from racial and ethnic discrimination of 'at-risk' groups (Justice Initiative 2008).

In Britain however, following the finding of institutional racism in the British police force by MacPherson (1999), efforts are now made to record statistics about the ethnicity/race of all persons at every stage of the criminal justice process (see Home Office 2005; Riley et al. 2009).[13] In this way all criminal justice processes are monitored with a view to detecting and eliminating discriminatory practices.

Despite the limited statistical databases available to European researchers, concerns about the disproportionate numbers of ethnic minorities in European prisons have prompted a number of research projects which have examined the treatment of minorities within the criminal justice system. In Britain results have varied. A number of studies failed to find evidence of discriminatory sentencing practices (McConville & Baldwin 1982; Moxon 1988; Brown & Hullin 1992) while others did find evidence that race influences sentencing decisions (Hudson 1989; Hood & Cordovil 1992). The most influential of these studies was that carried out by Hood & Cordovil (1992) and warrants looking at in further detail.

Hood & Cordovil based their study on data from Crown Courts in the West Midlands. As court records did not indicate the ethnicity of accused persons it was necessary to refer to police/probation files in order to assemble ethnic profiles of accused persons. The results suggest that only a very small proportion of the over-representation of black men in UK prisons can be explained by discriminatory sentencing practices, and although the authors recognise that the over-representation of black men among criminal defendants may be the result of different policing practices and the

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[13] In 2007 ethnicity was recorded in 81% of Crown Court cases but just 22% of Magistrates' cases. Data collection improvements are underway to improve the recording of ethnic data on court proceedings (Riley et al. 2009).

differential impact of the criminalisation of drug-use on the black community, they argue that the principal reason why black men are over-represented in prisons is that they are over-represented amongst criminal defendants.

Hood & Cordovil note that treating race as a dichotomous variable (black/white) may conceal discriminatory sentencing practices (1992). In their study, for instance, the results indicate that after controlling for legal variables black male offenders had a 5-8% higher probability of a custodial sentence than average, whereas Asian male offenders had a 4% lower than average probability of a custodial sentence. However, they found no evidence to suggest that black women were more at risk of receiving a custodial sentence than white women.[14] The results also indicate that unemployed black offenders had a greater risk of receiving a custodial sentence whereas unemployment did not impact on the risk of custody for white and Asian offenders. The greater propensity of black offenders to plead 'not guilty' was not found to increase their risk of imprisonment, but did impact on the length of the custodial sentence black men received, while black women were not penalised for not guilty pleas.

A comparison of sentencing patterns in court centres revealed significant inconsistencies which resulted in the probability of an offender receiving a custodial sentence varying with the court centre his case was dealt in. While in some centres race was not found to impact on sentencing decisions, one court centre imposed particularly harsh sentences on black offenders, and individual judges in other centres also displayed discriminatory patterns of sentencing. Individual black offenders could therefore face a greatly increased risk of imprisonment depending on the judge and court centre dealing with their case (Hood & Cordovil 1992). The results suggest that in order to identify discriminatory sentencing patterns it is necessary to disaggregate statistics to isolate particular court centres and individual judges whose sentences are influenced by the race of the offenders.

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[14] The authors advise caution in interpreting these results as the number of non-white women in the sample was small (76 black and 14 Asian women) (Hood & Cordovil 1992).

Other research on courtroom processes indicates that ethnic minorities are less likely to plead guilty than accused persons from the native population (Smith 1997) and are also more likely than accused persons from the native population to be subject to pre-trial detention (Junger-Tas 1997; Tournier 1997; Smith 1997).[15] Persons subject to pre-trial detention are more likely than other accused persons to be found guilty (Junger-Tas 1997; Tournier 1997).

## 3.5 Qualitative Research in Legal Settings

Studies such as those considered above which evaluate courtroom processes using an input/output matrix are certainly a useful means of detecting disparate and discriminatory sentencing practices, but they tell us little about courtroom dynamics. Sentencing practices cannot be divorced from social context, and as Travers points out, there is a growing tendency to view sentencing as a collaborative process rather than simply as the output of independent judges (2007). Therefore, in order to understand sentencing practices we need to understand the roles of the various social agents who have active roles in the courtroom process. We need to understand how actors communicate with one another; we must consider what information is available and how it is presented; we must know what really happens and what really matters in our courtrooms.

### 3.5.1 The Human Face of Sentencing

Research into sentencing practices inevitably involves focussing on the men and women who make sentencing decisions. Reports on sentencing which are largely quantitative in nature can sometimes fail to capture what John Hogarth illuminated so well in his study conducted in Ontario Canada; sentencing is a human process (1971). Hogarth contends that in the

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[15] This has been associated with a higher rate of non-appearance at trial amongst ethnic minorities as well as a greater lack of permanent accommodation (Junger-Tas 1997).

absence of consensus about the social goals of the criminal justice system, and with little information about the effectiveness of penal interventions, disparity in sentencing is inevitable. He considers that without a prescriptive ranking of the social goals which are commonly ascribed to the criminal justice system the penal philosophies and attitudes of individual sentencers become a fundamental cornerstone of the sentencing process.[16] This point was examined further by Hood in his comprehensive study of the sentencing of motor offenders, which highlighted how the personal experiences of magistrates as drivers, and at times motoring offenders, could also impact on sentencing decisions (1972).

Hogarth's work is particularly noteworthy because he employed a variety of both quantitative and qualitative research tools. These included semi-structured interviews and self-administered questionnaires and sentencing decision sheets. He also compiled and analysed data on 2,400 criminal cases from police and probation records, assembling around 100 variables on each case.

Hogarth, like Hood (1972), found that magistrates are not representative of the general public in several key respects. Both age and social class distinguish magistrates as they are older than the general public and disproportionately likely to have had fathers engaged in a profession or in business. Hogarth found that magistrates were notable for their strong ties to their local communities as well as for their marital stability. These characteristics paint a picture of a group with a strong interest in maintaining social order and the status quo, and help to explain Hogarth's finding that when compared to groups of law students, social work students, police officers and probation officers, magistrates as a group most strongly supported the view that punishment is good for offenders.

While Hogarth stresses the impact that penal philosophy can have on a magistrate's approach to sentencing, and his evaluation of sentencing

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16 Hogarth lists the social goals of the criminal justice system as rehabilitation, deterrence, punishment, incapacitation and the assertion of moral disapproval.

options, he also points out the complex relationship between penal philosophy and punitiveness in sentencing, highlighting for example that the prioritisation of rehabilitation can result in harsh rather than lenient sentences. Hogarth's analysis teases out the importance of varying penal philosophies and judicial attitudes, as well as highlighting the constraints that are supplied by a magistrate's legal experience, and by what he believes people expect of him. He posits that sentencing behaviour can only be understood when we understand how the sentencer defines his own social and legal environment (Henham 1990). Overall, the picture of sentencing that emerges from Hogarth's study depicts, 'a dynamic process in which the facts of the cases, the constraints arising out of the law and the social system and other features of the external world are interpreted, assimilated and made sense of in ways compatible with the attitudes of the magistrates concerned' (1971:343).

### 3.5.2 Understanding Social Interactions in Criminal Courtrooms

Qualitative studies which analyse social interactions in legal settings use research methods such as observation (Blumberg 1967; Cicourel 1968; Emerson 1969; Mileski 1971; Brickey & Miller 1975; Levin 1977; Feeley 1979; McBarnet 1984; Rock 1993; Wandall 2008); participant observation (Cicourel 1968; Emerson 1969; Travers 1992, 1997; Castellano 2007); interviews (Levin 1977; Rock 1993; Burns & Peyrot 2008; Wandall 2008); conversation analysis (Cicourel 1968; O'Barr 1982; Conley & O'Barr 1990); attending lawyer client meetings (Sarat & Felstiner 1988; Travers 1992); examining legislation (McBarnet 1984); and analysis of audio (Rock 1993; Travers 2007) and video tapes of courtroom proceedings (Bennett & Feldman 1981). A number of studies have combined both quantitative and qualitative research methods (Hogarth 1971; Eisenstein & Jacob 1977; Crow & Simon 1987; Parker et al. 1989; Wandall 2008).

One of the most relevant socio-legal ethnographic studies is Rock's portrayal of the complex social organisation of an English Crown Court

(1993) which provides an interesting insight into front and back stage interactions in criminal courtrooms. Rock's account of the various social networks that operate within the Crown Court setting illustrates the manner in which different social actors negotiate relationships which require both the sharing of information and the keeping of secrets, as the interests of actors are at times mutual, and at other times contradictory. The distress, upset and passion of defendants and witnesses is contrasted with the professional detachment and emotionless front that professionals display. The theatricality that defence and prosecuting barristers indulge in from time to time is clearly presented as simply the deployment of a tactical device, and not indicative of any emotional investment in the outcome of the case. Counsel can feign passion and reprehension but are actually detached and untouched by the proceedings.

O'Barr's distinction between powerful and powerless speech styles (1982) in courtroom settings is called to mind when Rock sets out in some detail the ease with which witnesses' testimony can be manipulated and challenged by defence counsel. He describes the speech of counsel as 'the formal speech of men and women accustomed to being heard and reported at a distance, well-modulated, with an idiom and pace that convey authority' (1993:59). This powerful speech style not only adds to the authority of utterances made by counsel, it also makes the testimony of witnesses who adopt powerless speech styles less credible and more open to challenge. He points out that normal speech conventions must be abandoned in the courtroom, where there is no space for the common ruses adopted to manage the disclosure of intimate or embarrassing details (1993:49). Disclosures have to be 'bald, literal and unambiguous' (1993:49); speech is robbed of the 'tricks and devices' that add nuance and preserve face (1993:54). The professionals are at ease with the rules of the court, but for outsiders they are unnatural and tend to frustrate and increase their sense of impotence.

Like Bennett & Feldman (1981), who characterise criminal trials as forms of storytelling, Rock suggests that opposing counsel use different frames to

construct different versions of reality.[17] He contrasts the role of the prosecuting and defence counsel; the former must seek to maintain a coherent story line, whereas the latter is free to 'fish' for means to undermine the prosecution's version of reality. His portrayal of judges is sympathetic in character. Although he notes several occasions when judges become impatient with witnesses, this does not obscure the picture of an impartial non-partisan figure. Indeed he suggests that the appearance of impartiality is so essential to the role of the judge that he must at all costs avoid situations which could be construed as compromising. Rock claims that 'judging is a difficult and solitary business' (1993:182-3). The position is seen as creating barriers between the judge and other courtroom users so that judges' physical movements within the courtroom complex are limited and confined.

The most telling message contained in Rock's account of the social organisation of the Crown Court is that the court is essentially organised to suit the needs of the 'insiders'. 'Outsiders' (who include defendants, witnesses, jurors and members of the public) are transients in the courtroom, and are almost viewed as props in the staging of the trial. Rock recounts an attack by a defence barrister on the character of two witnesses in an assault trial. From an insider's perspective this is a legitimate means of undermining the prosecution's case, but from an outsider's perspective it suggests that all those who find themselves in contact with the criminal justice system, even victims and witnesses, do so at a personal cost. One is left with a sense that for many outsiders there is a disjuncture between what takes place in the court and what they might characterise as 'justice'. Perhaps, as Merry suggests, if the essential character of at least some cases that end up in our criminal courts is moral rather than legal, the resolution offered by the legal system can never be entirely satisfactory (1990).

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17 McBarnet also refers to the construction of storylines by advocates which she suggests must be good rather than accurate (1984).

### 3.5.3 Procedural Efficiency and the Production of 'Justice'

Rock's study is located in a Crown Court which deals with criminal offences of moderate gravity. The pace with which cases are disposed of in the Crown Court is pedestrian compared to the frenetic pace of the minor American criminal court as described by Mileski (1971). The heavy caseload of minor courts means that there is considerable pressure to process cases quickly. Mileski's observations indicate that 'quickly' is less than one minute for almost three-quarters of cases (72%), and that processing is further expedited by processing some defendants in groups rather than individually. The study also suggests that the vast majority of accused persons plead guilty (85%), although non-white defendants, and especially black defendants, plead 'not guilty' more often than white defendants. Mileski found that contested cases were rare, and winnable contested cases even rarer. Trials were therefore generally avoided altogether, but when they were made unavoidable by a defendant asserting his rights, they are almost always regarded by judges as 'open-and-shut convictions' (1971:499).

Mileski, like Levin (1977), suggests that the court is not oriented towards an adversarial fact-finding mission, and sees the primary work of the court as sentencing. She argues that sentencing can be seen as a process that confirms the decisions of various criminal justice agents prior to the court hearing. Mileski contrasts the sentencing of 'regulars' with those who do not habitually find themselves before the court. 'Regulars' are not regarded as a problem even though they are more frequently incarcerated than other defendants. It seems that they are considered to be beyond redemption and therefore not of concern. Consequently, judges find it easier to sentence 'regulars' to custody than deciding on the size of fines to impose on non-habitual offenders.

In Mileski's view the court delivers 'situational justice' (1971:499). The dispositions chosen by judges are influenced by the character of preceding punishments and the nature of clusters of cases. The suggestion is that justice is somewhat arbitrarily and capriciously dispensed without reference to any guiding penal philosophy. Travers (1992) does not adopt the same

critical stance with regard to judicial decision making, but he does point out that social context, and not simply the facts of the case, may impact on how cases are processed and highlights how some courtroom decisions may have a symbolic as well as an instrumental value.[18]

It is interesting to compare Mileski's depiction of judicial decision making with Levin's portrayal of the contrasting decision making models followed by judges in Pittsburgh and Minneapolis (1977). Levin contends that the different political structures in both cities, and different judicial appointment processes, directly impact on the judicial decision making models adopted. So, while Mileski depicts the immediate courtroom dynamics as a key influence on the nature of courtroom dispositions, Levin asserts that it is the political environment, and the pre-judicial experiences of judges, that are the most important factors influencing judicial decision making.

Writing at a time before the introduction of sentencing reforms in the United States, Levin asserts that the model followed by judges in Minneapolis is based on formal legal rationality whereas that followed by judges in Pittsburgh is oriented towards substantive issues. Levin likens the justice dispensed by the Pittsburgh judges to Weber's description of 'khadi justice' (1969); a form of justice which is outcome- rather than rule-oriented.[19] Levin considers 'khadi justice' to be an inferior form of justice which is based on instinct and emotion rather than rationality and consistency and is critical of the approach to sentencing adopted by the Pittsburgh judges. He considers that the two judicial decision making models produce crucially different outcomes: one is universalistic and the other particularistic; one is oriented towards justice (Minneapolis) and the other is oriented towards

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18 Travers refers specifically to the decision by magistrates to request a social enquiry report (SER) in respect of a defendant who has pleaded guilty, despite the final disposition of the case by way of a fine not being in doubt. The request for the SER is symbolic therefore in that it is not made to assist the magistrates in deciding on the appropriate sentence, but because the magistrates wish to signal their concern at the number of recent assaults on police officers (Travers 1992).

19 The term 'khadi justice' is more generally applied to the form of justice dispensed by Islamic law. Rosen's analysis emphasises the importance that cultural context plays in determining outcomes under khadi law (Rosen 1989). The term 'khadi justice' has also been used to denote a form of justice which results from a resistance to determinate sentencing guidelines and which inevitably results in sentencing disparity (Anspach & Monsen 1989).

benevolence (Pittsburgh). Levin argues that justice can be dispensed by ordinary men whereas the bestowal of benevolence requires extraordinary men. He suggests therefore that it is unwise to have a judicial decision making model that assumes that judges are extraordinary men (1977). Levin's conclusions in this regard could be applied to the very broad discretion allowed to Irish judges which one could say presumes that judges will be oriented towards benevolence.

The orientation towards benevolence that Levin describes and the emphasis on substantive issues relegates the importance of legal variables, and may lead to extra-legal variables impacting on judicial decisions. Levin points out that criminal court decisions based on extra-legal factors, however well motivated, can have negative, unintended consequences (1977). In support of this he claims that the more lenient punishment of black-on-black crime reported by some commentators (Kleck 1981; La Free 1980) has had a detrimental impact on the black community in that it can be interpreted as condoning black violence.[20]

### 3.5.4 Tacit Knowledge and Bureaucratic Processes

The literature reveals how those who work in courtrooms, or are routinely engaged in legal processes or law enforcement, use a repository of knowledge, intuition, commonsense and experience to arrive at the 'facts of a case' and to make assumptions about the guilt or innocence of accused persons (Cicourel 1968; Travers 1992). The 'facts' are shaped by the appearance, language, voice intonations, facial expressions and body language as well as any prior criminal history of the accused person. They are interpreted and inferred rather than objectively determined.

Travers (1992) shows how this tacit or insider's knowledge is used by a defence lawyer to filter and collate a number of conflicting accounts regarding a theft and assault on a police officer. Despite her client's 'not

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20 One must remember that the more lenient punishment referred to often simply meant that the offender did not receive the death penalty but still received a life sentence.

guilty' plea, the lawyer realises that the facts suggest otherwise. If her client pleads 'not guilty' she will be convicted and potentially face a more severe punishment than if she pleads guilty. The lawyer does not directly challenge her client's version of events but rather convinces her that the legal interpretation of her actions is such that the charges against her will be upheld. She therefore persuades her client to plead guilty, as she believes this is in her client's best interests. Travers argues that the lawyer is not coercing her client but rather guiding her towards a course of action that will secure the best outcome for her. Yet it is clear from Travers' account that even though the defence lawyer is concerned to achieve the best and most expeditious outcome for her client, her decisions and actions are constrained by courtroom etiquette, courtroom timetables, and her relationships with other members of the courtroom work group. Travers thus reminds us that courtroom processes are shaped by the agendas and priorities of courtroom insiders rather than by courtroom outsiders.

Bureaucratic processes routinise legal proceedings and a legal 'argot' aids communication within the courtroom work unit. Cases are processed on a courtroom assembly line which leaves little space for reflection on how things are done, and little time for debate about courtroom outcomes. Courtroom 'insiders' sort defendants into categories, which allow them to quickly understand their 'story'. Travers refers to 'regular', 'serious' and 'vulnerable' clients (1997). Regular clients are generally young men charged with minor offences. Serious clients are professional or career criminals who often face more serious charges and are on average more intelligent and more knowledgeable about the legal system than regular clients. Vulnerable clients are clients who find the criminal justice process particularly difficult to cope with. Vulnerability may be due to mental health issues, sub-normal intelligence or precarious living conditions. The categories Travers refers to echo those noted by Emerson (1969) who refers to delinquents being typed as 'normal', 'hard-core' and 'disturbed'. This latter category also matches Cicourel's reference to 'sick' delinquents (1968).

### 3.5.5 Differences between 'Insiders' and 'Outsiders'

The literature highlights the clear distinction between 'insiders' and 'outsiders' in the courtroom processes (Rock 1993). For insiders the work of the court is routine. They are detached and unemotional (Rock 1993). They use key 'story lines' to categorise and sort the defendants that appear before the court (Cicourel 1968; Emerson 1969; Travers 1997). Insiders have a base of tacit knowledge that renders the courtroom environment natural, and allows them to at various times anticipate, initiate and interpret court procedures. Implicit judgement practices are not universal as they are shaped by local societal norms (Bennett & Feldman 1981) and political structures (Levin 1977). Judges are just one of the key 'insiders' in the courtroom. Although their decision making responsibilities are a central feature of courtroom processes, the literature suggests that courtroom decisions can most usefully be considered to be the product of the work practices of a set of courtroom actors rather than being explained simply by reference to the judge.

For outsiders, however, the courtroom is a foreign and at times threatening environment (Rock 1993). They may struggle to understand the rationale behind courtroom procedures and outcomes. This imbalance in knowledge means that insiders are the dominant group in courtroom settings and outsiders are subject to both direct and subtle forms of control (Merry 1990). Insiders are concerned with a succession of cases; outsiders are generally focused on just one case. Procedural efficiency is a central concern of many insiders who must struggle to clear large caseloads. This can lead to an assembly line approach in the courtroom and an irritation with those who are considered to be wasting the time of the court (Levin 1977; Travers 1992). This concern is not shared by outsiders, a factor that can lead to different interpretations of courtroom outcomes.

## 3.6 Irish Criminal Courts

Literature that specifically pertains to the Irish criminal court system, and in particular the operation of the Irish District Court, is of particular interest In

the context of this thesis. Rottman claimed in 1984 that 'the lack of information on how the courts operate is extraordinary' (1984:23). More than a quarter of a century has elapsed since Rottman made that claim; how has the situation changed in that time? The most important change occurred in 1999 when the Courts Service (CS) was incorporated following the enactment of the Courts Service Act, 1998, pursuant to the recommendations of the First Report of the Working Group on a Courts Commission (1996). One of the functions of the CS is to provide information on the courts system to the public, which it does through its website, press announcements, and publications. It is certainly easier now than when Rottman was writing to get an overview of the operations of the courts, but when we try to get information on the 'micro' operations of the courts, and in particular the District Court, we still find an 'extraordinary' lack of information.

### 3.6.1 Lack of Transparency and Accountability

No transcripts of District Court proceedings are available. Stenographers are not employed by the Court and audio recordings are not yet available. This results in a regrettable accountability deficit with regard to District Court proceedings. The Working Group on the Jurisdiction of the Courts (2003) rejected the Law Reform Commission's (LRC) recommendation (2002) that District Court judges should give reasons for imposing custodial sentences on the basis that as District Courts did not have the facilities for recording proceedings the recommendation was impractical given the workload of the District Court (2003:96-7). It could be argued that this suggests that reasoned decisions are superfluous when recording, and therefore accountability, are limited. However, improvements in this area are planned. A pilot introduction of digital audio recording (DAR) began in three District Courts in December 2009 (CS 2010:23), but no timeline has been announced as yet for the introduction of DAR in all District Courts. When DARs are available for District Court sittings the current gap in accountability will be narrowed considerably. It may also be that as the argument against the provision of reasoned decisions for custodial sentences would no longer be relevant this issue would also be revisited.

### 3.6.2 Statistical Database Deficiencies

Many commentators have decried the absence of a comprehensive statistical database on sentencing in Irish courts (Rottman 1984; LRC 1996; O'Malley 2000; Bacik 2002; Seymour 2006). Hamilton (2005) has suggested that the phrase 'here be dragons' used by cartographers in the past to depict areas about which nothing was known, and used by Brewer et al. (1997) to describe the data deficit on crime rates in Ireland, accurately describes the almost complete non-existence of data on sentencing practice in Ireland.

Sentencing databases are routinely maintained in other jurisdictions. They provide a means of evaluating judicial decision making, and as such are an important means of providing a check on the powers of the judiciary. They facilitate research which can confirm consistency or detect patterns of disparity and discrimination in sentencing. As Bacik notes, 'the routine collection and publication of data on sentencing... would be hugely beneficial in terms both of enabling greater public awareness as to actual sentencing practice, and also of facilitating the judiciary by providing guidance as to sentencing consistency' (2002:369).

Bacik (2002) describes the provision of training for new District Court judges through various initiatives including an induction course, a handbook, and a period of 'shadowing' an experienced District Court judge, combined with the scheduling of two meetings of District Court judges and an annual residential conference, as the bones of a sentencing information system. Sentencing information is now also provided by the Irish Sentencing Information System (ISIS). ISIS refers to a steering committee set up to plan for and provide information on sentencing. ISIS has undertaken a number of pilot projects in various tiers of the criminal courts. The information compiled by ISIS can be accessed at www.isis.ie. A limited database has been compiled in relation to matters sentenced in the Dublin and Cork Circuit Courts (see Conroy & Gunning 2009). A pilot project was also undertaken in Dublin District Courts in 2009 and a database compiled in relation to 121 cases. The database provides information about the

offender including details of nationality.[21] Although the database is modest in size it is a welcome initiative.

The scheme of the long awaited Judicial Council Bill has now been published (see Irish Government News Service, www.MerrionStreet.ie). When the judicial council is established it will be charged with the task of devising a judicial code of ethics, managing judicial training, disseminating information on sentencing and investigating complaints against judges (Ward 2007). It was suggested that the absence of DAR for District Court proceedings might be an impediment to the introduction of the Bill (Coulter 2010a) as complaints about the behaviour of District Court judges could not be appropriately assessed. However, the absence of District Court transcripts has not prevented the publishing of the draft Bill.

Statistics on District Court case outcomes have been included in recent years as part of the Annual Report of the Courts Service. The unit of analysis used is designated 'office'. This term is not explained. All the Dublin District Courts appear to be aggregated into one 'office'. Court dispositions are analysed for key offence categories such as public order, drugs and road traffic offences as well as larceny and sexual assault. The statistics indicate significant disparities in sentencing practices. If we look at public order/assault charges we see that in 2007 12.1% of all defendants convicted of public order/assault charges received custodial sentences. However, the incarceration rate imposed by individual court offices varied between 2% and 26.5% (CS 2008a:76-77). The statistics for 2006 reveal a similar total incarceration rate of 11.6%, and an even wider variation in the incarceration rate for individual court offices which ranged from 3.3% to 30% (CS 2007:165).

It is regrettable that an analysis of District Court dispositions by office was not included in the 2008 or 2009 Annual Report (CS 2009, 2010). It would also be preferable if statistics were collated and presented in respect of each court location.

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21 Offenders are designated as Irish or 'foreign national'.

### 3.6.3 Sentencing Discretion

The 'broad' sentencing discretion enjoyed by Irish judges (O'Malley 2000; McCullagh 1992) means that inconsistency in sentencing is almost inevitable. O'Donnell claims that penalties are 'individualised' and are not 'desert-based' (2000). Broad discretion may also make it more difficult to detect discriminatory sentencing practices which may be cloaked by sentencing disparity. Kilcommins et al. (2004) are critical of the current position, describing the approach to sentencing used in many Irish criminal courts as 'disjointed "instinctive synthesis"' (2004:145).

The sentencing discretion of Irish judges is not restricted by any presumptive penal philosophy or any guidance on how to reconcile the often competing goals of punishment, retribution, deterrence and rehabilitation commonly attributed to penal systems. O'Malley (2000) has suggested that the most appropriate direction that can be given to Irish judges is descriptive guidance supplemented with a sentencing information system. This view would seem to suggest that external controls may be resisted by the judiciary, but general guidelines supported by information about sentencing patterns might promote internal efforts to ensure sentencing consistency. However, there is little evidence to suggest that reducing sentencing disparity is a priority of the Irish judiciary.

The LRC recommended the adoption of a 'just deserts' (Von Hirsch 1976, 1993) approach to sentencing in 1996. A 'just deserts' sentencing approach measures the severity of the sanction by reference to the seriousness of the offence. It has been criticised by Tonry as resulting in 'harsher and more mechanical sentencing than is necessary or just' (1996: 13). The potential influence of the LRC's recommendation was substantially diluted because it was not unanimously supported by the Commission members charged with reporting. Indeed, the consultation paper presented in considerable detail the position of both the majority view, which supported a 'just deserts' approach, and the minority view, which favoured an approach more oriented towards rehabilitation and the individual offender (LRC 1996). Not surprisingly perhaps, the recommendations of the LRC, which in their own

report lacked conviction and certainty, have not been given legislative effect.

Considerable importance is attributed by the Irish courts to the principle of proportionality in sentencing which has been referred to as a constitutional requirement (Murphy 2007), but O'Malley notes, 'the question of whether proportionality is actually mandated by the Constitution has yet to be argued in detail before the superior courts, although ... it is difficult to foresee a rejection of the proposition that such a mandate exists' (O'Malley, 2006:88, cited in Murphy 2007:80). Proportionality appears to require that sentencing should be based on consideration of both the offence and the offender and may take account of issues such as the need to deter particular offences in specific localities (Murphy 2007:84).

It has been suggested that sentencing rationales may become more punitive during periods of economic recession (Melossi 1985). McCullagh's study (1992) of the relationship between unemployment and imprisonment in Ireland between 1951 and 1988 lends limited support to Melossi's contention (1985) that the 'vocabulary of motives', or moral codes, used by judges may shift in times of economic recession if those who commit crime are perceived as being a greater threat to social order. For the bulk of the period reviewed it is not possible to point to a strong link between unemployment and imprisonment. However, McCullagh's analysis suggests that the relationship between unemployment and imprisonment strengthened from 1980 for male offenders. McCullagh points out that the sentencing discretion enjoyed by Irish judges permits shifts in judicial 'vocabulary of motives'. He suggests that an increasingly punitive attitude towards crime is evident in media reporting of crime during the late 1970s and early 1980s and this may have encouraged a shift towards a more punitive 'vocabulary of motives' (1992).

### 3.6.4 Penal Philosophy of District Court Judges

Evidence regarding the penal philosophy of District Court judges is limited. Questionnaire responses by District Court judges indicate that judges expect custody to produce beneficial effects mainly through deterrence and

incapacitation, but Vaughan contends that research indicates that judges are overly optimistic in this regard (Vaughan 2001).

Maguire used sentencing vignettes and interviews to explore the sentencing rationale of District and Circuit Court judges (2008). More than a quarter of all sitting District Court judges participated in her research. She describes a practice of 'cumulative sentencing' whereby repeat offending results in the gradual application of more severe penal tariffs.

Healy & O'Donnell's study of accounts of court proceedings in local papers principally examines reported details of District Court proceedings (2010). Their study suggests that judges as a group understand offending behaviour to be largely within the power of the individual to control, and not to be primarily associated with external social conditions. Judges also demonstrate a strong belief in the capacity of individuals to redeem themselves which is reflected in their sentencing practices. This means that although previous convictions will result in harsher punishment, judges may seek to afford defendants an opportunity to display willingness to reform by suspending prison sentences or adjourning cases (Healy & O'Donnell 2010).

### 3.6.5 Research Findings

The empirical evidence regarding sentencing practices in the District Court is limited. It seems likely that the lack of a detailed statistical database has been the chief constraint on research efforts to date.

A number of largely descriptive studies provide us with snapshots of the sentencing practices of the District Court. Boyle (1984) selected a sample of 899 cases which represented 5% of the total offences disposed of in the Galway District Court in the three year period 1978-1981. The sample was weighted to include one indictable offence for every two non-indictable offences. This is likely to have biased the sample towards more serious offences as current caseloads indicate that indictable offences only account for around 12-14% of total cases disposed of in the District Court (Court Services 2007, 2008a, 2009) and this proportion is higher than was

previously reported (McCullagh 1996:179). Boyle contends that the proportion of people charged with indictable crimes who opt to be tried in the District Court is very high (90% in the Galway sample) because of the limited term of imprisonment that can be imposed by the District Court. He claims that this constitutes 'a form of statutory plea bargaining' and concludes that there is a need for restrictions on the District Court's jurisdiction to dispose of indictable offences.

The results indicate substantial variations in sentencing practices. In Boyle's sample only 41 offenders were sentenced to immediate imprisonment (4.6%). Boyle attributes the low rate of imprisonment to the minor offences dealt with by the court in Galway. Needham's study (1983), which was also based on a sample of cases from the Galway District Court for the same period, indicated that prison sentences were imposed on 11.2% of those convicted of indictable offences. Rottman & Tormey's survey (1985) of criminal cases disposed of during a four week period in 1984 revealed that over 15% (20% of those who pleaded guilty) of all cases disposed of by the District Court in this period (2,783) resulted in imprisonment. The variations in the rates of imprisonment reported suggest a lack of consistency in sentencing practices.

The study carried out by Lyons & Hunt (1988) was based on 1979 data relating to larceny cases heard in the Dublin Metropolitan Area District Court. Larceny was chosen as it is a crime commonly committed by both males and females. The sample size in this study was very small; 108 females and 120 males. The sample size was limited by the numbers of females convicted of larceny in the period, all of whom were included in the study.

In order to assess the severity of punishments Lyons & Hunt devised a penal ladder by ranking the punishment options available to judges. They ranked probation as the lowest level of punishment below fines or suspended sentences. This ranking system is potentially problematic and indeed the authors note that the ranking system they adopt is not consistent with that adopted in a number of studies which ranked probation

as a punishment equivalent to a small fine (Farrington & Morris 1983; Kapardis & Farrington 1981). The study controlled for previous convictions and for the severity of offences, which were categorised according to the monetary value of the goods stolen.

The results indicate that seven out of ten women offenders were sentenced more leniently than male offenders, but many differences were not statistically significant. The authors note that the model adopted proved a better fit in predicting sentences for male offenders than female offenders, and they suggest that this indicates that other variables not included in the model impact on the sentencing of women. Earlier research conducted by Farrington & Morris (1983) in the UK also suggested that gender specific sets of variables impact sentencing. Farrington & Morris (1983) identified marital status, family background and parenthood as more important factors in the sentencing of females than males. Lyons & Hunt's conclusion that their results 'suggest quite strongly that males and females are treated quite differently before the courts' (1988:137), and their assertion that patriarchal notions of women's role in society are influential in the sentencing of women (1988:138), may overstate the significance of the sentencing differences found in this study, and ignores the possible impact of the small sample size.

Bacik et al. (1998) begin their study by voicing concern regarding the over-representation of young men from working class backgrounds amongst defendants in the criminal justice system. The authors are influenced by the Social Disorganisation Model of Crime as set out by Sampson & Wilson (1995), a derivative of Shaw & McKay's earlier model (1942/2006). The model contends that the level of deprivation and disorder at community level plays a crucial role in determining individual offending rates and that as mainstream norms are less influential in socially disorganised communities this leaves space for criminal/delinquent subcultures to emerge.

Bacik et al. set out to examine the association between the levels of deprivation in the community of the individual offender, and District Court

appearance and sentence severity. The District Court was chosen because of the lack of previous academic research and because it was considered that the low level of public scrutiny of District Court proceedings may contribute to inconsistency in sentencing patterns. The study used data from the records of the Bridewell District Courts in Dublin city. A sample of 2,000 cases was selected from the court records for 1988 and 1994. This was reduced to 1,603 by only including the most serious offence when an individual defendant was charged with multiple offences. Offence seriousness was categorised and severity of punishment measured in accordance with the scale used by Farrington & Morris (1983). The relative and combined effects of sex, age and community deprivation on the risk of court appearance were measured. The study developed a 'standardised court appearance ratio' (SCAR) which took account of the different age profiles of communities and allowed a comparison between the expected court appearances and the actual court appearances of offenders from areas with different levels of community deprivation. The median SCAR value in the most deprived communities was found to be almost twelve times that in the least deprived communities.

When sentencing was reviewed the sample of cases dropped to 1,283 due to inadequacies in the records. Details of prior previous convictions were not available in the District Court records, but two proxy measures were included to take account of previous convictions. These were the presence/absence of bench warrants and other outstanding offences. These variables, along with being male, were found to significantly increase the likelihood of a custodial sentence. Defendants from deprived areas were found to be 49% more likely to be imprisoned than other defendants when other variables were controlled. Bacik et al. conclude that their findings pose 'serious questions about the impartiality of the sentencing process' (1998:26). However, the study's failure to control for prior criminal convictions means that this conclusion must be interpreted with some caution.

Hamilton (2005) reported on the study conducted in 2003 by two Irish Penal Reform Trust (IPRT) researchers in the Dublin Metropolitan District

Court. Details and outcomes were recorded in respect of 356 individual defendants. This study was essentially descriptive in character but was supplemented with qualitative research in the form of interviews with solicitors.

Hamilton presents anecdotal evidence of inconsistency in judicial decision making. She reports one interviewee referring to a practice of 'judge-shopping' in an effort to present cases to judges known for their leniency. She contends that rather than District Court judges seeking to operate in unison, each judge is free to make decisions in accordance with his or her personal moral dictates. This inconsistency in sentencing was also highlighted by Walsh & Sexton in their report on CSOs (1999). They pointed out that there was a wide variance in the relationship between the length of a CSO and the default term of imprisonment. They recommended that this relationship should be more specifically correlated. It is also evident from their study that while some judges use CSOs routinely other judges may rarely or perhaps even never impose CSOs.[22]

Hamilton notes that reasons were given for only 42% of the custodial sentences imposed and that the reasons given rarely gave any insight into the rationale for imprisonment. Rationales that were referred to indicated the absence of any coherent policy (2005:2). Immediate terms of imprisonment were imposed on 12% of the study group. This proportion was lower than that recorded in previous research (Rottman & Tormey 1985; Bacik et al. 1998; O'Mahony 1996) but considerably higher than the proportion in Boyle's study (1984). The study indicated that 63% of the custodial sentences imposed were for six months or less, and 38% of sentences were for periods less than three months. These findings are consistent with the observations of other commentators (O'Donnell 2001). The routine use of short prison terms is criticised strongly by Hamilton who claims that they are 'a particularly pointless form of imprisonment, placing a huge strain on penal resources yet with minimal deterrent or rehabilitative

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[22] In the sample studied 62% of the Dublin based CSOs were imposed by 5 judges and 68% of the Limerick based CSOs were imposed by one judge. Four District Courts did not impose any CSOs in the files surveyed (Walsh & Sexton 1999).

effect on the offender' (2005:3). However, Vaughan's research points to only limited support amongst District Court judges for restricting the use of short terms of imprisonment (2001). It should be noted that countries such as Germany, Austria and Portugal have legislative restrictions on the use of short prison sentences (Kuhn 1997). It is possible that debate regarding the issue of overcrowding in Irish prisons may change judicial attitudes. Recently, the Irish Inspector of Prisons suggested that it may be appropriate to automatically suspend short term sentences (Reilly 2010:96)

Only 2% of offenders in the IPRT study received a CSO or probation order. The article points to a decline in the use of CSOs which may be due to concerns about the suitability of placing offenders with substance addiction problems in community service schemes. Hamilton notes the absence of research into the effectiveness of probation bonds in Ireland and the general under-resourcing and under-development of the probation and welfare services.

Fines were imposed on 21% of offenders in this study; a proportion which Hamilton notes is broadly in line with the statistics reported by the Courts Service. Hamilton notes that interviews conducted with criminal solicitors highlighted concerns that offenders' means are not always considered in setting fines which can result in the indirect imposition of a custodial sentence due to their inability to pay. Hamilton claims that 23% of all committals under sentence in 2001 were accounted for by fine defaulters. However, it should be noted that it is not clear whether this figure includes persons committed to prison in respect of civil debt as fine defaulters are amalgamated with debtors in some statistics reported by the Irish Prison service (Redmond 2002; IPS 2007:67, 2008:44).

The concerns raised by Hamilton in relation to the imposition of fines echo some of the issues raised by Redmond in his earlier research (2002). Redmond collated information on persons committed to Mountjoy, Cork and Limerick prisons in 1999. He found that three-quarters were discharged from prison within five days and 29% were discharged on the same day they were committed to prison. Redmond interviewed 24 persons in prison

for fine default and civil debt; two of those interviewed were in prison for default in respect of a civil debt. The interviewees were not representative of the general population with many living in deprivation and struggling with substance addiction. The interviews revealed that a number of those imprisoned had never been in court prior to their imprisonment and those who were in court had a limited understanding of the court process. As pointed out by Hamilton (2005) little effort appears to be expended to relate the level of fine to an individual's income and Redmond notes, 'enquiries in the court process about offenders' means and capacity to pay fines would appear to be non-existent or at best cursory' (2002:53).

Redmond's report highlights the need for an alternative punishment for fine default and suggests that permitting fines to be paid by instalments might reduce the expensive and ineffectual practice of imprisoning large numbers of fine defaulters. The Fines Act 2010 addresses some of the issues highlighted by Redmond in that it provides for the payment of fines by instalment and provides the court with alternatives to imprisonment for default on payment on fines.

### 3.6.6 Reported Impact of Immigrants on District Court Processes

The volume of cases processed by the District Court is extraordinarily high. The high volume of cases necessitates a concern with procedural efficiency. The increasing presence of immigrants in the District Court, both as defendants and as witnesses, impacts on the speed with which the court can process its case list (Riordan 2007). Riordan's practical experience as a District Court judge makes his article on immigrants and the criminal courts particularly interesting (2007). Riordan suggests that there are difficulties in 'engaging' immigrants with the criminal justice system and claims that the increasing presence of immigrants in the court has resulted in a 'permanent shift in the manner in which the court must now conduct its business' (2007:105). He argues that some immigrants are thwarting the justice system by their unwillingness to provide details of their identity. This leads

to unnecessary remands and additional court appearances. Riordan also argues that extra strain is put on the court's resources by immigrants opting to plead 'not guilty' even when the evidence against them is overwhelming.

Several commentators have expressed unease about the standard of interpretation services provided in Irish courts (Waterhouse 2009; Bacik 2007). This unease must be regarded as being of particular concern in the context of the District Court given the absence of court transcripts or audio recordings of court sittings. There is no professional accreditation system in place for court interpreters in Ireland, and the standard of interpreting is uneven (Waterhouse 2009; Bacik 2007). Riordan (2007) recognises the need to provide appropriate interpretation services, but is also concerned at the extra court time taken up by trials conducted with the assistance of an interpreter. Bacik (2007) is critical of the decision to contract out interpretation services to a private company without the implementation of suitable standards and guidelines. Bacik's concerns echo those of the NCCRI (Phelan 2007).

Riordan's article suggests that the same range of sentencing options may not be considered for immigrant and Irish offenders. He points out that the resources of the probation and welfare services may not be sufficient to cope with non-English speaking immigrants. He contends that this consideration may prevent judges from imposing probation orders or community service orders on immigrants. However, this ignores the importance of the role that judges must play in requesting the intervention of the probation and welfare services. In many ways the extent to which the probation and welfare services are resourced and the format of their services is dictated by judicial referrals and directions. Riordan may have overstated the reluctance of judges to consider community-based sentences for immigrants. It is worth pointing to the community service scheme for Roma women developed by the probation services in Tallaght following the request of a District Court judge.[23] The scheme is reported to be very

[23] Judge James Paul McDonnell.

successful in reducing offending rates among Roma women. It also addresses the poor language and literacy skills of the women and uses their excellent sewing skills to present a more positive image of the Roma community (Horgan 2007).

In summary, the evidence available about District Court sentencing practices is very limited. There is concern with regard to inconsistency in sentencing practices (Hamilton 2005) and the number of custodial sentences, particularly short-term custodial sentences, imposed. Research indicates that young men from deprived communities are particularly at risk of facing a custodial sentence (Bacik et al. 1998). The influx of immigrants into Ireland is impacting on the work of the court and making it harder for the court, as currently resourced, to deal with its very large caseload (Leonard 2002; Riordan 2007). There have been calls for judicial training to ensure that judges deal with ethnic and religious minorities appropriately (Leonard 2002). Concerns have also been expressed about the standard of interpretation services provided (Waterhouse 2009; Bacik 2007; Phelan 2007).

## 3.7 Discussion and Conclusion

This chapter began by pointing to the link between penal expansion in Europe and the presence of foreign nationals in European prisons. The political economy of punishment provides us with an explanation for the increased presence of foreign nationals in our prisons. It is argued that although this explanation is persuasive it is not comprehensive enough to fully explain the reasons for the change in Europe's prison population.

This review has highlighted that links between immigration and crime are long standing and have been bolstered by both historical and current penal practices. In our 'liquid modernity' (Bauman 2000) ontological insecurity is widespread and the extent and rate of technological, economic, political and social change is challenging, and for many troubling. Immigration stokes this sense of insecurity as it is seen as a force which threatens our national

and religious identity (Kinnvall 2004). Increased general insecurity may also be linked to increased fear about crime (Gerber et al. 2010), and the stereotype of the criminal alien is supported rather than dispelled by changing patterns of crime, and the increased presence of foreigners in our criminal justice system. This stereotype has also been further perpetuated by the media and certain politicians who have sought to attribute high levels of crime to increased levels of immigration. Perhaps it is not surprising therefore that the perception of a link between immigration and crime appears to have strengthened amongst the public in recent years (Simon & Sikich, 2007; Watson et al. 2007).

Empirical evidence has largely suggested that first generation immigrants have lower levels of crime than the population at large (Yeager 1996). This pattern continues to be observed in America, and indeed immigration has been posited as a force which has contributed to a widespread substantial and sustained fall in crime (Sampson 2006). However, in Europe there is evidence to suggest that immigrant patterns of offending have changed and that criminal offending is higher amongst immigrants than amongst natives (Vazsonyi & Killias 2001; Martens 2007; Sun & Reed 2007; Killias 2009). The apparent differences in offending rates of American and European migrants deserve further scholarly attention, and this would seem a fruitful area for future research.

This review highlighted that the current theoretical explanations of the immigration-crime nexus are not sufficiently comprehensive to provide an adequate explanatory model for levels of crime amongst immigrants. Modern patterns of mobility call for a re-evaluation of the social impact of migration and the validity of 'Chicagoan' (Valier 2003) social theories relating to crime and immigration. This theoretical deficit is not surprising given the complex constellation of psychosocial and cultural factors that influence crime rates and indeed the mixture of 'push' and 'pull' factors which influence immigration flows. Theoretical perspectives of immigration as a crime-reducing force have recently been set forth by a number of analysts and have been reviewed. It is considered that the relationship between immigration and crime is not fixed and can be expected to vary

from country to country and over time. Therefore a flexible theoretical framework is required which espouses a neutral view of the potential impact of immigration on crime. This could be assembled by devising a composite theory drawing on existing theories.

The value of research directed at dispositions in criminal courts is reduced due to the inconsistent operationalisation of key variables, and the failure of some studies to control for all legal variables. Overall, research findings suggest that discriminatory practices in courtroom processes and decision making are more likely to occur in certain social contexts, and to be subtle rather than overt. It seems likely that discrimination is most likely when a number of variables coalesce (Spohn & Holleran 2000). The literature review strongly suggests that the establishment of a comprehensive information system with regard to accused persons is a necessary pre-condition for the reliable identification of discriminatory sentencing practices.

Qualitative research highlights that courtroom practices are not universal as they are shaped by societal norms and customs, the penal philosophy of individual judges, and local political structures. Courtroom processes are orchestrated and controlled by courtroom insiders who have little emotional investment in courtroom outcomes. Procedural concerns and relationships with other courtroom insiders influence the actions of courtroom insiders and at times subsume concerns about justice. Courtroom encounters may be frightening and confusing for outsiders who may interpret outcomes differently from insiders and struggle to understand the rationale for courtroom outcomes.

There has only been limited scrutiny to date of courtroom procedures in the Irish District Court. Research has been hampered by the absence of court transcripts and the limited statistical information about outcomes. Concern has been expressed about the frequent use of short custodial sentences and about sentencing disparity. The increased numbers of immigrants coming before the District Court is impacting courtroom work practices, and their presence demands that greater priority be given to measures aimed at

promoting consistency in sentencing. It is clear that research on the work of the court to date has been very limited and this thesis aims to make the work of this very important arm of the Irish criminal justice system more visible and transparent.

In chapter four relevant ethical considerations and their impact on the research methodologies adopted are outlined and the difficulties encountered obtaining ethical approval for this research are noted and discussed. The chapter goes on to describe the methodology adopted in detail, and locates the methodology used in relation to previous research.

# 4 Ethics and Methodology

## 4.1 Introduction

Methodology choices for social researchers are often shaped and limited by constraints. The researcher may well have to decide 'what can I do?' rather than 'what would I like to do?' Research methodologies employed therefore reflect practical accommodations necessary to get the work done; they cannot be aspirational, they must be implementable. Research constraints may take many forms such as limited resources; restricted access; lack of willing informants; inadequate statistical databases; and ethical considerations. Ethical considerations act as an over-arching constraint on the methodology adopted for social research projects, and given the requirement within most academic institutions that ethical approval must be obtained prior to embarking on research, they can be a very important determinant of what research takes place and how it is conducted. Hence, it seems apposite to address both ethical and methodological issues in this chapter.

The chapter begins by outlining the ethical principles which have guided this research and points to ethical issues which can arise in conducting and reporting socio-legal research. It details how in certain respects this research did not follow standard 'blueprint' ethical practices, and explains how departures from standard practice were appropriate in the context of this research project. The process of obtaining ethical approval for this project is outlined and discussed.

The chapter then addresses methodological issues by firstly outlining what information is available regarding accused and convicted persons who appear before the District Court. This highlights that the limited information recorded regarding District Court defendants ruled out the possibility of quantitative research and essentially dictated that a qualitative research methodology be adopted for this project. The quasi-ethnographic research adopted is located in relation to traditional ethnographic research with the

differences between traditional or 'pure' ethnography and quasi-ethnography highlighted and discussed.

The chapter then describes the factors that determined the choice of research locations, provides a detailed description of the various locations where research was conducted, and outlines the length of time spent at each site. The process of writing and coding field notes and organising field note extracts thematically is described. The chapter also outlines the discussions held on an informal basis with various courtroom regulars during the course of the research and the process of seeking and conducting interviews with criminal law solicitors.

## 4.2 Ethical Principles in Social Research

Wiles et al. (2005) note that decision making regarding ethical issues in social research is guided by a commitment to participants' rights; a commitment to respect for participants; a commitment to knowledge; a commitment to the promotion of respect for social science; and the need to protect the researcher. These commitments provide the basis for ethical decision making and they have shaped the design and implementation of this research.

The commitments outlined above are reflected in the statements of ethical practice for social researchers issued by bodies such as the British Sociological Association (BSA) and the Social Research Association (SRA). However, these statements of ethical practice act as guidelines only and are designed to leave sufficient ambiguity to allow researchers discretion to interpret them and apply them as appropriate to the circumstances of the specific research they are undertaking. The BSA statement of ethical practice notes that it does not 'provide a set of recipes for resolving ethical choices or dilemmas, but recognises that it will be necessary to make such choices on the basis of principles and values, and the (often conflicting) interests of those involved' (BSA 2002; cited in Wiles et al. 2005:3.1). While there is broad agreement amongst the research community about the

ethical principles which guide social researchers there is a lack of consensus about how these principles should be interpreted in practice (Hammersley 2009), and about how the ethical nature of social research can best be ensured.

## 4.3 Ethical Issues Reported in Qualitative Socio-Legal and Criminological Research

Qualitative criminological and socio-legal research can involve observing and interacting with those engaged in illicit and dangerous behaviour, or it may be located in the safe confines of a courtroom. Research may at times present very contentious ethical issues and in other instances pose little in the way of ethical dilemmas.

Ethical issues receive very little attention in the reporting of courtroom-based research, which suggests that such research is generally regarded as being ethically unproblematic. As noted in chapter three a significant body of courtroom-based qualitative socio-legal research has been conducted (see *inter alia* Sudnow 1965; Blumberg 1967; Emerson 1969; Mileski 1971; Brickey & Miller 1975; Feeley 1979; Bennett & Feldman 1981; Conley & O'Barr 1990; Rock 1993; Cottino 1998; Kupchik 2006; Travers 2007; Wandall 2008). This research is carried out in some instances in conjunction with quantitative research (Eisenstein & Jacob 1977; Crow & Simon 1987; Parker et al. 1989; Wandall 2008) and at other times is supplemented by interviews with courtroom 'insiders' (Crow & Simon 1987; Travers 2007; Burns & Peyrot 2008; Wandall 2008); analysis of court transcripts (Travers 2007); or by an account of the interaction of courtroom insiders and courtroom work practices and the ecological organisation of the court (Rock 1993). Courtroom-based research has also involved the videotaping of courtroom proceedings and the review of an existing videotape of a previous trial (Bennett & Feldman 1981).

Courtroom-based research can become more ethically contentious when it is combined with 'deeper' and more intrusive research methods. Research

methods adopted have included attendance at team meetings of drug treatment groups (Burns & Peyrot 2008), and taping and attending meetings with clients involved in divorce proceedings (Sarat & Felstiner 1988) and with those facing criminal charges (Travers 1992, 1997). The methods used have at times placed the researcher in 'behind-the-scenes' roles (Travers 1992, 1997; Castellano 2007) in which the role of the social researcher may not have been fully understood by all participants (Travers 1997) or was knowingly obfuscated (Castellano 2007).

However, ethical concerns are much more to the forefront in other forms of criminological and socio-legal research such as research that involves incarcerated populations (Owen 1998; Castellano 2007); is directed at people engaged in illegal activities (Inciardi et al. 1993); or places the researcher alongside police officers during the execution of their duties (Marks 2004; Rowe 2007). Research can potentially place the researcher or informants in danger (Inciardi et al. 1993; Bourgois 1995; Marks 2004). In addition, the possibility of harm to research subjects may be of particular concern because the research process may result in the disclosure or uncovering of illicit, corrupt or unprofessional activities, and researchers may be concerned that criminal justice authorities may seek access to their field notes or information about research subjects (Fitzgerald & Hamilton 1996).

While methodological devices can be employed to protect the anonymity of research subjects and to ensure that data are stored securely, researchers may at times feel it necessary to go to extreme lengths to safeguard their data and the identity of their research subjects and informants (Adler 1985; Adler & Adler 1993). In certain situations researchers may decide that the benefits gained by the research justify conducting covert or semi-covert research, and in other situations they may feel it appropriate not to protect the anonymity of certain research subjects such as senior public officials (as in the case of Sudnow 1965: see Rainwater & Pittman 1967). Researchers may anticipate encountering morally contentious issues in the course of their research (Punch 1979; Norris 1993; Rowe 2007), but in some

situations the dilemmas that arise cannot reasonably have been anticipated (Inciardi et al. 1993).

## 4.4 Obtaining Ethical Approval

Clearly, at times socio-legal research can be an ethical minefield which has to be negotiated with the utmost care and reflection. However, as this research project planned to utilise long-established and unobtrusive methods, and side-stepped the obvious ethical quandaries flagged above, it was initially thought that ethical approval would be unproblematic. This did not prove to be the case, and garnering ethical approval turned out to be more difficult than anticipated. Hence, it is considered worthwhile to outline the particular ethical considerations that apply to this project along with ethical concerns raised by the Research Ethics Approval Committee (REAC) which withheld ethical approval for this project until it received clarification regarding a number of issues.

### 4.4.1 Measures Adopted to Protect Research Participants

This research focuses on the Irish District Court which disposes of a high volume of cases. The attention given to individual defendants by the court, and hence by the researcher, was generally brief and fleeting. The field note extracts that are interspersed throughout this thesis have been selected to highlight aspects of behaviour of key court actors, or features of court processes, or to provide illumination on factors that influence sentencing decisions, rather than because of any particular interest in any individual defendant. All defendants are referred to by pseudonyms and on occasions other personal details have been altered to ensure the anonymity of defendants is protected.[1] In addition, field notes are referred to by number rather than date, which further protects the identity of individual defendants.

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[1] Personal details such as age and country of origin have also been altered when considered necessary.

Defendants were generally unaware of the presence of the researcher in court, and their court experience was therefore not affected by the researcher observing the court proceedings. On a number of occasions defendants did notice the researcher making notes and were curious enough to enquire as to the researcher's role. When such approaches were made defendants were simply told research was being conducted. This answer was normally sufficient to satisfy any curiosity on the part of defendants although one man, on hearing that the court proceedings were the subject of research, seemed anxious to assist the researcher and after finding his name on the court list pointed to it saying 'that's me!' In general, however, approaches to the researcher by defendants were initiated to secure access to the court list or because she was presumed to be a solicitor.

Each of the court locations where research was conducted has been assigned a pseudonym. Given the limited number of courtroom locations in Ireland it is not possible to guarantee that the research locations will not be identifiable. This is not considered problematic. At each court location proceedings were observed on multiple occasions over a two month period, and in each location more than one judge presided during the period of research. Even if a court location could be identified it would not be possible to identify an individual defendant from the observations reported because of the high volume of cases dealt with in every court location and the fact that references to field notes are undated and simply referred to by number (e.g. FN1).

Judges observed are referred to by an assigned code rather than by name. The researcher endeavoured to make individual judges aware of the research process and to offer them an opportunity to discuss the research with her if they so wished. Courts Service (CS) staff were requested to advise presiding judges of the researcher's presence in court and the nature of the research, and to inform them that the researcher was available to provide further information regarding the research on request.

Semi-structured interviews were conducted with a number of solicitors. Permission for these interviews was obtained by writing to selected solicitors outlining the nature of the research being conducted, and requesting an interview. Those solicitors who wished to contribute to the research then contacted the researcher. All those who were interviewed therefore clearly consented to the interview and were informed as to the nature of the research. Given the expert knowledge of the solicitors and their professional training they were very much in control of the interview process, and of the information they chose to disclose. Interviews were taped with the permission of solicitors. Solicitors are not identified by name in transcripts of interviews, and are referred to solely by an assigned code.

### 4.4.2 Departures from 'Normal' Ethical Practice

Some departures from normal ethical practice were considered necessary for the purposes of this research. These are addressed in detail below.

#### *4.4.2.1Informed consent*

The dictates of ethical social research normally require that researchers obtain the consent of participants, and that they ensure that consent is informed and based on knowledge of all material and pertinent matters (Homan 1991; Bryman 2004; Wiles et al. 2005). Informed consent should not be viewed as unproblematic as researchers must consider the capacity of subjects to give informed consent and be guided by the legal and regulatory framework in which they are working (Wiles et al. 2005).

Researchers must also be aware of the possible conflict between obtaining signed consent forms and the principles of confidentiality and anonymity which are central to the protection of the privacy of research participants (SRA 2002, 2003; Coomber 2002). Coomber (2002) directly addresses the potential adverse consequences which may stem from obtaining signed consent forms from participants engaged in criminal activity. He suggests that in practice this requirement, when stipulated, is circumvented by

participants signing as 'Mickey Mouse', 'Elvis Presley', 'John Smith', or some other invented name. He claims that research ethics committees need to adopt a flexible approach which is adapted to suit the specific nature of each research proposal. Homan (1991, 1992) views true informed consent as more of an aspiration than a working reality, and certainly researchers seeking to ensure the informed consent of their research participants must adopt a reflexive approach to interpreting and operationalising 'information', 'consent' and 'capacity' (Wiles et al. 2005).

However, in certain circumstances the researcher may not require the consent of participants. One of the situations in which the usual requirement for informed consent is negated is when the research is conducted in a public place. The distinction between research conducted in public and non-public places is referred to specifically in Clause 7.1.3 of the Statement of Principles of Ethical Research Practice issued by the Socio-Legal Studies Association (2009) which states that 'where data is gathered through observation of behaviour occurring in public there may be no expectation of privacy and hence no need for consent from all of the observed people.'

This thesis relies primarily on information collected from observations carried out in Irish courtrooms which are public places. The public nature of Irish courtrooms is determined by Article 34 of the Irish Constitution which requires that, except in exceptional circumstances, court proceedings are open to the public.[2] The constitutional provisions make it clear that there can be no expectation of privacy in Irish courts. The public nature of court proceedings is intended to provide an important counterbalance to the power of the Irish judiciary which derives from the very broad sentencing discretion afforded to Irish judges and the security and privileges which attach to judicial appointments. By stipulating that court proceedings are public the Irish Constitution seeks to ensure that judicial decisions are transparent and accountable, and that public confidence in the legitimacy of judicial processes is maintained.

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2 At present, hearings of the Special Criminal Court, the Children's Court, and the Family Law Court are held *in camera*.

The public nature of criminal court proceedings also recognises that criminal proceedings allege an offence against the state rather than an individual. Part of the price paid by people convicted of criminal offences is the public ignominy that attaches to criminal convictions. Similarly, the innocence of those accused but found 'not guilty' of criminal offences is a matter of public record.

Clearly, people in public places conduct themselves according to different standards of behaviour than they might in private when they can reasonably assume that their activities will not be observed or reported. Participants in Irish District Court proceedings know that their behaviour is open to public scrutiny, and that their comments may be noted and reported.

District Court sessions are conducted in settings where there is an ongoing movement of people in and out of the courtroom. Members of the public, Gardaí, defendants, prison officers, solicitors, barristers, witnesses, reporters, interpreters, and court clerks can all enter and leave at will. All of these could be viewed as 'participants' in courtroom-based research. But, with few exceptions, the population of participants is not a captive population. Very few courtroom actors remain in the court for the duration of a court session; they come and go in a manner which is not under the control of the researcher. The presence of a researcher in the court will not alter the population of participants; the vast majority of people in the courtroom will be there because they either have a legal obligation to attend or because it is the place where they carry out their professional duties.

The above illustrates that given the specific nature of this research it was not necessary, and neither would it have been possible, to obtain informed consent from courtroom participants. It is believed that the absence of informed consent has not in any way compromised the integrity of the research or resulted in any harm to participants. The REAC of the School of Social Work and Social Policy withheld approval for this research project until they received clarification on this issue.

#### *4.4.2.2Written consent*

The issue of written consent was also raised by the REAC who initially stipulated that written consent be obtained by 'court magistrates' observed in the study. This requirement, which was later rescinded, suggested that the prestige, power and security of Ireland's District Court judges needed to be explained in more detail. This is addressed below.

The Irish District Court is presided over by District Court judges. Currently the maximum permitted number of District Court judges is 64. District Court judges are appointed by the President based on binding recommendations of the Cabinet. Prior to their appointment they must have a minimum of ten years experience practicing as either a solicitor or a barrister. Their appointment is full time, and attracts a generous salary. An Irish judge may only be removed from office for 'stated misbehaviour or incapacity' (see Art. 35.4.1 of the Constitution and s.20 of the Courts of Justice (District Court) Act, 1946), and only if a joint resolution is adopted by both houses of the Oireachtas. No Irish judge has ever been removed from office. It is also noteworthy that the Irish Constitution expressly prohibits any diminution of judges' remuneration during the term of their office; this provision has attracted a great deal of media attention in the current era of cost cuts.

The meaning of the term 'magistrate' varies according to the legal system in different countries. In civil law jurisdictions (such as Italy, Spain and France) the term 'magistrate' comprises both prosecutors and judges. In countries with common law traditions such as England and Wales, Canada, Australia and New Zealand, magistrates, who often sit as part of a group, hear and dispose of minor criminal offences summarily. District Court judges enjoy considerably more security of office than magistrates who are typically appointed for short periods. Magisterial appointments are often part time, and are awarded by the payment of an allowance rather than a salary. This contrasts to the full-time salaried nature of District Court appointments. District Court judges also differ from magistrates by virtue of their legal training and experience.

The Irish District Court is a court of limited and local jurisdiction. The maximum custodial sentence that can be imposed by a District Court judge is 12 months for a single offence and two years for multiple offences. Despite this limited jurisdiction it is the judges of the District Court who are responsible for the majority of committals to Irish prisons and who dispose of more than 90% of criminal cases in the state. The judges of the Irish District Court therefore comprise a small, elite and privileged group whose day-to-day decisions greatly impact the Irish criminal justice system and the wider Irish society.

Given the constitutional requirement for Irish court proceedings to be held in public it was considered very unlikely that District Court judges would agree to provide written consent to the presence of a researcher in their courtroom, as legally they do not have the power to restrict, without reason, public access to courtrooms. This does not mean that judges are powerless to object to the presence of a researcher. However, to be legally valid any such objection would probably have to be framed so as to claim behaviour on the part of the researcher which constituted contempt of court. Judges therefore have the power to exclude persons who are already in the courtroom, but it is not within their power to grant access as this is provided for by the Irish Constitution.

While it was therefore not considered appropriate to seek the written consent of District Court judges observed, the research was conducted with the knowledge and consent of both the President of the Irish District Court and individual judges observed during the research. Prior to commencing fieldwork on this project the President of the District Court was given a very detailed outline of the proposed research and was also provided with examples of courtroom-based research conducted in other jurisdictions. The President did not raise any concerns with regard to the planned research. The researcher also requested CS staff to alert individual presiding judges of her presence so that they were aware that courtroom proceedings were subject to observation. She also advised CS staff that she was available for discussions/consultations with judges at any time. Physical access to judges

is naturally carefully controlled, and it was therefore necessary to rely on CS staff to inform individual judges of the presence of the researcher in court.

#### *4.4.2.3Discussions with courtroom insiders*

The REAC also raised concerns regarding the granting of consent for planned discussions with various courtroom actors. It was envisioned that discussions were likely to be spontaneous rather than scheduled, and determined by factors outside the control of the researcher such as the workload of individual court actors, the timing of court recesses and the interest/curiosity of court actors. Such informal discussions were expected to be brief and fleeting rather than long and detailed and in many cases were likely to be instigated by court actors rather than the researcher. In such circumstances it was considered impractical to preface any discussion with a request that the person first read an information sheet and then sign a consent form. Instead the researcher's presence in the courtroom was explained to any courtroom actor who entered into discussions with the researcher.

## 4.5 Methodology

Having already acknowledged that ethical considerations constrain methodological choices the methodological approach adopted for this thesis is outlined in detail below. The methodology section begins by explaining why quantitative research was considered not to be feasible.

### 4.5.1 Information about Defendants

The information reported and recorded by the CS was reviewed prior to deciding on the appropriate methodology to adopt for this research project.[3] Unlike the Irish Prison Service (IPS) which provides information about the nationality of persons in the stock and flow of persons committed to Irish prisons in its Annual Report, the CS does not publish any statistics about the nationality of accused and convicted persons in Irish courts. Is this

[3] This review was carried out by consulting with CS staff.

information collected and simply not presented, or does the CS not seek to record the nationality of defendants? To answer these questions it was necessary to establish exactly what information the CS records regarding accused and convicted persons and the charges they face.

#### *4.5.1.1Courts service records*

A person may be required to appear in court on foot of a summons or may appear in court following arrest and charge. Each of these routes will be detailed below.

If a person commits a minor offence which comes to the attention of An Gardaí it will often be dealt with by way of summons. A summons must be issued within six months of the date of the alleged offence. Since late 2009 linkages between the CS computer system and the Garda Pulse system have allowed summons applications to be made online, and only a small proportion of applications are now made manually. Summons applications are processed by the Courts Service. A date, time and venue are assigned to each application and a summons is generated. The summons also includes details of the defendant's name and address, the nature and date of the alleged offence, and names the applicant. If known, the defendant's date of birth is set out at the bottom of the summons. Summonses are distributed to the Garda districts where the alleged offenders reside and Gardaí then either send them by registered post or personally deliver a copy of the relevant summons to each defendant. After receiving the summons the defendant is now on notice that he/she must attend court on the specified date.

Persons suspected of more serious offences will normally be arrested and may then be charged. Those granted station bail must be assigned a court date within 30 days of being charged. The court date will be decided on by An Gardaí and will be set out on the copy of the bail bond given to the

accused.[4] The signed bail bond and the charge sheet will then be forwarded to the CS. If bail is not granted by An Gardaí the defendant will be produced in court at the next available sitting of the District Court. The charge sheet, and if applicable the bail bond, are lodged with the CS by An Gardaí, and these must be entered manually onto the CS system to initiate a case file. The charge sheet identifies the prosecutor by name and by number as well as naming the District number of the station to which he/she is attached. The legislation which the defendant is alleged to have breached is referred to along with a brief outline of the offence. Details of the defendant's name, address, date of birth, sex, and in the case of a child the name of a parent or guardian, are included on the charge sheet. No details are provided of the defendant's nationality.

When a defendant appears before the District Court the presiding judge is presented with a case file for each 'turn' before the court. In some instances a turn equates to one offence, in other instances a turn may comprise multiple offences. Each file has a unique reference number that is computer generated. The first four digits of the reference number indicate the year. Case files may include one or more summonses or charge sheets. Generally multiple charges are treated as the same turn, and included within the same file, when they originate from a single incident such as a traffic stop, or when the charges are identical such as in social welfare fraud. In some instances multiple turns will be listed for the same defendant. This indicates that the defendant faces charges which have arisen from a number of different incidents.

The CS does not have any role in deciding when charges faced by individual defendants will be dealt with by the court once the initial court date is set. Future court dates are decided on by the presiding judge. An accumulation of 'turns' for an individual offender may arise in one court sitting because the defender has committed a succession of different offences within a short space of time, or because the defence has sought to have matters dealt

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4 Each Garda station will normally use a designated court location, and in some instances will be assigned a day each week to schedule court appearances.

with together in an effort to reduce the number of court appearances required of a defendant, or because the defence is trying to clear all outstanding matters. This latter objective is particularly likely when the defendant is either already serving a prison sentence or is anticipating a lengthy custodial sentence.

As already noted a defendant's nationality is not automatically recorded on the case file. A judge can infer that a defendant is not Irish in certain instances, such as when a defendant is charged with an immigration offence, or an interpreter has previously been certified by the court, or when the Court Presenter or defence counsel indicate that an interpreter is required. In other instances a judge may infer, sometimes mistakenly, that the defendant is not Irish based on his appearance or his name and may seek to establish whether he needs an interpreter by asking him where he comes from or asking him if he speaks English. On a number of occasions observed defendants replied to such questions in broad Dublin accents. While CS records do not record the nationality of defendants they do record details of the interpreters employed and the languages interpreted (see CS 2009:34). The information recorded does not seek to identify the scale of limited English proficient (LEP) defendants but rather to document the usage of interpreters of specific languages.

It can be seen from the above that non-Irish defendants cannot be identified from CS records. The records maintained regarding interpretation services are a useful indicator of the scale of LEP defendants, but do not allow the number of non-Irish defendants to be assessed. It is also clear that in many instances judges may only have very limited information with which to assess the nationality or residency status of a defendant.

### 4.5.2 Preliminary Interviews

The limited information recorded by the CS eliminated the possibility of using quantitative research methods for this project and dictated that the research was conducted using qualitative research methods. Prior to deciding on the research approach to be adopted, interviews were

conducted with a former District Court judge and a sitting District Court judge. The interviews were arranged at a time and venue of each judge's choosing after the judges were contacted in writing and provided with an outline of the research topic. Interviews were not recorded in accordance with the wishes of both judges. The objective of these interviews was to get a better understanding of the day-to-day work of the court and an assessment of the impact of non-Irish defendants on the work of the court, and to use this information to devise a research strategy that was appropriate and implementable.

Both judges expressed views about a range of issues including access to legal aid, interpreters, pattern of pleas, and the overall impact the increased diversity of defendants has on the work of the court. It was clear from this process that procedural efficiency was a key concern of District Court judges and CS staff. Given the heavy caseload faced daily in most District Courts it was essential that the research did not impinge on the work of the court or make undue demands on the time of CS staff. DCJ4 expressed the view that most judges would not be keen to engage directly by way of interview with the research. After careful consideration it was decided that the most suitable methodology for this research project was quasi-ethnographic courtroom-based observation supplemented with informal discussions with various courtroom 'insiders' (Rock 1993), and more formal interviews with a number of selected solicitors. The term quasi-ethnographic and its application to other socio-legal research are explored below.

### 4.5.3 Quasi-Ethnographic Research

The origins of ethnographic research can be traced to the work of early anthropologists such as Malinowski and Mead, and while ethnographic research has been adopted by researchers in a number of different disciplines it remains primarily linked to anthropology. Ethnographic studies in the anthropological tradition aim to understand distinct cultures or ways of living. These studies are generally conducted over an extended period of time and involve the researcher immersing herself in the world of the community being studied so as to understand it through everyday lived

experiences, perceptions, interpretations and meanings. This process of participant observation enables the researcher to interpret the actions and interactions she observes as if she were an 'insider' but retain the analytical and enquiring stance of the 'outsider' or observer. Ethnography demands that the researcher adopts an interpretative stance and is an inductive or theory-generating research approach.

Ethnographic research methods have been used extensively in the study of deviance and hard-to-reach subcultures (Shaw et al. 1938/2006; Shaw & McKay 1942/2006; Agar 1971; Inciardi et al. 1993; Whyte 1993) and in the research of criminal justice processes (Cicourel 1968; Punch 1979; Travers 1992; Norris 1993; Rowe 2007; Travers 2007). In looking at research focused on the work of criminal courts it is helpful to distinguish between studies which use the tools of ethnography but do not adopt an ethnographic stance; those that present an 'ethnographic perspective'; and true ethnographic studies.

Hogarth (1971), Crow & Simon (1987) and Ashworth et al. (1984) used a range of research methods which included courtroom observations and interviews with judges/magistrates. But although these studies used methods commonly used by ethnographers they are not ethnographic in character.

Travers (2007) presents an 'ethnographic perspective' of an examination of sentencing in a children's court. Travers employs ethnographic methods and an interpretative stance in exploring the work of the court but his research is not comprehensive enough to be described as ethnography and the term 'ethnographic perspective' is therefore appropriate. Similarly Mileski (1971), who observed proceedings in a lower criminal court on two days a week for three months, describes her research as an 'observational study' rather than as ethnography.

Blumberg's account (1967) of the practice of criminal law, in which he describes defence lawyers as 'double-agents' and 'con-men,' is based on his extensive experience working as a lawyer in criminal courts. His account

presents a fascinating 'insider's' perspective of court bureaucratic processes, the shared goals of judges, prosecutors and defence lawyers, and their collegial rather than adversarial relationships. But his essay employs generalisations and a broad sweeping approach, and lacks the detailed references to specific events which are usual in ethnographic studies.

Bogira (2005) spent a year observing proceedings in the busiest felony courthouse in Chicago and enjoyed access to all areas of the courthouse including the lock-up, the jury room and the judges' chambers. Bogira also interviewed a range of court actors and defendants. His research methods were ethnographic in character, and his account is nuanced and complex. However, Bogira's main aim is to tell a compelling story rather than to present the findings of the social research he has conducted. His account is journalistic in tone, and is not sufficiently supported by references to other academic studies or commentaries, which results in it presenting an overly subjective picture of courtroom processes and participants.[5]

Although much of the research based in criminal courts and the observation of court processes has not resulted in true ethnographic studies we can point to several ethnographies of criminal courts. Emerson (1969) and Cicourel (1968) focused on juvenile courts, and combined observation of courtroom processes with other research methods such as observation of informal encounters in courtroom corridors (Emerson 1969), and analysis of background information in probation files and discussions with police and probation officers (Cicourel 1968), to arrive at a multi-layered and 'thick' description of how courts deal with juvenile offenders. Bennett and Feldman (1981) spent more than a year conducting their courtroom-based ethnography of criminal trials. They combined courtroom observations with informal interviews with various participants and the analysis of videotapes of trial proceedings. Rock's (1993) fieldwork was also lengthy and was

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5 Johnson describes Bogira's work as 'participatory journalism' and claims that "in many ways, Bogira's inquiry is comparable to good ethnography" (2007:367).

conducted over a ten month period during which time he observed proceedings in the Crown Court and interviewed a range of court 'insiders'.

This research, following Owen (1998), adopts the designation 'quasi-ethnography'. This designation recognises that while the research has key ethnographic features (such as naturalism, and a commitment to a detailed exposition of the work of the court), the research methods adopted depart in some ways from those adopted by traditional ethnographers.

The first such departure concerns the total immersion of the researcher. Criminal courts only sit for limited periods of time; all courtroom actors therefore have lives outside the court, and to that extent none are completely immersed in the life and culture of the court. The researcher was able to carry on with most elements of her 'normal' life while conducting this research and can only therefore legitimately claim a partial immersion in the 'culture' of the District Court. The second departure from traditional ethnographies relates to the time spent conducting this research. The period of time spent conducting this research, although lengthy, does not equate to the extensive periods spent by those conducting ethnographies in the anthropological tradition. Thirdly, the research was conducted at a number of different locations whereas traditionally ethnography is associated with a single research site. Finally, the researcher was not a participant in the court. She did not assume the role of the advocate, prosecutor, judge, probation officer, interpreter, witness or defendant. She was always an 'outsider', and undoubtedly this will have resulted in some interactions with courtroom 'insiders' being marked by suspicion and caution.

Using these criteria Brickey & Miller's study of a traffic court could more accurately be described as a 'quasi-ethnographic' study than an ethnographic study (1975). Wandall's study of decisions to impose sentences of immediate incarceration in a Danish District Court, which combines quantitative research with courtroom observations and interviews of courtroom actors, could also be described as 'quasi-ethnographic' (2008).

### 4.5.4 Gaining Access

As most courtrooms are designated by law as public places researchers do not usually have to negotiate access and gain permission for their research. Hence, Brickey & Miller who observed proceedings in a traffic court over a period of five months note that:

> ...entry into the court was quite easy. There were no posted restrictions for observers and there was no pressure to account for our presence. Consistent with state law, traffic court was a public proceeding. However, since the number of defendants rarely exceeded twenty-five and the room was quite small, we thought it best to introduce ourselves to the judge as students of the court (1975:689).

Brickey & Miller seem to have considered that in light of the public nature of the proceedings they were observing, the disclosure of their status as researchers was warranted by concerns around social etiquette rather than ethical concerns. Researchers may choose to make their presence known because of such social etiquette concerns or as a gesture of respect to the court, or in recognition that good relationships with court administrators and the judiciary will facilitate requests for additional information and future research.

In the context of this research project, and the plan to spend extensive periods of time in specific court locations, it was evident that the co-operation of the CS and the judiciary would facilitate this research. Failure to secure this co-operation could also have adversely impacted the evaluation of this project by the REAC. The researcher therefore sought to secure the CS's co-operation with the planned research. The Chief Executive Officer (CEO) of the CS was informed of the planned research and provided with details of courtroom-based research conducted in Ireland and in other jurisdictions. The response of the CEO of the CS indicated that he considered it was more appropriate to seek judicial sanction for the research. A written submission was then made to the President of the

District Court. The President replied indicating that the researcher should contact a named member of the CS staff (S1). When contact was made with S1 she asked a number of questions which were designed to assess how obtrusive the researcher's presence would be in court. The answers she received were presumably satisfactory as she then indicated that there was no objection to the research being conducted.

Prior to conducting research at each location the researcher contacted S1 who gave the researcher the name of a staff member to contact in the relevant office. Normally when the researcher contacted the staff member S1 had already informed her of the planned research. In one of the locations chosen S1 indicated that the sitting judge might raise objections to the presence of a researcher in court. Initial feedback from staff at the court office indicated that the judge was not happy to have the researcher in court. The researcher offered to meet the judge and discuss the research with him. It was then indicated that the judge would agree to the researcher's presence in court provided that she did not make any notes of matters said. It was not possible to agree to this condition so with the assistance of CS staff the researcher made an appointment to meet the judge. On the morning that the meeting was scheduled the judge indicated to CS staff that he no longer had any objections and did not wish to meet the researcher. This was the only instance when an individual judge expressed reservations about the researcher's presence in court.

### 4.5.5 Courtroom Locations

In selecting courtroom locations to observe proceedings the aim was to select locations where non-nationals were likely to be well represented, and locations which were representative of the work of the court as a whole. It was impossible to find both these qualities in equal measure in any given courtroom location, but locating the research in a number of different sites ensured that an appropriate balance of these qualities could be achieved. Overall however, it is likely that the presence of non-Irish nationals in the District Court as a whole is somewhat less than the level observed during the course of the fieldwork.

#### *4.5.5.1Dublin Suburban Court*

Dublin Suburban Court (DSC) is located in a suburban area (DSA) to the north-west of Dublin city. DSA is located in close proximity to the Dublin motorway ring and is only a short distance from Dublin city centre and from Dublin airport. It is served by a number of different bus routes and a limited rail transport system. It boasts a wide range of amenities which include a hospital, an IT, a theatre, a major retail centre, local government offices and business and industrial parks.

Current population is estimated to be close to 100,000, with a planned capacity of 150,000. In the decade between 1996 and 2006 the population grew by approximately 65% making it one of the fastest growing areas in Ireland. The population of non-nationals in DSA is over 20%, a proportion which is more than double the national average. The three biggest groups of non-nationals in DSA are citizens of Nigeria, Poland and the UK. The area offers a large stock of affordable rental accommodation and has succeeded in attracting a number of large service and high-tech companies. These features may have contributed to the concentration of migrants in the area. The socio-economic status of the population is varied. A number of areas within DSA are classified as 'disadvantaged' or 'marginally below average' and receive funding under the RAPID[6] programme which is aimed at improving the quality of life and the opportunities available to residents of the most disadvantaged communities in Irish cities and towns. Other areas within DSA are classified as 'affluent' and 'very affluent'.

#### *4.5.5.2City Centre Court*

City Centre Court (CCC) is located on the north side of Dublin city (NDC), just a short walk or a brief tram ride away from many busy shopping thoroughfares. The 19th century building which houses CCC and another court has been used as a District Court since the foundation of the state. NDC contains a number of prestigious department stores and buildings of

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6 RAPID stands for Revitalising Areas by Planning, Investment and Development.

historic importance such as the GPO, the Four Courts complex, and the Custom House, but is noticeably less affluent than the area south of the river Liffey. The area has long been associated with high levels of unemployment and deprivation but has undergone a process of partial gentrification in recent years. Old local authority flat complexes have been joined by newer privately-owned apartment developments. This juxtaposition of affluence and deprivation means that aggregate figures for Dublin's inner city do not accurately reflect levels of spatial deprivation experienced in many inner city areas. Many of Dublin's homeless services are located within a short radius of the CCC and both homelessness and drug use is very much a feature which is apparent in the vicinity of the court, and in the defendants who appear before CCC.

However, many defendants in CCC are not residents of NDC. A large transitory population is a feature of any large city and hence CCC deals with a higher proportion of people who do not live adjacent to the court than would courts outside the capital city.

*4.5.5.3North East Court*

North East Court (NEC) is located in a town (NET) on the eastern seaboard approximately 70km north of Dublin and close to the border with Northern Ireland. Its proximity to the border results in high levels of cross-border traffic which is evident from the number of Northern Ireland registered vehicles on the streets of the town. An army barracks is also located in the town.

NET has excellent road links to both Dublin and Belfast and is also served by the Dublin to Belfast rail corridor and by regular rail services to Dublin. Both Dublin and Belfast airports are within easy reach. The excellent road linkage between NET and both Dublin and Belfast, coupled with easy access to seaports and airports, has helped it to attract a wide range of international industrial and service companies as well as assisting the development of indigenous companies. Retail outlets in the town have

struggled in recent times as many shoppers have opted to cross the border to take advantage of lower prices.

The population of the town and its environs grew by almost 8% between 2002 and 2006 when it amounted to over 35,000. The non-national population of NET was just over 11% in 2006 which was only marginally above the national average of 10.2%. The three biggest groups of non-nationals in NET are citizens of Nigeria, the UK and Lithuania. NET has an IT offering both undergraduate and postgraduate courses.

#### *4.5.5.4Remand Court*

Remand Court (RC) is located in the grounds of a male remand prison situated west of Dublin city. Adjoining the remand prison is a closed medium-security committal prison. RC is located in a modern purpose-built building adjacent to the visitors' centre for the prison. The court is linked to the prison by an underground passageway. Sports grounds and a pitch-and-putt course are sited on the road opposite the court. There is very little pedestrian traffic on the road leading to RC and most of it consists of people heading towards the court or the prison.

The vast majority of defendants appearing before this court are in custody; just a small number of defendants are on bail. This greatly reduces the body of people in the courtroom. RC can be accessed by bus although the nearest bus routes are a 10-15 minute walk away. The court's limited accessibility to public transport may also reduce the volume of people in the court.

### 4.5.6 Duration of Research

Observation of court proceedings took place over a 15 month period.[7] At each court location proceedings were observed for approximately a two month period. DSC, CCC and RC dealt almost entirely with criminal matters and during the observation period in each of these courts the researcher

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[7] Observations were conducted between October 2008 and December 2009.

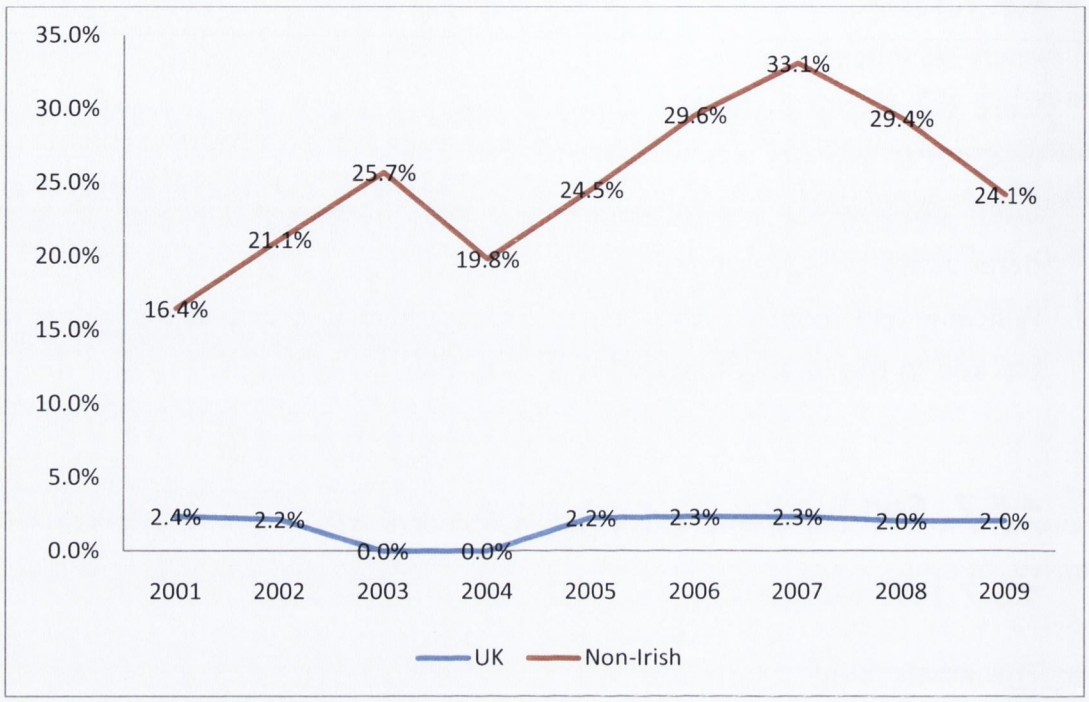
spent 2-3 days per week in court. In NEC however, only one day a week was reserved for criminal matters. Criminal matters were dealt with by the court as necessary on an intermittent basis on other days. Observations were conducted in NEC on the one day reserved for criminal matters. In DSC, CCC and RC the normal remand period was two weeks, and it was often possible to chart the progress of individual cases and to observe defendants on several occasions. In NEC however, the remand period was typically two months. This meant that the progress of cases could not be tracked in the same manner as was possible in the other courts.

### 4.5.7 Conducting Observations

#### *4.5.7.1UK nationals*

The single biggest group of immigrants in Ireland are UK nationals. They account for more than a quarter of the recorded non-Irish resident population (see http://cso.ie./statistics/nationalityagegroup.htm). Their presence in Ireland is long standing and largely unproblematic. The steep growth in the proportion of non-Irish persons committed to prison which is shown in Figure 7 below occurred despite there being a small decline in the proportion of UK nationals committed to Irish prisons. The growth in the flow of persons committed to prison was accounted for by a growth in the numbers of 'new' migrants within the Irish prison system. Given this and the difficulty of distinguishing UK nationals from Irish nationals, observations have concentrated on non-Irish, non-UK nationals who are referred to as foreign nationals.

Figure 8: Non-Irish Persons as a Proportion of Total Persons Committed to Irish Prisons 2001-2009




(*Source*: IPS Annual Reports 2001-2009[8])

### *4.5.7.2Identifying foreign nationals*

Foreign nationals were identified based on features such as the defendant's name, proficiency in English, appearance, accent, comments by court officials, and the nature of the charge. In many cases the defendant could be categorically identified as being foreign. This was the case when the charges faced were immigration charges, the defendant was provided with an interpreter, or specific reference was made in court to the defendant's nationality or period of residence in the country. It is thought that the method used to identify foreign defendants is likely to have understated rather than overstated the presence of foreign nationals in the court. Each morning before court a court list was obtained by the researcher. The list was perused in an effort to identify foreign defendants by name. This was used as a guide for the researcher but it was not definitive and therefore

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8 UK nationals committed to Irish Prisons are not separately identified for 2003 and 2004. Nationality was not recorded for a small number of persons committed to Irish prisons in all years from 2001-2009. Such persons are not included as 'non-Irish'.

the researcher followed the court proceedings in respect of all defendants in an effort to identify all foreign defendants.

*4.5.7.3In the courtroom*

While conducting courtroom observations the researcher tried to sit in a location which provided her with a good view of the court, and a reasonable chance of hearing the proceedings. In two of the courts observed, RC and NEC, the level of background noise was relatively low and on most occasions it was possible to hear exchanges in court without any difficulty. In RC there were very few defendants in the body of the court and usually there were also few family members and other members of the public in court. In addition there were far fewer Gardaí in this court than in other courts which helped to reduce the level of background noise. The background noise in NEC was somewhat louder than in RC but not unduly intrusive. However, at times it was very difficult to hear proceedings in DSC and CCC. In both these courts there was a constant hum of background noise, a good part of which emanated from conversations between Gardaí, and between solicitors and their clients. Not surprisingly defendants and members of the public in these courts seemed to think that they too could carry on conversations and on occasions discreet, and sometimes not so discreet, phone calls.

Pronouncements by judges were generally clearly audible but it was frequently very difficult to hear the testimony of witnesses, the bulk of whom were Gardaí, as they simply did not seem to appreciate that they should use the microphones provided. Even judges sometimes had difficulty hearing the evidence of Gardaí. On one occasion observed Judge DCJ12 said to a Garda who was giving evidence in an inaudible voice, 'is there any chance you could use that microphone, and you have my permission to shout by the way' (FN44).

In all locations where proceedings were observed, court proceedings often took on the form of a conversation between the judge and the arresting Garda who was usually the main prosecution witness, or between the judge

and the defence counsel or prosecutor. Little acknowledgement was made of the wider audience in the court. It often seemed as if there was no expectation that court proceedings would be of interest to anyone other than those directly involved in a case.

In CCC and RC the researcher sat in the area reserved for interpreters. In RC this provided an excellent view of the court and of the defendant. In CCC the position of the researcher was similarly at the front of the court very close to the stairway from the custody cells, and at the side of the area reserved for solicitors and barristers. However, at times CCC was extraordinarily busy and the court could hardly accommodate the number of people present. A number of barristers and solicitors often had to stand during court proceedings simply due to the lack of space, and when a sufficient throng of people was present the researcher's view of proceedings was often obstructed. At such times it was occasionally necessary for the researcher to stand simply to see the defendant. The numbers in the court were greatest in the early part of the morning, and the audience diminished as the day's caseload was dealt with. No area was specifically reserved for interpreters in either DSC or NEC, and in both courts the researcher sat at the front of the court, behind the area reserved for solicitors and barristers. Many of the defendants and members of the public seemed to prefer to stand or sit at the back of the court rather than take a seat at the front of the court.

As far as possible the researcher observed interactions between solicitors/barristers and their clients after cases were dealt with by the court. Such interactions were normally very brief and took place in the body of the court.

### 4.5.8 Shift in Focus

The researcher's primary focus in the court was on foreign nationals who faced criminal charges. However, the researcher also observed Irish defendants in court and often noted cases, courtroom exchanges or individuals of particular interest. In many ways the similarities and not the

differences between Irish and foreign defendants, especially persistent offenders, were remarkable. In seeking to understand the treatment of foreign nationals the researcher had to study and understand court processes and relevant legislation, and relationships between courtroom actors. Over time therefore, the research became broader in focus than had been originally planned, and much of the findings presented are of general relevance to all those interested in the work of the District Court rather than only being relevant to those interested in the treatment of foreign nationals.

### 4.5.9 Field Notes

Field notes were recorded in abbreviated form during court proceedings and were re-written in greater detail as soon as possible after the conclusion of court proceedings. Letters and symbols were used to denote features such as the gender and ethnicity of the defendant, whether or not he/she was in custody prior to his/her court appearance, the presence or absence of an interpreter, and legal representation by a solicitor or barrister. When possible a brief description of the defendant was also recorded including details of his/her clothes, and distinguishing marks such as tattoos or facial scars, which were remarkably common amongst young male defendants of all nationalities. The defendant's demeanour was also noted especially if he/she appeared aggressive, agitated or upset, or if the defendant appeared to be drunk or under the influence of drugs. Recording this information allowed the researcher to re-assemble an image of the defendant as they appeared in court.

The researcher then sought to record the substance of the court hearing as faithfully as possible. In many instances cases are dealt with in a matter of seconds when the defence simply seeks and is granted an adjournment but if matters are contested and go to a full hearing they can take up a substantial amount of court time. Consequently the account of court hearings varied with the length of court time they received.

#### *4.5.9.1Coding and organising field notes*

Field notes were written for each day spent in court, and in total the field notes amassed to over 210,000 words. The researcher began the process of coding her field notes by reading all the field notes and identifying relevant themes. The researcher often added comments to the field notes during the process of reading the notes. Defendants were also listed in an Excel file which made it easy to track defendants who were observed on more than one occasion. A number of themes emerged very quickly from the notes and these were used to collate the field notes thematically. This involved copying extracts from relevant field notes and collecting them in one file. The contents of this file were then organised under relevant derivative themes. In the process of reading and re-reading field notes additional themes emerged. As themes were added it was necessary to re-examine and re-read the field notes which had already been coded. Coding and thematically organising the field notes was a time-consuming and laborious process but ensured that the researcher identified all the major issues that came to light during the fieldwork and could identify common behaviours and procedures as well as those that were idiosyncratic or case specific.

### 4.5.10 Maintaining Objectivity

Maintaining the objective, dispassionate stance of a researcher was often difficult. Many of those who appeared before the court were clearly very vulnerable and it often seemed that they were more deserving of assistance than of punishment. This was particularly the case when defendants had psychiatric difficulties or had a drug or alcohol addiction. It was not uncommon to see defendants with a history of mental illness who exhibited signs of mental distress in court. Some Irish offenders with a history of mental illness were accompanied to court by elderly parents; somehow this made their court appearances especially poignant for this researcher. For LEP defendants with mental illness the court process, and remands in custody, can be especially difficult.

While at times the researcher found the histories and the vulnerability of defendants distressing, those that worked in the court seemed unaffected by what they saw and heard. For those who spend their working lives in the District Court it must often seem as if they listen to countless versions of essentially the same story. It seems that rather than exciting sympathy, the repetition of troubled backgrounds and addiction problems were considered by many to be simply excuses, and not very good excuses at that. The belief that structural disadvantages can be surmounted by individual agency allows courtroom regulars to distance themselves from the upsetting details of defendants' lives which are routinely recounted in court.

While acknowledging and recognising the vulnerability of many defendants the researcher was also aware that the work of the court placed a heavy and burdensome responsibility on judges, defence lawyers and Court Presenters. She was also keenly aware of the demanding and challenging situations that Gardaí and prison officers often faced, particularly in their interactions with violent and unruly defendants. The danger of the work carried out by Gardaí and prison officers was often visibly attested to by bruises and marks on their person. While relationships between some Gardaí and defendants were clearly marred by animosity, which at times seemed personal rather than professional, many Gardaí were a helpful point of contact for defendants in court, and could often be seen explaining the court process and sentences to defendants and their families. It was not at all unusual for defendants to seek out Gardaí after matters were concluded to shake their hands.

Overall, the researcher often found the experience of observing court proceedings to be dispiriting and depressing. There were very few success stories to offset the accounts of personal failures, setbacks and disasters. One could see that over time it would be very easy for those working in the court to distance themselves emotionally from the dysfunction and chaos that often characterised the lives of offenders.

### 4.5.11 From Non-Participant Observer to Participant Observer

The researcher's role in court was usually limited to observing court proceedings. Defendants were not normally identifiable until they were called in court and in NEC and DSC quite often the researcher found that the person sitting beside her was a defendant in court. In RC and CCC the physical organisation of the court almost always ensured that the researcher was never sitting beside a defendant.[9] The researcher always had a court list and this prompted a variety of people to approach her simply so that they could have access to the list. In one instance outlined below the researcher did initiate contact with a defendant in an effort to assist her. In this instance the researcher momentarily became a participant observer rather than simply an observer.

> Adeola B was seated at the very back of the court on a bench which is behind the rows of seats and right at the rear wall of the court. When her name was called out by the registrar she stood up but did not come forward. No-one else in the courtroom appeared to realise that the defendant was in court. The Court Presenter indicated to the judge that the defendant was not in court and the judge issued a bench warrant at 10.37am. I was unsure as to what I could or should do. I turned to a Garda seated behind me and told him that the woman was actually in court and pointed her out to him. The Garda simply shrugged his shoulders and made no move to intervene. It was clear that he had no interest in the woman's case. Meanwhile the court session proceeded, but I frequently turned around to check if the woman was still in court. She seemed to have no understanding that her presence had not been noted or indeed that a bench warrant had been issued, but it

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9 Very occasionally a defendant who appeared before RC on bail sat in the area reserved for interpreters while his case was being dealt with. In CCC on especially busy days defendants sometimes stood or sat beside the researcher.

appeared that she wasn't sure whether she was required to stay in court or not. At one point the woman moved from her seat on the bench when she recognised a man in the court who it later transpired was also a defendant. The two chatted quietly together at the back of the court until the man's case was called. Towards the end of the morning's session I realised that the woman had moved again and was now sitting behind me. I decided that it was best to let her know that a bench warrant had been issued. I explained as best I could that her presence in the court had not been recorded and that a warrant had been issued as a result and advised her make herself known to the Court Presenter, (who I pointed out to her) when there was a break in the proceedings. Ms B did this and the Court Presenter spoke to her briefly. It was some time later before her name was re-called, and in the interim she waited anxiously. The Court Presenter intimated to the judge that the woman had now turned up in court (whereas in fact she had been in court all along), and asked the judge for permission to rescind the bench warrant. The judge agreed and after noting that the woman had no solicitor he asked her would she like the court to assist her in appointing a solicitor. A solicitor present in the court was then assigned her case, the judge issued a 'Gary Doyle'[10] order and she was remanded on continuing bail for a further two weeks (FN3).

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10 The scope of the duty of disclosure in summary prosecutions has been defined by the Supreme Court in *Director of Public Prosecutions v. Gary Doyle* [1994] 2 I.R. 286. There is no general duty on the prosecution to provide the defence with statements of intended witnesses in advance of trial. The test to be applied by a court on an application by the defence to be furnished pre-trial with the statements on which the prosecution case will proceed is whether "*in the interests of justice on the facts of the particular case*" this should be done (*Gary Doyle*'s case, at p.301). See Office of Director of Public Prosecutions, 'Disclosure' available from http://www.odpp.ie A request by the defence to be supplied with prosecution witness statements is known as a Gary Doyle order.

This chapter began by pointing to the interconnectedness of research methodology and research ethics and this incident is a practical testament to that link. It also illustrates how prospective ethical approval may simply not be able to foresee all the potential ethical issues that can arise. It had not been anticipated that during the course of the fieldwork the researcher might initiate contact with a defendant. When the situation outlined above arose the researcher had to decide on the spot what the ethically appropriate course of action was. The intervention that was made was 'natural' in that it was unplanned; it was triggered by the specific circumstances that arose when the researcher found that she was in a position to clear up a misunderstanding which would have had adverse consequences for the woman in question, and it was nothing more or less than what any observer in court would have done. By initiating this contact the researcher was preventing harm to the defendant and the intervention, although unplanned, was therefore ethically justifiable.

## 4.6 Conclusion

This chapter points out how ethical concerns can constrain or even prevent social research and then presents some of the particular ethical difficulties that can arise in conducting socio-legal research. The literature on courtroom-based research does not suggest that this type of research has previously proved ethically contentious but obtaining ethical approval for this project was not unproblematic. The chapter describes the process of obtaining ethical approval for this research project and also presents an example of how prospective ethical approval may not anticipate the practical situations which may arise during the course of fieldwork.

The chapter distinguishes between quasi-ethnographic research and 'true' ethnographic research. A quasi-ethnographic study of the District Court has been conducted and the methodology adopted is described in detail. The process of recording and coding field notes is also described. The original focus of the research shifted somewhat during the course of the fieldwork and became more oriented towards the work of the court in general. While

primarily focusing on foreign defendants the research also became a study of the operation of the court and its handling of all defendants. The methodology adopted placed the researcher in close contact with many vulnerable defendants and at times the researcher found the process emotionally draining. It may be that those who work in the criminal justice system have to employ distancing strategies to legitimise their actions and discourage empathy with defendants.

The District Court is an arena which is unfamiliar to many people. Those who only spend brief periods of time in the court can find the proceedings difficult to decipher and understand. Chapter five acknowledges this unfamiliarity and provides an account of the atmosphere, the language, the work and the actors in the court which ensures that readers have the information to interpret courtroom proceedings.

# 5 The Irish District Court: An Ethnographic Account

## 5.1 Introduction

The District Court is the lowest tier of the Irish court hierarchy. It has been described as the 'workhorse' of the Irish judicial system (Rottman 1984:68), a designation that reflects the large volume of cases dealt with by the court, and the generally commonplace and petty nature of the matters it deals with. The minor and routine character of the matters dealt with by the District Court ensures that court outcomes attract little public scrutiny. The lack of public and academic attention focused on the court belies the importance of the court and the key role it plays in the Irish criminal justice system. The continuing lack of court transcripts or audio recordings of court sittings means that there is a lack of transparency about District Court proceedings which limits accountability and makes academic research more difficult.

District Court judges enjoy the 'broad' (O'Malley 2000; McCullagh 1992) sentencing discretion afforded to all Irish judges but have only local and limited jurisdiction.[1] The court is responsible for the majority of committals to Irish prisons and therefore has a pivotal influence on the Irish penal population.

### 5.1.1 Setting the Scene

To understand life in the Irish District Court we need to appreciate that the sheer volume and mundane nature of the court's work results in a fundamentally different atmosphere to the hushed, solemn and almost sacred atmosphere one might expect in a higher tier courtroom. The physical courtroom is the same; indeed some courtrooms are used interchangeably for District, Circuit and High Court proceedings, but no jury is present in the District Court. Matters are tried summarily which means

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1 The maximum term of imprisonment that can be imposed by the District Court for a single offence is 12 months. The court can impose a term of imprisonment of up to 24 months in respect of more than one offence.

that judges decide whether the guilt of accused persons has been proven, and also decide on the appropriate sentence.[2] The judge then is the key figure in the District Court and he/she will dictate the pace of courtroom proceedings and control the behaviour of those assembled in court. Although a lot of behind-the-scenes work takes place outside the court this should not give one the impression that District Court judges simply rubber stamp matters decided on between the defence and prosecution. All sentencing decisions are reached by judges without consultation and usually without a period of consideration. Sentencing decisions are considered in Chapter seven.

District Court proceedings often take place with a background hum of noise which at times can reach such a volume that the intervention of the presiding judge is required to restore the noise level in court to a tolerable level. The seating arrangements adopted could be described as tribal in nature and contribute to the ever-present buzz of noise. A small troop of Gardaí is usually assembled in the court.[3] Gardaí usually sit and converse together at the front of the court. Solicitors and barristers are also grouped together at the front of the court and they talk amongst themselves and to their clients who approach them at intervals. Defendants and those who accompany them tend to congregate at the back of the court; perhaps the presence of a sizable group of Gardaí at the front of the court is offputting for some.

Some defendants are carefully dressed in formal clothes, but most wear casual clothes such as tracksuits or jeans. Not all those in court are sober; this can lead to noisy outbursts which at times can give rise to collective mirth. Amongst those present in court one often finds people with the slurred speech, clumsy movements, and unpredictable behaviour consistent

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2 'Sentence' is defined by the LRC in the consultation paper on Prosecution Appeals from Unduly Lenient Sentence in the District Court (LRC 2004). Schweppe highlights that a sentence as defined by the LRC includes sentences made upon conviction and what the Commission terms 'conditional acquittals' which are sentences imposed following a finding of guilt without the making of a conviction (2005).

3 Fewer Gardaí are present in RC than in other courts as evidence of arrest charge and caution has normally already been given in another court.

with drug use. During the proceedings observed people have shouted out, sung, threatened witnesses and Gardaí, and thrown bottles and mobile phones; this behaviour sometimes resulted in people being removed from the court and a short spell in a cell for some of those removed. At times the antics of a defendant or a member of the public can move court proceedings close to farce, and can certainly provide entertainment to many of those assembled.

The Court Registrar, an employee of the Courts Service, sits directly below the presiding judge. She decides on the order in which cases will be heard, calls out the names of defendants in court, and passes files to the judge. She also carries out a myriad of other duties including preparing bail bonds, preparing bench warrants and custody warrants, recording details of sentences imposed and signing attendance sheets for interpreters. She can be an invaluable reference point for judges when a question mark arises regarding a procedural issue.

The probation officer is usually[4] a somewhat isolated figure who has no direct colleagues to confer with and when called on to consult with a convicted person generally does so outside the court. Interpreters, when present, normally sit as close to the front of the court as they can. Prison officers accompany defendants who are serving a sentence into court. Such defendants arrive into court handcuffed to a prison officer. The handcuffs are normally removed once the defendant is in the body of the court and applied again before the prisoner leaves the court. At times the late arrival of defendants in custody can mean that matters have to be put back to 'second calling'. In RC, which is attached by an underground tunnel to a remand prison, almost all defendants are in custody prior to their court appearance and are produced from custody by prison officers. A prison officer also sits in this court throughout all court proceedings.

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[4] During courtroom sittings observed, the probation officer in NEC sat with or beside the solicitors/barristers and had a much more collegial relationship with other courtroom regulars than was the case in other courts.

People come and go throughout the day but by afternoon the numbers in the courtroom are usually considerably less than in the morning and it is easier to maintain decorum. More serious and contested matters are usually dealt with later in the day when the courtroom is quieter. An air of solemnity often descends on the court, if only for a brief time, with the imposition of a custodial sentence.

The matters considered by the District Court are generally unexciting and commonplace in character, and hence tend not to engage the attention of all those in the court. Most people in the courtroom, including many solicitors and barristers, display little interest in the majority of cases that come before the court, and it is not unusual to see people passing the time in court by reading books and newspapers, consulting Argos catalogues, doing crosswords and sudoku puzzles, texting and even making mobile phone calls. One interpreter observed regularly applied hand cream in court.

The limited public interest in court proceedings means that in Dublin court reporters tend to descend on the court only when a person accused of a high profile crime is due to appear. In NEC however, despite the very minor nature of most of the matters before the court, several reporters for local newspapers attended all court proceedings observed.

This initial sketch of proceedings in the District Court will hopefully have created an alternative picture to the imagined calm and solemn courtroom that may have been in the reader's mind. In the remainder of this chapter colour and depth will be added to this initial sketch so that a more detailed picture of the everyday life of the court emerges. The role played by the prosecution and defence lawyers in the District Court is described and analysed. It is noted that much of the interplay between the prosecution and the defence takes place outside the court proceedings; this ensures the work of the court is minimised as both parties are generally aware in advance what applications will be made to the court and whether or not they will be contested. The distinction between the role of solicitors and barristers is described and the relationship between defence solicitors and

barristers is also considered. The chapter points out that proceedings in the District Court rarely result in adversarial battles between the prosecution and the defence whose primary role is often to present a credible case for mitigation to the court. Noting that many defendants in the District Court do not have legal representation the chapter details how, and to whom, legal aid is granted. The chapter then draws attention to specific challenges which may arise in defending foreign nationals and points in particular to the difficulties that defence lawyers face in communicating with defendants with limited English proficiency (LEP). To set the role of both the prosecution and defence in context the chapter begins by considering conviction rates in the District Court.

## 5.2 Guilt - A Process of Osmosis?

### 5.2.1 Convictions and 'Strike Outs'

Conviction rates in the District Court are high. In 2009 conviction rates ranged from 74% to 90% for those facing public order, assault, drugs, theft or sexual charges (CS 2010:56). The conviction rates in 2008 ranged from 75%-82% (CS 2009:64). A considerably lower conviction rate of 60% was achieved in 2009 and 2008 in respect of those charged with road traffic offences (RTOs). For all offence categories the principal reason why convictions are not secured is because charges are struck out; the particularly high proportion of 'strike outs' for RTOs (37/36%) explains the lower conviction rates achieved for this offence category (CS 2010:56, 2009:64).

Charges may be struck out on the application of the prosecution or the defence. When the prosecution applies for a 'strike out' they do not have to provide any explanation to the court. In such instances one can infer that the charges are struck out because the prosecution is flawed in some way, and is not expected to be successful. This could be because there is an error on the charge sheet or summons, or because a key witness has retracted their statement, or some other difficulty has arisen in relation to the prosecution of the charge, or because documents have been produced in

respect of RTOs. However, when 'strike outs' are requested by the defence an argument must put forward to the court as to why the case should not proceed. Applications for 'strike outs' by defence lawyers are often made when the prosecution fails to expedite matters with reasonable promptness. So, when instructions from the DPP are still outstanding after a number of adjournments, or disclosure orders have not been complied with by the prosecution, or witnesses fail to appear in court and further adjournments are sought, the defence is likely to apply for a 'strike out'. In some circumstances a judge may direct that the 'strike out' be recorded as a state application even though the impetus for the 'strike out' came from the defence. This is what happened in the case outlined below:

> Jamal and Hussan J[5] are co-accused and I assume that they are brothers or cousins. Their barrister tells the court that the state has not complied with a disclosure order which should have been met by a date more than two months previous. Judge DCJ6 states clearly and forcefully, 'if the disclosure order has not been complied with the matter will be going out'. He stresses the last word 'out'. The barrister, sensing victory, says, 'Judge, one of my clients has travelled from the UK'. The Court Presenter asks that the matter be put back to a second calling, although you sense that he is ready to admit defeat. It is some time before the case is again recalled. The defence barrister reasserts that the 'Gary Doyle' order has not been complied with. The judge looks at the Court Presenter as if daring him to argue that the state can justify its failure to comply with the disclosure order. The Court Presenter asks that the matter be struck out. The judge declares: 'Strike out on application of the state' (FN20).

If the prosecution suggests that further charges are expected, or the case is complex in nature, or has international dimensions, it is likely that a judge

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5 These and all defendants are referred to by pseudonyms.

will be reluctant to direct that the charges be struck out. In some circumstances a 'strike out' may be a product of skilled and ardent representations on the part of the defence lawyer, and in similar circumstances charges against an unrepresented defendant may proceed. It should be noted, however, that a 'strike out' does not prejudice future charges and it is possible in most cases for the DPP to bring the defendant before the court again on the same charges.

### 5.2.2 Pleas, Contested Charges and Adjournments

When charges do proceed, defence advocates use a variety of somewhat obscure terms to indicate that a defendant is pleading guilty or not guilty. One frequently hears that 'the facts are admitted,' or 'there is a plea in that matter'; it seems almost as if the term 'guilty' is too indelicate and unequivocal to be used. Only a small proportion of defendants ultimately contest the charges brought against them. A 'not guilty' plea is also couched in somewhat coded language. The court is told 'that matter is going ahead', or 'that matter is proceeding', or 'that is a contested matter'.

CS statistics do not identify the proportion of acquittals in the District Court. It seems that acquittals may be included as 'dismissals' in the CS statistics although this term strictly speaking refers to a judicial decision to terminate court proceedings prior to a verdict being reached. We can infer that the proportion of successful 'not guilty' pleas is not large as very few charges are dismissed by the court. In 2009 dismissal rates for defendants ranged from 1.6% for those charged with sexual offences to 3.8% for those charged with public order/assault (CS 2010:56). Similarly in 2008 dismissal rates for defendants ranged from 1.6% for those charged with drug offences to 4.2% for those charged with RTOs (CS 2009:64).

Why does the District Court find such a small proportion of defendants 'not guilty'? Most defendants do not contest the charges against them. Some may seek a hearing date as a delaying tactic even though they ultimately intend to plead 'guilty'. If defendants plead guilty at a hearing date this may

mean, as in the example below, that even for a first offence they will not be given the benefit of the Probation Act.[6]

> ...the solicitor told the court that his client had a sum of money in court of €200 and was prepared to make a donation to charity if he could leave the court with no conviction.[7] Judge DCJ11 was not receptive to this proposal and said, 'well, it's a hearing date, he's had opportunities to plea before this'. The solicitor suggested that acceptance of guilt is a '*process of osmosis*'.[8] The defendant was convicted and fined €100 (FN30).

During interview solicitor FS2 noted that in her experience the clients most likely to instruct her to plead 'not guilty' as a means of postponing sentencing are Irish clients who have experience of the criminal justice system. She stated:

> Typically our Irish clients would say, 'get it put back today', which means if it's the second or third remand pleading 'not guilty' ...when ultimately a few weeks or a month or two away they're going to be pleading guilty, they just want to postpone the evil day... and I would have thought that non-nationals who are less familiar with the system are perhaps a bit less likely to do that.

In many instances judges do not challenge defence requests for further adjournments and accede to them on what can only be considered fairly flimsy grounds. However, in some instances, as the examples set out below show, judges do challenge efforts by the defence to secure further

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6 References to the Probation Act are to the Probation of Offenders Act, 1907. The application of the Probation Act is explained in chapter 7 (7.7.3.1).

7 When judges apply the Probation Act they may also require the defendant to make a contribution to the 'Poor Box' or a designated charity. Defence counsel frequently suggest this course of action to the court by indicating that their client has available a sum of money which he is prepared to donate to charity.

8 Emphasis added.

adjournments and express their impatience at defence lawyers' failure to deal with matters expeditiously.

> At the beginning of the morning session Judge DCJ20 let off a warning shot to a solicitor who requested another court date to allow him to take instructions from his client. Judge DCJ20 said: 'Don't be wasting court time on section 6 and section 4 matters[9] unless there is something different or complicated about the offences'. He then instructed the solicitor to discuss the matter with his client and directed, 'let the matter stand'. Later when another defence solicitor requested a remand to get instructions from her client he commented with some irritation, 'it's not a murder trial...the man is alleged to have taken one box of beer'. This matter was also 'let stand' (FN40).

In both of the above cases when the matter was recalled 'not guilty' pleas were entered by the defence and a hearing date was set. The entreaties by Judge DCJ20 did not therefore succeed in expediting matters. Similarly:

> Judge DCJ12 berated one solicitor who told the court that his client was in RC by way of explaining his absence. Judge DCJ12 reacted with impatience and irritation and wanted to know how this had happened and whether the solicitor was going to be paid for his appearance in court today when his client was in RC. The solicitor did not provide an answer regarding whether he would receive payment. On another occasion when a solicitor said, 'I'm seeking disclosure today' Judge DCJ12 said, 'why not next week or next year? Weren't you in the court on the last day...why didn't you seek it then? Bit of a waste of time this morning' (FN43).

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[9] He was referring to offences under s. 4 and s. 6 of the Criminal Justice (Public Order) Act, 1994. It is very common for a defendant to be charged with offences under the provisions of both of these sections.

This extract highlights Judge DCJ12's impatience with what he interprets as prevaricating tactics on the part of the defence. His comments also suggest that he suspects that sometimes the failure to progress matters may be motivated by solicitors' desire to maximise their fees rather than because they are simply following their clients' instructions.

## 5.3 The Case for the Prosecution

### 5.3.1 Level of Proof Required

Although the same presumption of innocence applies to defendants in the District Court as it does to defendants in higher courts it has been suggested that the standard of proof that the prosecution is required to meet in the District Court is lower (see Devins 2009). A book of evidence must be prepared by the prosecution for all cases tried by indictment. This is not required for cases tried summarily. Simply put the prosecution has to do less work to secure convictions in the District Court than in higher courts, and convictions will usually be secured more rapidly in the District Court (LRC 2003).

The level of proof typically presented in the District Court can be illustrated by reference to one of the most common charges dealt with by the court, a charge under section 4 of the Public Order Act, 1994. Section 4 stipulates that it is an offence for a person 'to be present in any public place while intoxicated to such an extent as would give rise to a reasonable apprehension that he might endanger himself or any other person in his vicinity'. Normally the charge is not contested and the arresting Garda presents the facts to the court in a formulaic fashion. The Garda will note in his evidence that the defendant was arrested in a public place and will refer to how he formed the impression that the defendant was intoxicated. From the evidence presented in court it seems that 'a strong smell of an intoxicating liquor' emanating from a defendant is generally key to this impression being formed. It is also necessary for the Garda to cover the legislative requirement that the defendant must present a danger to himself or to others in his vicinity in his evidence. If a Garda fails to refer to these

matters in his evidence the charges may be dismissed. To satisfy the court regarding the defendant's inebriation at the time of his arrest, and the danger he presented to himself or others, it is common for Gardaí to note in the course of their evidence that the defendant was 'unsteady on his feet', or 'had difficulty standing upright', or was 'swaying onto the road and into the path of traffic', and consequently had to be 'arrested for his own safety'.

The observations conducted suggest that when defendants try to defend a section 4 charge by offering any one of a myriad of defences (such as claiming that they were not drinking on the night in question; that they only had two drinks prior to their arrest; that they could not have been drunk because the hotel they were in had run out of beer; that they were mistakenly taken as being drunk because they had an eye infection which caused their eyes to look red and bloodshot), they are simply not believed. Although such defences are very unlikely to succeed they can usually be used to secure adjournments and hence postpone sentencing. In NEC when a solicitor acting for an Irish defendant who was clearly well known to the court indicated that he was seeking a hearing date in relation to a section 4 public order charge Judge DCJ9 looked exasperated. Noting this the solicitor went on to explain his client's intention to contest the charges, adding that his client claimed that he had fallen down because he had a weakness in his legs which was being treated by medication. Judge DCJ9 turned to the defendant somewhat wearily and said: 'I know you have weak legs, and they go beneath you, and you're on medication ...but you are fond of a few drinks Mr Murphy...more than a few'. The hearing date was granted (FN80).

### 5.3.2 Who Acts as Prosecutor?

In the substantial majority of cases decided in the District Court matters are not referred to the Office of the Director of Public Prosecutions (ODPP) (Devins 2009), and hence the roles of investigating and prosecuting an offence are not clearly delineated. In such cases the role of the prosecutor is assumed by a Court Presenter who is a Garda of the rank of sergeant or

higher.[10] Court Presenters of higher rank received greater deference from other courtroom actors.

For more serious offences An Garda Síochána prepares and submits files to the Solicitors' Division of the ODPP for Dublin cases and to the local State Solicitor for cases outside Dublin. Solicitors from these offices conduct certain summary prosecutions in the District Court (ODPP 2009:55). Such prosecutions will normally relate to more serious charges, but may also include charges brought against individuals considered to be serious offenders. Investigative files are submitted to the Directing Division of the ODPP for directions. The Directing Division directs initiation or continuance of a prosecution and provides ongoing instruction and legal advice to An Garda Síochána, the Solicitors' Division and local State Solicitors.

When dealing with minor indictable offences the prosecution normally has no incentive to refer the charges to the Circuit Court for trial by indictment. In such instances the Court Presenter will inform the court that the DPP directs summary disposition and the judge must then consider whether he will accept jurisdiction. Jurisdiction is not automatically accepted; judicial discretion may therefore override the directions of the DPP. The defendant may also be given the opportunity to opt for trial by indictment.[11] For less minor indictable offences the prosecution may direct that the offence may only be tried summarily on a plea of guilty.[12] This practice could be viewed as a form of plea bargaining whereby the prosecution trades the certainty of a conviction against the limited sentencing powers of the District Court.

When indictable offences are considered serious the prosecution will usually be referred to the Circuit Court or, for charges of murder or rape, to the Central Criminal Court. When the DPP directs trial by indictment solicitors

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10 In NEC during all court proceedings observed a Garda Inspector assumed the role of the Court Presenter. In RC, CCC and SDC the role of the Court Presenter was carried out by a Garda sergeant.

11 See Devins (2009) for an explanation of 'hybrid' and 'either-way' offences. Devins also points to 'disquiet' regarding the level of *'nolle prosequi'* decisions made after a defendant has exercised his right to trial by indictment or where cases are sent forward after a District Court judge has refused jurisdiction.

12 This decision will be made by the Directing Division of the DPP.

from the Solicitors' Division and local State Solicitors usually attend preliminary hearings in the District Court for indictment cases and are responsible for the preparation of the book of evidence.

### 5.3.3 Evidence

Much of the prosecution evidence presented in the District Court is witness testimony and in many instances the chief prosecution witness is the arresting Garda. In situations when the evidence of a defendant is not consistent with the evidence of a Garda it is likely to be difficult to persuade the judge that the defendant's version of events is closest to the truth. Some judges may be particularly disinclined to question the veracity or accuracy of a Garda's evidence. As one solicitor put it: '...this judge now[13]...he will almost always believe the Guards no matter what' (FN4). This attitude is also evident in the comments made by Judge DCJ20 while passing sentence on a man who pleaded 'not guilty' to charges under section 4 of the Public Order Act, 1994. DCJ20 said that he was satisfied that the defendant 'was polluted with alcohol' at the time of his arrest, and that 'his judgement was significantly impaired'. DCJ20 indicated that he thought it probable that 'the defendant's recollection of events was likely to have suffered as a result'(FN47). This categorical statement regarding the defendant's condition at the time of his arrest was based essentially on the arresting Garda's description of him as being 'extremely intoxicated', and the defendant's admission that he had been drinking. The judge's comments also show how he has reconciled the competing versions of events presented by the defendant and the arresting Garda by concluding that alcohol had clouded the defendant's recollection of events.

Other forms of evidence presented by the prosecution in the District Court include CCTV footage, results of alcohol breath tests in drink driving cases, and drug analysis certificates. Less routinely, Gardaí from the Documents Section may be called upon to present evidence regarding contested charges of false instruments. While there are frequent requests by the

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[13] He was referring to Judge DCJ8.

defence for CCTV footage, no CCTV footage was shown during the courtroom proceedings observed.[14] It seems that in most instances the CCTV footage is incriminating and does not aid the case of the defence. In such circumstances even though the CCTV footage has been requested by the defence it will not be shown in court if ultimately a guilty plea is lodged. In many instances therefore, requesting CCTV footage may be motivated by a desire to defer conviction and sentencing rather than an expectation that it will establish the innocence of the defendant.

In the case of drink driving charges evidence is given in court of readings taken by an 'intoxilyzer' which indicate the level of alcohol in a defendant's body. Even if the charge is not contested the readings are relevant in that the period of disqualification from driving is determined by the level of the reading. If drink driving charges are contested Gardaí will be required to present evidence in court regarding the time of arrest and the time the breath test was conducted, the required observation period prior to conducting the test, the competence of the Garda who conducted the test, the temperature and humidity in the room where the test was conducted, and in some instances efforts to contact doctors to take blood samples. For drug charges to succeed a certificate of analysis in relation to drug samples seized must be presented in court.[15] Delays in obtaining certificates of analysis are common.[16]

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14 In one case observed the defence did seek to play the tape in court but the quality was such that the images were not decipherable and the charges were dismissed. CCC did not have facilities to display CCTV footage and consequently many cases were referred to other courts.

15 The standard practice of relying on these certificates was unsuccessfully challenged in the case of *DPP v. Omotoya Bakara* (High Court, unreported, 20 October 2008). The applicant appealed his conviction in the District Court for possession of a controlled substance contrary to section 3 of the Misuse of Drugs Act, 1977 (as amended) to the Circuit Court, and claimed he should have been allowed the opportunity to cross-examine the forensic scientist who prepared the certificate. The appeal failed and the applicant then initiated a judicial review seeking an order of the High Court directing the prosecution to make the forensic scientist available. The High Court refused the relief sought, ruling that 'a certificate is of such a scientific nature that it has to be amenable to *prima facie* proof by certification' (see ODPP 2009:18).

16 The analysis is carried out by the Irish Forensic Laboratory Service (FLS) which was unable to report on 33% of drug samples received between 2000 and 2006 (Kopp 2008).

No District Court proceedings were observed during which other forms of forensic evidence such as fingerprint evidence or DNA evidence were presented. It is clear that there are limited resources available for forensic testing, and testing associated with more serious offences is prioritised (Kopp 2008).

## 5.4 Legal Aid

Frequently a defendant will not have legal representation for his initial appearance in court. If the judge considers that the gravity of the offence, or any 'exceptional circumstances' (Criminal Justice Legal Aid Act, 1962[17]; Department of Justice Equality and Law Reform (DJELR) Undated; Irish Criminal Law Journal (ICLJ) 2007a), are such that the defendant should be legally represented he may question the defendant regarding his personal circumstances and if he is not considered to be a 'person of means' he will be assigned legal aid.

In practice, when legal representation is considered desirable a defendant in receipt of social welfare will be routinely assigned legal aid unless there is a suggestion that he has undisclosed means. The judge will normally ask the arresting Garda if there is any objection to legal aid and if an objection is raised a statement of means may be requested by the court. Some judges routinely request a statement of means before assigning legal aid to defendants facing certain charges. Defendants in employment may qualify for legal aid particularly if their earnings are low, they have dependants, or they have fixed outgoings such as rent or mortgage repayments. Defendants whose means are such that they do not qualify for legal aid may be offered an adjournment to obtain legal advice. Defendants may also appear in court having already secured legal representation, and normally when this is the case an application will be made for legal aid.

The assessment of the gravity of an offence and 'exceptional circumstances', if any, may depend crucially on the attitude of the presiding

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[17] S.2(1).

judge. Some judges assign legal aid if the defendant is considered to be 'at risk' (see ICLJ 2007b). 'At risk' is usually understood to mean that the defendant is at risk of receiving a custodial sentence; there is therefore a possibility of a custodial sentence. However, 'at risk' may also be understood to mean that there is a probability rather than a possibility of a custodial sentence. This is illustrated by the following field note extract:

> Edgar B faces charges of drunk driving and driving without insurance. A 'Gary Doyle' order was made to be complied with by a date some two weeks hence and the defendant was remanded for a period of three months to Court 52. The solicitor representing Mr B in court made an application for legal aid noting that his client works as an agricultural labourer. Judge DCJ11 said that he would not approve legal aid as the defendant was not 'at risk'. The solicitor said: 'In the context of no insurance and drunk driving travelling together he might well be at risk on a bad day'. Judge DCJ11 did not waiver and refused legal aid (FN35).

The solicitor's assertion that his client might be at risk 'on a bad day' suggests that he considers the risk that his client may face a custodial sentence to hinge crucially on the attitude of the judge who imposes sentence. Judge DCJ11, however, made the decision not to grant legal aid based on his assessment that it was not probable, rather than not possible, that the defendant would ultimately face a custodial sentence.

While some judges may assign legal aid when a custodial sentence is possible and others only when a custodial sentence is probable, still other judges may assign legal aid for all but the most minor of offences. The inconsistency of judicial attitudes towards legal aid was evident in the views expressed by the two District Court judges interviewed prior to the commencement of fieldwork. Judge DCJ19 asserted during interview that he considered that, 'the ability of the person to conduct the case and to understand the processes', should be taken into account when assigning legal aid, and commented that many migrants who found themselves as

defendants in the District Court were simply not in the same position as 'articulate English speaking people', and consequently should be assigned legal aid in some circumstances when an Irish defendant would not deserve legal aid. Contrast this to the view of Judge DCJ4 who said that he only assigned legal aid when a custodial sentence was likely rather than probable and noted, 'in Ireland we don't normally imprison people for drunk driving unless it's a third offence. So normally I would refuse an application for legal aid and the defendant pleads guilty. But if you grant legal aid the first thing that will happen is the number of 'not guilty' pleas will increase'. Judge DCJ4 went on to link the higher number of non-Irish defendants with extra claims on the legal aid system and with a higher proportion of 'not guilty' pleas.

## 5.5 Defence Advocates

### 5.5.1 The Role of the Defence Advocate

A good defence advocate is a wordsmith who can craft his client's life history into something heroic at best, or at worst present the court with the possibility, however slim, that the defendant is still redeemable and capable of reformation. This involves weaving together selected facts from the defendant's past to present the defendant in the best possible light. Many defendants have histories which are more distinguished by failures then achievements, and it is often simply not credible for the defence lawyer to suggest that the offence before the court was an aberration and the defendant is a solid upstanding citizen who is unlikely to trouble the court again. In such instances the defence seeks to devise a storyline which does not misrepresent the facts, but which does not necessarily seek to present the truth.[18] Every effort is made to create an impression of a defendant who is capable of and seeking redemption and reform. Not surprisingly perhaps, judges do not accept such storylines without a certain amount of cynicism, and at times a lawyer's efforts to present their client in a favourable light

[18] The prosecution also present a version of the 'facts'. See Devins (2009).

can be derailed by a few apposite questions from the judge. This is clearly shown in the following field note extract:

> Paul Sheehan pleaded guilty to a collection of serious driving offences; in all, 10 charges for driving without insurance and a similar number of charges for driving without a licence. We were told by his solicitor that he is 40 years of age and his first wife has sadly passed away. We also learned that his second wife has very serious health problems and was recently diagnosed as having a brain tumour. As the couple have four young children the defence solicitor noted that a custodial sentence would be particularly difficult for her client at this time when he was needed to assist with the care of the children. Judge DCJ7 listened impassively to this account and after considering matters briefly he noted that a number of the convictions against Mr Sheehan were in respect of domestic violence and Mr Sheehan's wife had in fact taken a barring order out against him which he understood to be still in place. This information put a rather different complexion on this man's situation (FN56).

However, on many other occasions advocates were able to accentuate the elements of their clients stories that they knew would be viewed favourably by the court. In the extract set out below the solicitor stresses that her client is a responsible member of society by pointing out her family responsibilities. She also highlights her efforts to improve her employment prospects by training as a nurse, and indeed the choice of profession underscores the basic storyline of a caring, responsible individual. She emphasises that the theft occurred when her client was under stress and hence does not reflect her underlying character. She mentions her client's immigration status because she is able to point out to the court that her client is legally resident in the state.

> Vida D was called at 2.45pm. She is an African woman who is represented by Ms O'Shea[19] who indicated that her client is pleading guilty. The prosecuting sergeant told the court that the matter is a s.4 theft charge, and that cosmetics valued at €71 were taken by the defendant from Boots in Jervis Street. She has no previous convictions. Ms O'Shea told the court that her client is a 27-year-old Zimbabwean[20] national and mother of two children. She has a Stamp 4 status as the mother of two Irish-born children.[21] She came to Ireland in 2003 and is now studying nursing. Ms O'Shea told the court that her client is at a loss to account for her actions and can only say that she was under some considerable stress at the time which may have resulted in this behaviour which is completely out of character. Ms O'Shea then concluded by repeating that the defendant is the mother of two young children. Judge DCJ16 said, 'the nature of the items does not indicate necessity'. Ms O'Shea replied that her client was experiencing some difficulties at the time of the offence. Judge DCJ16 applied the Probation Act (FN50).

It is not always so easy for the defence advocate to find redeeming features in their client's history, as the following extract shows.

> Stefan D is in custody prior to his court appearance. His solicitor tells the court, 'Judge, we're anxious to complete matters', and indicates that her client is pleading guilty on all charges. This man has amassed a number of fairly minor charges including several public order charges, a theft charge, and a s.13 'failure to appear' charge. His solicitor,

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19 Pseudonym.

20 Defendant's nationality has been changed.

21 Stamp 4 indicates that the person is entitled to work without a work permit. It is issued to people on work visas/work authorisations, and also to, e.g., spouses of Irish and EU citizens, refugees, people with Irish Born Child residency, and other people with long-term residency status.

> Ms Burke,[22] tells the court that the defendant previously had terrible drink difficulties but that he has now 'turned his life around'. The man still has 'an occasional drink' but it is no longer on the disastrous scale it was in the past. Ms Burke asks for leniency. She also notes that her client has no income at present as he is not working and is not in receipt of social welfare. When Judge DCJ20 asks about previous convictions the prosecuting guard indicates that the defendant has 'quite a few' dating back to 2007. 'Quite a few' is never firmed up. Judge DCJ20 imposes three terms of imprisonment of two, three and four months to run concurrently (FN47).

In this case the defendant has a criminal history and is before the court in respect of further multiple incidents of offending. Although the offences are minor the persistent offending makes it much harder to present him as worthy of leniency. The solicitor blames her client's behaviour on his drink problem and suggests that as he has taken steps to bring his drinking under control he will no longer trouble the court. But Ms Burke's admission that her client still has 'an occasional drink' puts the credibility of this suggestion in doubt. The defendant's impecunious situation effectively makes the imposition of a fine pointless. Therefore, the custodial sentence imposed was probably not unexpected.

### 5.5.2 The Different Roles of Solicitors and Barristers

Section 17 of the Courts Act, 1971 provides that a solicitor acting for a party shall have a right of audience in any court. In practice most solicitors do not act as advocates for their clients in the superior courts, but it is usual for defendants in the District Court to be represented by solicitors. Barristers who act as advocates for defendants in the District Court do so on the instruction of a solicitor; solicitors are the legal representatives on record. Barristers are independent advocates whose relationship with the

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22 Pseudonym.

defendant is indirect in that the solicitor selects and agrees payment terms with the barrister. Contact with the defendant prior to the court appearance is likely to be minimal. Some barristers are well briefed by their instructing solicitors and are able to craft remarkably skilful presentations in court after a very short consultation with their client. However, it appears that instructions are often very limited and the quality of representation in such instances can appear desultory and formulaic.

## 5.6 Core Courtroom Work Groups

In the Dublin area a number of larger firms of solicitors which specialise in criminal law have a regular representative in each busy courtroom. Smaller firms tend to locate in a limited number of courts and assign barristers to deal with clients who appear in other court locations.

Hence, in CCC and SDC a core group of solicitors deal with a large proportion of the cases before the court. This core group is augmented regularly by solicitors who only deal with occasional criminal cases; solicitors who handle all matters for specific clients; and barristers assigned cases by various solicitors.

In NEC there is also a core group of regular solicitors attached to local firms. Occasionally reference was made during courtroom observations to solicitors handling cases for Dublin-based firms of solicitors. NEC has a much more tightly-knit work group than the other courts observed with fewer 'visiting' solicitors and only rare appearances by solicitors from the local State Solicitor's or DPP's office. The probation officer is included within this core work group whereas in other courts the probation officer is very much a peripheral figure who only has a very formal relationship with other courtroom professionals. The nature and extent of the inter-group ties in NEC are highlighted in the field note extract below:

> At the commencement of today's court session Judge DCJ9 said that he had a sad announcement to make. I

> immediately thought that the death had occurred of a judicial colleague,[23] but in fact the sad announcement was the retirement of Ms Henderson,[24] a probation officer who has worked in the NET District for eight years. Judge DCJ9 said that the importance of the work of the probation service is often overlooked. He described it as 'silent work'. He described Ms Henderson as 'scrupulously fair' and a 'formidable' woman. He said it was a shame that she was retiring and that he would greatly miss her. When he expressed his regrets about her retirement the man sitting on the bench beside me said, 'it's a pity he wouldn't fuckin retire'. After Judge DCJ9 concluded his remarks they were followed by remarks in a similar vein by the Court Presenter on behalf of An Gardaí, and by a solicitor on behalf of all the solicitors who work in NEC. The Registrar then paid quite an emotional tribute to Ms Henderson on behalf of the CS and then Ms Henderson thanked everyone. It seemed extraordinary that this should take place in a busy court full of defendants and members of the public. Certainly the various representations sent a very strong message that the courtroom insiders operate as a closely-knit team and that they view each other as colleagues rather than adversaries (FN80).

On another occasion observed, a new solicitor was formally introduced to Judge DCJ9 in NEC by one of the resident solicitors who recited at length details of the schools and university the solicitor had attended, and the tutelage and guidance he had received from another highly-esteemed solicitor. This was followed by welcoming remarks by Judge DCJ9, the Court Presenter, the probation officer and the Registrar (FN78).

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23 The death occurred of two sitting District Court judges during the course of the fieldwork.

24 Pseudonym.

RC is unusual in that the resident group of legal representatives in this court is smaller than usual and consists in the main of barristers rather than solicitors. This may be because most defendants who appear before RC already have legal representation, and it is quite unusual for legal aid to be assigned in RC. Most defendants are not remanded in custody without being assigned legal aid or given an opportunity to consult a legal advisor. Therefore there is almost no 'new business' to be picked up in RC. Accordingly, as the extract set out below shows, when a defendant is assigned legal aid in RC the court may have to handle the matter somewhat more delicately than usual to ensure all proprieties are addressed. The issue of assigning arose when a defendant indicated that he did not wish to be represented by the solicitor originally assigned to him. After Judge DCJ13 advised him that it would be wise to have legal representation the defendant agreed and Judge DCJ13 then had to assign the matter. He dealt with it as follows:

> Judge DCJ13 addressed one of the regular barristers in court and said, 'Mr Deegan,[25] who do you represent?' Mr Deegan seemed to find this a difficult question to answer and after an initial hesitation said, 'a number of solicitors, Judge'. Judge DCJ13 then said: 'Yes...well...maybe you would name them...perhaps alphabetically?' The barrister then listed a string of solicitors and Judge DCJ13 picked a firm of solicitors. He advised Mr Deegan as follows, 'I think it best if you consult with the defendant and explain matters to him...he's seeking trial on indictment for the theft of a bottle of wine'. Judge DCJ13 also added, 'professionally Mr Deegan, perhaps you might call the solicitor to let him know he has been assigned' (FN73).

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25 Pseudonym.

### 5.6.1 Co-operation between Defence Solicitors and between Barristers

Solicitors in the District Court have a rather unusual relationship. They are competitors vying for the same business but they are also professional colleagues. Solicitors are allowed to advertise their services subject to regulations which prohibit advertisements in 'inappropriate locations',[26] or on any form of transport, and prohibit a solicitor from making claims to have specialist knowledge superior to other solicitors. The regulations also state that, 'an unsolicited approach may not be made where it is likely to bring the profession into disrepute. In particular, approaches at an "inappropriate location", or at or adjacent to a calamitous event, a Garda station, courthouse or prison, shall not be made' (Law Society of Ireland Undated). Solicitors are therefore quite constrained in the efforts they can engage in to secure clients. Solicitors working in criminal law get new business when they are assigned under the legal aid scheme to defendants in the District Court or when defendants seek them out either because they have previously represented them or because they have heard of them by word of mouth. Some solicitors can build up a substantial number of clients within particular communities in this way. This was confirmed during interview by FSA and MSB.

> FSA: ... I don't know how we first started but we have a lot of Georgian[27] clients and that's because they are a close-knit community ... so once you advise one you end up advising their friends and so on....
>
> MSB: Yeah, I have loads of nationals from Nigeria and Somalia[28] ...and again it's word of mouth... I mean I had five clients from Nigeria, say, a year and a half ago and now I have more than a hundred....

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26 'Inappropriate locations' are defined in s.4 (10) of the Solicitors' (Amendment) Act, 2002 as: 'a hospital, clinic, doctor's surgery, funeral home, crematorium, or other location of a similar character.'

27 The country has been changed.

28 The country has been changed.

The competition between solicitors is real but is cloaked by professional etiquette and controlled by regulations. In court many solicitors co-operate with one another as if they were part of the same team. Solicitors normally deal with a number of cases during any given court session. This means that they will sometimes leave the body of the court to consult with their clients and may be absent when some of the cases they are dealing with are called. Normally if this happens another solicitor will play a sort of holding role by noting that 'Ms X appears in that matter' and ask for the matter to be put back to a second calling.

However, tensions between solicitors can arise, particularly when defendants opt to change their assigned solicitors. When judges assign legal aid cases they usually ask defendants if there is a particular solicitor they wish to represent them. If the defendant does not nominate a solicitor the judge will usually try and assign cases to solicitors in court on the legal aid panel as fairly as possible. Defendants may, however, subsequently decide that they do not wish to be represented by the solicitor initially assigned to them. This can cause tension amongst solicitors, but not normally the kind of behaviour that occurred in the following case.

> Ali P was assisted in court by an Arabic interpreter. The solicitor for this man told the court that his client is in custody on 'an identity matter'. He added that this man's identity documents were sent to the original solicitor on record who refused to send them on to his office and instead sent them back to Iraq.[29] The Court Presenter asked for a further remand for two weeks to 'give everyone a chance'. The solicitor asked that the prosecution note the position regarding the documents. Judge DCJ15 asked for the name of the solicitor who returned the documents to Iraq and the solicitor said 'I'm not going to say that at the moment' (FN59).

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29 The country has been changed.

Barristers operate as independent agents and often handle only one or a small number of cases in a District Court session. This means that they often drift in and out of the courtroom with limited interaction with other barristers or solicitors. However, in RC where barristers deal with much of the business it was evident that most of the regular barristers had a collegial relationship and would step in to assist colleagues when they were temporarily out of the court. On one occasion in RC a female barrister came to court without her robes and another female barrister came to her assistance by sharing her robes. This created a kind of comical tableau in which one barrister shrugged off the robes as required, and the other quickly donned them. The whole performance was repeated several times and was entirely visible to the judge who made no comment.

### 5.6.2 Co-operation between Prosecution and Defence

There is a significant amount of behind-the-scenes co-operation between the prosecution and defence in District Court cases, and most judges seem to expect them to work together almost in a spirit of partnership. Judges expect defence lawyers to know when bail is being objected to and similarly expect the prosecution to be made aware that a bail application is to be made. It is also considered unreasonable to indicate that a guilty plea is to be entered in court without notifying the prosecution in advance.[30] When the necessary pre-court arrangements have not been put in place judges frequently put matters back to 'second calling' which can mean a delay of a matter of minutes or a matter of hours. Even when the prosecution application is to amend a charge the judge may expect the defence to be notified in advance. When Judge DCJ20 found that the defence was not alerted in advance to a prosecution application to amend one of the charges he told the Court Presenter, 'you can't ambush him with these requests' and put the matter back to a second calling (FN40). The following extract illustrates how a defence solicitor can work behind the scenes with the prosecution to secure the best outcome for her client and to simplify court proceedings:

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30 The prosecution are expected to have details of the accused person's criminal history ready to present to the court.

> Before the commencement of the afternoon court session Ms Murphy,[31] one of the most experienced solicitors in CCC, explained to the Court Presenter that Jerzy R, who appeared before the court that morning and was remanded on continuing bail, was also on the court list for the previous day and failed to appear. A bench warrant was issued due to his non-appearance. Ms Murphy managed to convince the Court Presenter that the failure to appear by her client on the previous day was a genuine mistake. Later, the Court Presenter rather than the defence raised the matter with the judge noting that a bench warrant had been issued on the previous day and stating that he was happy that it was a genuine mistake. Judge DCJ11 cancelled the warrant and re-instated bail (FN30).

The field note extract set out below highlights how the defence may seek the assistance of the prosecution to secure bail on terms that the defendant can meet. The accommodation reached in this case involves a degree of compromise on the part of the defence but crucially succeeds in mollifying a judge who has adopted an intractable approach in the matter.

> Robert A was produced for the second time from the cells in the afternoon. This time he was in court long enough to be assisted by a Polish interpreter. The charge before the court is one of criminal damage. The arresting Garda indicated that there was no objection to bail subject to a cash lodgement. The defence solicitor indicated that her client is a man of very limited means. His income consists of jobseekers' allowance and he is living in a hostel. DCJ15 simply said '€200 cash'. The matter was put back for a further 'second' calling at the request of the defence. It was some time later before Robert A was again called and again produced from the custody cells. His solicitor attempted to

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31 Pseudonym.

> impress upon the judge her client's very limited means but Judge DCJ15 simply said, 'I'm here 'til 6 o'clock'. The solicitor was clearly frustrated but court etiquette dictates that there can be no direct display of dissent so she simply said, 'may it please the court'. Later the solicitor approached the interpreters' bench and spoke to the Polish interpreter and said, 'could you tell him if he agrees to stay in prison 'til Tuesday the Garda will let him out with €100 bail. He should be able to get someone to come up with that'. The interpreter later accompanied the solicitor to the custody cells. When Robert A was called for the fourth time the solicitor told the court that there was consent to a remand in custody until Tuesday with consent to bail on a cash lodgement of €100. Judge DCJ15 noted the terms (FN51).

Here the requirement by the arresting Garda that a cash lodgement be made to secure bail seems at first to present an insurmountable roadblock to the release of the defendant. Many defendants would not have difficulty in lodging a cash amount of €200 to secure bail, but in this instance the solicitor was aware that if bail was set on these conditions her client would continue to be remanded in custody. She therefore sought the assistance of the prosecution to secure the release of her client. The 'deal' was not reached without the prosecution extracting a few ounces of flesh, however, in that the cash amount was reduced on condition that the defendant was remanded in custody for a number of days.

## 5.7 The Voice of the Defendant

As his demeanour is always deferential, polite and refined judges seem to infinitely prefer to 'do business' with the legal professional rather than with the defendant who effectively does not speak the same language as the judge. Solicitors and barristers try as far as possible to secure the silence of their clients during court proceedings, but not all clients are co-operative. Some of them get visibly frustrated when they feel their solicitor or barrister

is not doing their job properly. They may tap the advocate on the back in the hope of gaining their attention, or if that does not succeed in getting the attention of their lawyer they may seek to bypass them by calling out 'Judge, Judge, can I speak'. Such interjections are not welcomed by the court, or by defence lawyers, but sometimes, as can be seen from the extract below, the opportunity to speak seems to provide the defendant with a certain degree of personal satisfaction.

> During a bail application today a defendant took the stand to testify on his own behalf. The defendant, Mr Buckley, insisted on testifying even though it was clear that the barrister representing him was not keen that he should do so, and tried several times to dissuade him. Mr Buckley's testimony was rambling but he addressed the substance of the objection to bail which was based on his history of bench warrants by saying, 'Judge, Judge, I never ever, ever in my life, Judge, meant to take a warrant, never Judge,.... Judge, it's just the drugs, Judge'. He also stressed that he did not wish to go to prison saying, 'I'm locked up since I was 12...I just want help...prison has ruined me...it's ruined me...it's worse in prison...it's worse'.[32] Mr Buckley referred to himself as drug free. This was somewhat surprising as his speech was slurred and his movements were deliberate rather than fluid, and he certainly appeared to be under the influence of drugs. The arresting Garda asked him was he really drug free, noting that Mr Buckley had told him that he had four or five 'benzos'[33] the other day. Mr Buckley did not dispute this claim and the following exchange ensued:
>
> - Mr B: Yeah, because me head was wrecked.
> - G: But you'd still describe yourself as drug free?
> - Mr Buckley: Yeah, yeah...I'm drug free and I want to stay that way (turns to judge with hands together as if in

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32 When Mr Buckley says 'it's worse in prison', he seems to be suggesting that it's harder to stay drug free in prison.

33 'Benzos' refers to benzodiazepines.

> prayer)... Judge, prison is going to ruin me...prison is going to ruin me.
>
> Mr Buckley's barrister addressed the court and explained that her client's understanding of drug free was free from heroin and methadone. Mr Buckley was not granted bail. When Judge DCJ11 announced his decision Mr Buckley simply shrugged his shoulders and turned to the public gallery and said, 'what can you do?' (FN33).

Mr Buckley was clearly a seasoned campaigner in the court, and despite his impassioned pleas he does not seem to have had an unrealistic expectation of the likelihood of his being granted bail. It was clear by his reaction to the judge's decision that at least some of the distress he displayed was contrived; he was essentially delivering a performance. He seemed to enjoy his time in the witness box and was quite aware that for a few moments he had secured the attention of the whole court. So many times the defendant is effectively written out of the script and must accept his barrister or his solicitor as his voice. On this occasion Mr Buckley's voice was heard in the court. His barrister, however, did not want to irritate the judge by taking up too much court time, or have a situation arise in which her client might be held to have lied under oath. Hence she felt it necessary to explain her client's understanding of 'drug free'.

## 5.8 Solicitors and Non-National Defendants

### 5.8.1 Immigration Charges

Those charged under immigration legislation are almost exclusively non-Irish nationals.[34] In many instances such charges are not contested and solicitors are not required to have a detailed knowledge of immigration law. However, in some instances the personal circumstances or residency status of a defendant may provide grounds for a defence against immigration

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[34] Observations indicate that persons who appear before the District Court charged with immigration offences are almost always charged under the provisions of s. 12(1) of the Immigration Act, 2004.

charges and the ensuing contest in the court may centre on relatively complex immigration law issues. To provide their non-national clients with the optimal defence, solicitors may at times require a detailed knowledge of immigration law.

### 5.8.2 Communication Difficulties

Communication with non-national clients may be problematic in many instances. Solicitors need to evaluate their client's fluency in English and ensure that interpreters are available for consultations with LEP clients. If solicitors overestimate their client's fluency in English, misunderstandings can arise and solicitors may not interpret their client's instructions correctly. When legal aid has been assigned by the court the costs of providing an interpreter for consultation with LEP clients will be met by the CS (DJELR Undated) but consultations must be certified by the court.

There is no professional accreditation system in place for court interpreters in Ireland, and the standard of interpreting is uneven (Waterhouse 2009; ITIA 2008; Bacik 2007). The Irish Translators' and Interpreters' Association (ITIA) claim that, 'there are far too many people working as interpreters in our courts who have no background in translation or interpreting, no knowledge of legal terminology or interpreting techniques and a doubtful knowledge of ethical issues' (ITIA 2008:5). Solicitors therefore cannot assume that the court-appointed interpreter will always be competent and must exercise some vigilance in this regard.

### 5.8.3 Limited Social Rights

Foreign nationals do not enjoy the same social rights and may not be able to access the same services and benefits as Irish nationals. This can mean that some foreign criminal defendants are especially vulnerable; this is especially likely to be the case for non-EU defendants. At times solicitors may seek to assist their clients to access services, particularly medical

services. On some occasions, as in the case set out below, solicitors may ultimately have to appeal to the court to assist them.

> Mr Kumar is African in appearance and is middle aged. This man was in custody prior to the court proceedings and the court was told that the Gardaí had no objection to bail but Mr Kumar refused to sign the discharge papers. Mr Kumar sat during the court proceedings holding his head in his hands. His solicitor, Ms Murphy,[35] told the court that her client is suffering from depression and is homeless. He doesn't have access to the treatment or the medication he needs. His solicitor commented: '...he doesn't have a medical card and it is important that something is done to address his difficulties'. Judge DCJ11 noted that Mr Kumar had already appeared before him and a psychiatric report had been requested. The solicitor said there had been no progress regarding the report. Judge DCJ11 asked Ms Murphy whether representations had been made on behalf of Mr Kumar regarding a medical card and he was told that representations had been made but had not been successful. In the end Judge DCJ11 decided that Mr Kumar should be remanded in custody until Friday and requested a psychiatric report and medical treatment. It seems that the decision to detain Mr Kumar was made on the basis that prison might be the only place where he would receive free medical treatment (FN25).

## 5.9 In Summary

This chapter focused on the key courtroom actors in the Irish District Court and on the day-to-day work of the court. This non-partisan sociological account of District Court proceedings presented in this chapter erases some of the inscrutability that has surrounded the work of the court. Drawing on

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35 Pseudonym.

extensive observations of courtroom proceedings it provides an authentic description of courtroom argot, etiquette and procedures, and so reveals a wealth of information that would be impenetrable to a casual observer.

The chapter reveals that sittings of the Irish District Court often lack the solemnity one might imagine a criminal courtroom warrants, and can even at times comprise elements of farce, disarray and confusion. There is a lack of separation between the investigation and prosecution of the majority of matters that come before the District Court. Most charges are ultimately not contested and interactions between key courtroom actors are mainly co-operative rather than adversarial in nature. Much of the communication between courtroom actors takes place 'off-stage'. This 'off-stage' communication is necessary to allow the court to deal with its dauntingly long caseload. Despite the relatively straightforward nature of most matters, adjournments are common and add greatly to the workload of the court. Many of those that appear before the court do so without legal representation, with the allocation of legal aid being largely determined by judicial discretion. Defence lawyers are rarely required to launch a defence against the charges faced by their clients; rather, their role is often limited to securing adjournments which defer sentencing, and ultimately presenting the defendant in the best possible light to the court. The chapter points to specific issues which may impact the work of the defence lawyer representing non-Irish defendants who may be especially vulnerable due to their immigration status, language difficulties, or their limited access to social supports.

The defendant, who is after all most impacted by the decision of the court, is expected to be present but is usually strongly discouraged from speaking. The courtroom is a forum for the educated and the articulate; the voice of the defendant is seldom heard, and when it is, it often seems as if it is afforded little consideration. As the chapter highlights, the opportunity to be heard in court may be important to some defendants, and may even be central to their perception of the fairness of the court process.

Despite the volume of cases disposed of by the court the cast of courtroom regulars is quite small. Even for many solicitors and higher tier judges the world of the District Court is quite alien. This chapter opens up that world to a wider audience. Its central contention is that by understanding the context in which the work of the court is carried out we can better evaluate the decisions of the court and criticisms thereof.

Chapter six describes the defendants observed during the course of the fieldwork undertaken. The chapter compares and contrasts Irish and foreign defendants. A number of different categories of foreign defendants are identified and the scale of the presence of foreign defendants in each location is detailed.

# 6 Defendants in the District Court

## 6.1 Introduction

In 2009 the Irish District Court disposed of 451,280 (2008, 482,203; 2007, 388,345) summary offences and 69,778 (2008, 68,491; 2007, 48,272) indictable offences summarily (CS 2010:56; 2009:64). The volume and varied nature of the cases dealt with by the District Court ensures that defendants from all sections of society appear before the court. Although many defendants will be charged with multiple offences, and many may also appear before the court on a regular basis, and in a number of different locations, others will only ever appear before the court once. Collectively District Court defendants consist of a very large and diverse mass of people. Included amongst the ranks of defendants are people with a long criminal history and people with no previous convictions. Some defendants will be very familiar with court processes, others will find them bewildering. Defendants include articulate well-educated persons as well as persons with very little formal education for whom the formal language of the court may be quite alien. Many of those who appear before the court will consider themselves to be law-abiding citizens and respectable members of the community. They will not consider themselves to be criminals and may have no difficulty asking advice from court officials or Gardaí. Others will be reluctant to approach such persons.

In recent years the court has also had to deal with a sizable proportion of foreign nationals, some of whom have limited or no English. Some of these foreign nationals will be resident in Ireland and are well embedded in Irish society; others will never have been resident and may never have intended to be resident in Ireland.

This chapter draws on observations of District Court sittings to present a picture of defendants who appear before the District Court, with particular emphasis on foreign defendants. Initially it presents an overview of Irish defendants observed, describing the stereotypical young male offender and then describing some of the variation from this stereotype. Attention is

drawn to the presence of defendants with mental health issues and substance abuse problems, and the disproportionate presence of Travellers.[1]

The chapter then examines the profiles of national groups resident in Ireland compiled from Census 2006 and points out that key differences in these profiles suggest that offending rates of foreign national groups resident in Ireland are likely to vary significantly. While it is not possible to present a detailed analysis of the nationality of District Court defendants observed during the course of fieldwork, the information compiled suggests that key features of foreign national groups such as age, sex and socio-economic class only partially predict offending rates. Observations indicate that the level and pattern of alcohol consumption is also a critical predictor of differences in offending rates amongst foreign national groups. In addition, as a proportion of the foreign nationals who appear before the District Court were not previously resident in Ireland, statistics concerning the resident population of foreign nationals have a limited predictive value. The chapter highlights that the presence of some of the foreign defendants who appear before the Irish District Court stems from transitory movements which are commonplace in modern life. Like other national criminal justice systems the Irish criminal justice system must now dispense justice within its boundaries to many who are not citizens, and to some persons who were never resident in Ireland. Finally, the chapter presents an outline of the scale and proportion of foreign defendants observed in each location.

## 6.2 Expanding Diversity

Although there is now a far greater breadth of diversity amongst the defendants who appear before the District Court it should be acknowledged that diversity is not new to the District Court. While District Court

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[1] Travellers are an indigenous minority group who have a culture and lifestyle which is distinct from mainstream Irish society. Formerly nomadic Travellers now mainly adopt a settled or semi-nomadic lifestyle. There is widespread discrimination against Travellers in Irish society (see Task Force on the Travelling Community 1995; NCCRI/Equality Authority 2003b; Pavee Point 2006).

defendants include a preponderance of young working class men, men and women from all social classes and across all age cohorts have always appeared before the court. Drink driving is an example of an offence which is not confined by gender or class; one finds men and women, young and old, unskilled and professional amongst those charged with this offence. Motorists who commit speeding offences appear to be spread across all socio-economic classes, although the incidence of some motoring offences (such as driving without insurance) appears to be closely correlated with low levels of income. Domestic disputes which give rise to breaches of safety orders, or on occasions assault charges, also result in defendants from all socio-economic classes appearing before the court. Those charged with the gravest of crimes such as murder or rape who appear before the District Court when they are initially charged may be middle aged and from the middle classes and be well embedded in society, and so often do not fit with the generally accepted image of a deviant criminal. While the ethnic diversity of District Court defendants was relatively limited in the past, some diversity was provided by the presence of members of the Traveller community.

## 6.3 Overview of Irish Defendants

### 6.3.1 Young Working Class Men

Observations indicate that a very large proportion of defendants of all nationalities who appear before the District Court are young men from lower socio-economic backgrounds. The bulk of foreign defendants observed were aged 20 or older,whereas many young Irish defendants were aged only 18 or 19 and often looked even younger. Sometimes the defendants appeared in court carefully dressed in clothes that looked as if they had been specially bought for their court appearance, but for the most part they wore casual clothes such as tracksuits and jeans. A smartly dressed defendant may indicate a middle class background or may indicate that the defendant is particularly concerned about the charge he faces and is especially anxious to give a good impression in court.

Despite their young age, many defendants were veterans in court and had progressed to the adult court from the children's court. It was rare to hear that these young men were in employment or attending school or college. A number were involved in youth outreach programmes but the majority of them had no work or study to occupy them, and with little or no educational qualifications their prospects of gaining employment are very poor. Learning difficulties, early school leaving, a history of alcohol and/or drug abuse, parents absent or ineffective due to incarceration/sickness/death/mental health issues/substance abuse, were all common motifs in the life histories of defendants who were presented in court.

### *6.3.1.1Substance abuse*

The physical appearance of defendants was often testament to their substance abuse. A sickly pallor, an unsteady gait, slurred speech and uninhibited behaviour are suggestive of substance abuse and were frequently displayed by District Court defendants. Some defendants struggled to stay awake for their court appearances. A few were almost in a catatonic state in court. One such defendant observed was Karl Fowler.

> This morning Karl Fowler was barely conscious during his court appearance. He sat on the bench with his eyes closed and when his case had been dealt with one of the custody guards had to rouse him so that he left the courtroom. When I left the court complex shortly after 1pm Mr Fowler was sitting on the pavement, in a stupor, about twenty feet away from the Luas stop. He was still there at 2pm when I returned to the court complex. When I left the court at 3pm he was also there but he now only had one shoe on, and had an unlit cigarette in his mouth. His eyes were still closed. (FN43).

Although some defendants faced charges that directly stemmed from drug possession, most offending by substance abusers was indirectly related to their substance abuse. Persons who are addicted to drugs often steal to get

money to buy drugs, but the effects of the drugs they take make them more liable to be apprehended (Furey & Browne 2004, cited in Connolly 2006:77). Similarly, those who abuse alcohol often simply try and steal alcohol. If they do this when they are drunk they stand little chance of getting away with their crime.

### *6.3.1.2Mental health difficulties*

Sometimes the behaviour of defendants whilst in court suggested that they had mental health difficulties. Some sat holding their head in their hands, others wept, while a few called out or laughed inappropriately, or seemed dazed, confused, and uncomprehending of the court processes. Solicitors on occasion referred to difficulties taking instructions from clients with mental health difficulties, or requested psychiatric reports when defendants were remanded in custody. On other occasions the court was presented with reports detailing the psychiatric history of defendants. A small number of defendants observed in RC were detained in the Central Mental Hospital.

Although mental health difficulties were often presented by solicitors as a mitigating factor not all judges seemed to accept them as such. The field note extract set out below provides an example of this:

> One of the Irish defendants in court today pleaded guilty to a criminal damage charge. The amount of the damage was €6,000 and Judge DCJ13 made it clear that in his view jurisdiction should have been refused. The defendant is a 38-year-old man with no previous convictions. It was admitted in court that he broke 24 windows in a building using a sling shot and marbles. He had no connection with the institution which uses the building. A detailed psychiatric report was submitted to the court outlining the current psychiatric difficulties of the defendant. Despite this Judge DCJ13 sentenced the man to six months imprisonment and in addition ordered that he pay compensation of €6,000 and a fine of €1,000 within six months and specified 90 days in

default. He recommended that the man be detained in Wheatfield prison commenting that Mountjoy[2] would be unsuitable and further noted that the man should be considered for possible admission to a secure psychiatric unit. Efforts by the defence barrister to get Judge DCJ13 to reconsider the order for compensation and the amount of the fine were unsuccessful (FN64).

### 6.3.2 Family Support

Defendants did not always have a disadvantaged background or a dysfunctional family; references to 'respectable' and 'hard-working' families were presented by defence lawyers in an effort to convince judges that defendants were not likely to re-offend. Some parents accompanied their adult children in court and their presence was often noted by defence lawyers, presumably as evidence that the defendant would receive some form of ongoing familial support and control. In SDC three brothers from the same family were observed in court on several different occasions. The mother of these three young men was always present in court; her face quickly became very familiar to the researcher due to the frequent court appearances of her sons. She was very thin and looked completely worn out and on a number of occasions she was in tears in court. She was known to Judge DCJ8 who commented once, 'I see his mother in court today...every time he was in Court 55 she was in there with him and she is still here' (FN17). Clearly in this instance at least parental support was not effective in preventing re-offending.

While familial support may help some offenders to desist from criminal behaviour, sometimes family ties seem to enmesh people in criminal behaviour rather than encourage them to desist. In CCC a mother and her adult son regularly appeared before the court and on several occasions it was noted that the partner of a defendant also had court appearances or was in prison.

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[2] The reference to 'Mountjoy' is to Mountjoy prison which is located a short distance north of Dublin's city centre.

### 6.3.3 Wide Variety of Defendants

Although it is possible to point to the young, poorly-educated male from a low socio-economic background as a stereotype of a District Court defendant, it is also important to recognise the diversity of defendants and the different circumstances that can lead to their presence in the District Court. In addition to those who get involved in brawls outside nightclubs, or who refuse to pay the taxi driver who has brought them home, there are persons such as the 60-year-old grandmother charged with fraud because she continued to cash her aged mother's pension after she died. There are people before the court who repeatedly drive without insurance, or while under the influence of alcohol, and also those who find themselves before the court because they forgot to pay a speeding ticket. Courtroom demeanour of defendants can also be misleading. The defendant charged with assaulting a bar man after a day of binge drinking may present in court as a calm, demure, middle-aged woman who looks altogether unthreatening when she is sober. The appearance of those charged with particular crimes may also not match our expectations. It was surprising to learn that a female defendant who appeared in CCC 'wearing stiletto heels, an off-the-shoulder figure-hugging top and a surfeit of gold jewellery' (FN28), faced burglary charges. This and other instances observed made it clear that stereotypical images of offenders may simply not fit those who appear before the court.

### 6.3.4 Travellers in the District Court

Census 2006 indicated that the population of Travellers in Ireland only amounted to 22,435, or just over 0.5% of the total population (CSO 2007). If Travellers appeared before the District Court in proportion to their presence in the population Travellers would only account for roughly one out of every 190 defendants who appear before the District Court.[3] The fieldwork conducted suggests that the presence of members of the Traveller community amongst District Court defendants is not in proportion to their

[3] If one adjusted for children in both populations one would expect even fewer adult Travellers to appear before the District Court.

presence amongst the general population, but rather is far in excess of what one would expect based on the size of the Traveller population. If one looks at indices of employment (CSO 2004, 2007) education (NCCRI 2004) or health (Pavee Point 2005), the Traveller community can be quickly identified as being a severely disadvantaged group in Ireland. Anti-Traveller sentiment amongst the general population can also result in discrimination and generate animosity between the Traveller community and the general population. These factors are likely to contribute to the presence of Travellers amongst criminal defendants.

Travellers often appeared before the court in groups rather than as individual accused persons. Indeed, during the course of the fieldwork it was not unusual to see several members of the same family before the court as co-accused. In such instances the charges usually arose out of public order incidents. As with all other defendants public order charges faced by Travellers often stem from the consumption of excessive alcohol, but they can also arise as a result of disputes between Traveller families, or between members of the same family. When Travellers appear as defendants it is common for several, and sometimes a large number of, family members to be present in court. This increases the visibility of their presence in court.

Travellers were amongst the most truculent defendants who appeared before the court, and it seemed that at least some of those observed felt that the criminal justice system played an inordinate and inappropriate role in regulating their life. Their attitude suggested at times that they did not fully accept that it was legitimate for the state, through the criminal justice system, to intervene in Traveller matters. Solicitors were sometimes instructed to characterise incidents which gave rise to arrests as family disputes which the family should be allowed to resolve without interference. Such efforts were not normally successful, particularly when weapons such as hammers and machetes were involved.

The presence of Travellers and Traveller families in the Irish District Court can be best illustrated by pointing to one of the families observed during

the course of the fieldwork. On the first day of fieldwork two members of a Traveller family, a mother and daughter, were observed in court. Neither woman had any shoes on her feet and the older woman seemed to be wearing pyjamas (FN1). It became apparent in court that both women had been arrested at their home earlier in the day. Both seemed very angry at being arrested and struggled to maintain their composure in court. It was revealed in court that these women, and everyone else in their house, were arrested after a family dispute became violent.

During a subsequent court appearance it was noted that Kathleen, the 18-year-old daughter, who had a number of previous convictions, had recently got married. During the course of the fieldwork the father, two brothers, and husband of the younger woman were observed in SDC on a number of occasions when they appeared on various charges. Kathleen and her mother were also observed in both SDC and CCC on several occasions when they were in court to answer charges or to support one or other of their relatives. On one occasion Kathleen and her mother were granted a lengthy remand by the court because they had to travel to England to give evidence in a court case. Kathleen's husband was also observed in RC where he appeared before the court on bail charged with criminal damage. He secured a six week remand when the court was told that his wife was pregnant and expected to give birth shortly (FN57).

The fieldwork highlighted that Kathleen's early married life and the life of her family was punctuated by frequent entanglements with the criminal justice system which were clearly greatly resented. Many of the features of Kathleen's life were very ordered and traditional. She had married at a young age, and was expecting her first child. She clearly had strong family ties, and appeared to have a good support system within the Traveller community. But her life was very much marred by her family's involvement with the criminal justice system, which largely stemmed from violent intra- and inter-family disputes.

## 6.4 Resident Foreign Nationals

Census 2006 provides the most detailed source of information available regarding the population of foreign nationals resident in Ireland. Examining Census 2006 statistics regarding Ireland's resident non-Irish population not only provides us with a picture of the origins of the resident population of non-Irish nationals in Ireland in 2006, but also enables us to evaluate which national groups have features which make their members more or less likely to appear before the District Court as defendants.

The 2006 census reveals how remarkably diverse the resident population of Ireland has become. The census shows that in 2006 non-Irish nationals accounted for just over 10% of the resident population, while the proportion of resident foreign nationals was 7.4%.[4] Persons from 188 countries were resident in Ireland in 2006. However, citizens from over 40 of these countries only totalled to between one and ten persons, thus merely constituting small family-sized groups. While there were many small aggregations of nationals from a wide range of countries only eight national groups numbered in excess of 10,000 (CSO 2008a).[5] The origins of non-Irish nationals resident in Ireland are illustrated in Figure 8 below. In 2006 more than two out of every three non-Irish nationals resident in Ireland were citizens of just ten countries; these were the United Kingdom (112,548); Poland (63,276); Lithuania (24,628); Nigeria (16,300); Latvia (13,319); United States (12,475); China (11,161); Germany (10,289); Philippines (9,548); and France (9,046). The Irish population could therefore be said to be sprinkled with a great variety of nationalities of which just a small number have amassed to a substantial magnitude.

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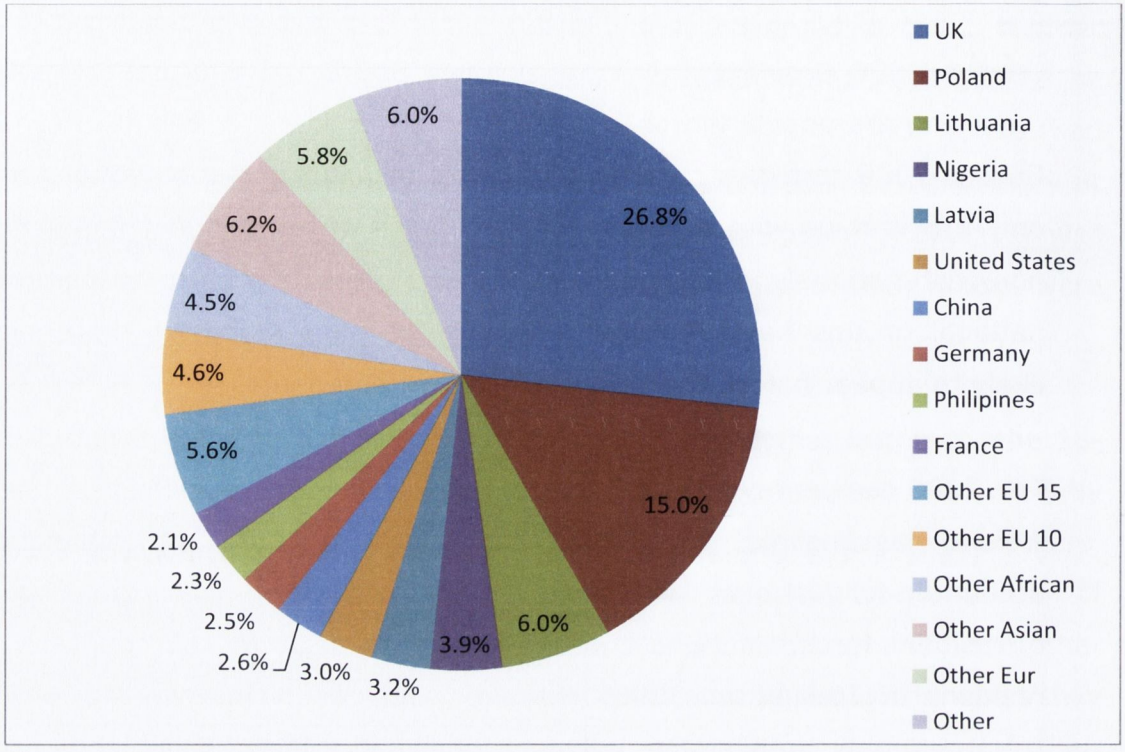
4 Foreign nationals are non-Irish and non-UK nationals.

5 These national groups were from China, Germany, Latvia, Lithuania, Nigeria, Poland, UK and USA.

Figure 9: Origin of Resident Non-Irish Nationals 2006




(*Source*: CSO 2008a)

### 6.4.1 Diversity in Composition of Non-Irish Resident Population

Aggregate statistics indicate significant differences in the sex and age profile of the non-Irish population compared to the Irish population. The proportion of males in the migrant population was greater than in the Irish population, and the age profile of non-Irish nationals resident in Ireland in 2006 was heavily concentrated in the 20-44 age cohort, with far fewer persons in the older or younger age categories than was the case for the Irish resident population (CSO 2008a). However, if we look at the profiles for each of the largest ten national groups resident in Ireland we see a far more varied picture. Amongst the Polish population the male/female ratio was the highest at 64:36 (CSO 2008a:29). In contrast females significantly outnumbered males in the Filipino population, and the male/female ratio was 41:59 (CSO 2008a:57). The age profile of UK nationals resident in Ireland did not differ substantially from the Irish resident population (CSO 2008a:25). US and Nigerian persons resident in Ireland in 2006 included a

higher proportion of children under the age of 15 then the general population (CSO 2008a:37 and 45). Amongst some other national groups there was a very marked age clustering. More than seven out of ten Chinese nationals resident in Ireland in 2006 were aged in their twenties (CSO 2008a:49), and seven out of ten Poles were aged between 20 and 34 (CSO 2008a:29).

There were also very significant differences in levels of participation in the workforce by the different national groups, and the area and type of employment. Very high workforce participation was recorded for Filipino, Polish, Lithuanian, and Latvian nationals resident in Ireland in 2006. For each of these national groups over 80% of persons resident in Ireland in 2006 and aged over 15 were employed. The highest level of employment recorded was 85% for Filipinos (CSO 2008a:58). In contrast only 38% of Nigerians were employed in 2006, and at 31% Nigerians also had the highest level of unemployment (CSO 2008a:38).

While high proportions of Poles and Lithuanians were employed in construction and manufacturing, Chinese workers were very heavily concentrated in the hotel and restaurant industry. The working population of Filipino nationals was heavily concentrated in the health sector with seven out of ten female and four out of ten male Filipino nationals employed in 2006 working in this sector (CSO 2008a:58).

The proportion of Polish, Lithuanian and Latvian workers in the higher socio-economic classes only ranged between 4% and 9% (CSO 2008a:30, 34 and 42). This contrasts to the very high proportion of US, German and French nationals employed in Ireland in managerial or professional occupational groups. Indeed, over half of US nationals at work in Ireland in 2006 were in managerial or professional occupations (CSO 2008a:46).

The proportion of non-Irish nationals who described themselves as students also varied very considerably by national group. The highest proportion of students in any national group was 43% of Chinese nationals (CSO 2008a:50). Just over one in six of both US and Nigerian persons aged over

15 and resident in the Ireland were also students. However, only a very small proportion of Lithuanian (3%), Latvian (3%) and Polish (2%) persons aged over 15 and resident in Ireland in 2006 were students.

The spatial concentration of national groups also varied. Nigerians were the most urbanised of all national groups profiled, whereas UK nationals were most likely to be living in a rural location. In 2006 some national groups seemed to be much more integrated with the native Irish population than others. While a high proportion of both UK and US nationals lived with an Irish partner in 2006 just 1% of Lithuanians aged over 15 had an Irish partner (CSO 2008a:34). It seems likely that the especially low level of integration between the Lithuanian and Irish populations was chiefly because most Lithuanians had only recently arrived in Ireland in 2006. The resident Lithuanian population in Ireland increased nearly twelve times between 2002 and 2006 (CSO 2008a:32) which means that the vast majority of Lithuanians living in Ireland in 2006 arrived during the four year period from 2002-2006.

#### *6.4.1.1Risk of criminal offending*

This brief comparison of the largest non-Irish national groups resident in Ireland in 2006 highlights the diversity amongst the biggest national groups resident in Ireland. Non-Irish nationals living in Ireland are not a homogeneous group, and the differences already pointed to strongly suggest that the risk of non-Irish nationals engaging in criminal behaviour will vary between nationalities. Criminal offending is likely to be higher amongst national groups that are heavily concentrated in the 20-34 age cohort and which have a high proportion of males. Factors which are likely to reduce the probability of criminal offending are high proportions of females, more diffuse spread of ages, and higher socio-economic status. One would therefore expect, given the features of the resident population in Ireland in 2006, that Polish, Chinese, Latvian and Lithuanian nationals would be more likely than US, UK, French, German or Filipino nationals to engage in criminal behaviour and to consequently appear in the Irish District Court. While some features of the Nigerian resident population

suggest that offending is less likely (sex and age distribution), the very high level of unemployment amongst Nigerian nationals resident in Ireland in 2006 may be suggestive of a higher risk of criminal offending (see Smith et al. 1992).

## 6.5 Overview of Foreign Defendants

As the nationality of defendants is not recorded by the CS and nationality is not routinely mentioned in court it is not possible to present a breakdown of the defendants observed by nationality. However, it is possible to present an overview of the foreign defendants observed. This overview corresponds in some respects with the expected profile of foreign defendants based on the analysis of the results of Census 2006, but there are also some unexpected findings.

As expected Polish, Lithuanian and Latvian nationals were observed in large numbers in the District Court. They most commonly faced public order or motoring offences such as drink driving or driving without insurance. Heavy alcohol consumption seems to greatly contribute to the presence of Polish, Lithuanian and Latvian nationals in the District Court.

Chinese nationals were less commonly observed amongst District Court defendants than expected given the size of the Chinese resident population. Indeed, a sizable proportion of those who appeared before the court were charged with breaches of immigration legislation, and the majority of these had not been previously resident in the state. Observations indicate that Chinese nationals are very seldom charged with breaches of public order legislation. Cultural influences may result in Chinese nationals carefully regulating their public behaviour. Chinese nationals were also rarely observed in the District Court charged with motoring offences. This may indicate lower levels of alcohol consumption by Chinese nationals. It is possible also that the level of car ownership amongst Chinese nationals is lower than average as Chinese nationals resident in Ireland in 2006 were

overwhelmingly resident in urban areas (CSO 2008a:48), and included the highest proportion of students of any national group.

With the exception of UK nationals, defendants from other EU15 countries were rarely identified. This is consistent with the high education levels and socio-economic status of EU15 nationals living in Ireland. It may also reflect the strong social support systems in these countries which may make EU15 nationals more likely to return home if they face unemployment or health difficulties.

No Filipino or US nationals were identified during the course of the fieldwork. The high employment level enjoyed by Filipino nationals combined with a preponderance of females may account for their absence. More US nationals than any other national group were employed in managerial and professional occupations. The high socio-economic status of this group may contribute to a low level of offending.

Despite the favourable sex/age distribution of the resident Nigerian population, Nigerian nationals were frequently observed amongst District Court defendants during the course of the fieldwork. However, like Chinese nationals, Nigerian nationals were rarely charged with public order offences and tended to appear before the court in relation to motoring offences, theft charges, and breaches of immigration legislation. Offending rates may be impacted by the very high unemployment rates experienced by this group.

Romanian nationals were observed amongst District Court defendants in greater numbers than would be expected based on Census records of resident foreign nationals. This was particularly the case in SDC and CCC. Almost all of the Roma who appeared before the District Court were Romanian nationals. The frequent presence of Roma amongst District Court defendants in SDC and CCC therefore greatly contributed to the disproportionate number of Romanian nationals observed.

### 6.5.1 Non-Resident Foreign Nationals in the District Court

While the recorded population of non-Irish nationals resident in Ireland in 2006 gives us some basis for anticipating the likely profile of non-nationals who will appear in Irish courts charged with criminal offences, it must be remembered that not all foreign nationals before the courts will have been previously resident in Ireland, and not all foreign nationals previously resident in Ireland may be enumerated in Census 2006.

During the course of the fieldwork conducted many foreign nationals were observed who had been charged under the provisions of s.12 of the Immigration Act, 2004. In SDC most persons charged under the provisions of s.12 had been detained at Dublin airport while attempting to gain entry to the country. Almost all of these persons had never been previously resident in Ireland. All persons observed who had been arrested under the provisions of s.12 at a point of entry to the state were non-EU nationals. Persons observed in SDC following arrest at Dublin airport were mainly either Chinese or from one of a number of different African countries. In CCC many of those arrested and charged under the provisions of s.12 had previously been resident in Ireland but it is not clear whether all such persons would have been captured by Census 2006. The origins of those charged with immigration offences in CCC were more diverse than those in SDC. A large proportion of those charged were Europeans from non-EU countries, but persons from Africa, Asia, and members of the Roma community who were EU nationals were also observed in court facing charges under the provisions of s.12. In RC a high proportion of foreign nationals of very diverse origins were observed who appeared before the court on immigration charges. These charges had arisen in a wide variety of circumstances and the persons charged were a mixture of persons never previously resident in Ireland and persons previously resident in Ireland. Immigration charges were very rare in NEC.

A small number of persons never resident in Ireland were also observed in court on non-immigration matters. Some of these people faced very serious charges in relation to the possession and importation of drugs of significant

value. A number had been arrested at Dublin airport and one man observed was arrested in Rosslare port. If convicted they are likely to face very lengthy prison sentences. They are also likely to be deported at the end of their prison sentence. All they may ever see of Ireland is Garda stations, courts and prison cells.

Persons who come to Ireland for a short visit can also find themselves before the District Court. As the field note extracts set out below highlight, sometimes the visit may be motivated by entirely legitimate reasons, and on other occasions it may be triggered by criminal motives.

> Robert Krzynska was produced from the custody cells for his court appearance. His appearance was noteworthy because his ruddy, fresh face and strong, muscular build suggested robust health and contrasted to the pale, wan and often sickly appearance of many of the defendants in the District Court. A Polish interpreter was provided for this man and he also had a solicitor. Although the nature of the charges faced by this defendant were not revealed in court, I later learned that he faces sections 4 and 6 public order charges arising out of an incident in Dublin airport where he was drinking while waiting for his flight. He also faces charges arising from the alleged burning of a mattress in a Garda station. The court hearing essentially only dealt with an application for his bail. The prosecuting sergeant indicated that bail would be subject to a cash lodgement of €1,000. Judge DCJ8 was surprised and asked, 'why is that?' The sergeant replied 'Judge, he's of no fixed abode in this country'. The sergeant also went on to stipulate that the defendant be required to reside at an address in the IFSC. The matter was relisted to await DPP's directions. The judge asked, 'is it a legal aid matter?' and the defence solicitor replied, 'no Judge, it is not' (FN20).

This man came to Ireland on a visit with no expectation of appearing before a court. It seems that his drinking got out of hand just as he was about to leave the country, and he made matters substantially worse for himself by behaving badly while in Garda custody. Nowadays it is commonplace for people, particularly people from wealthy developed nations, to make frequent trips overseas. Increased international travel will inevitably lead to a greater incidence of foreign nationals amongst those charged with criminal offences.

Other visitors come to Ireland with less benign motives. Examples of such visitors are the four Romanian nationals[6] who appeared before SDC as co-accused (FN13). The four were charged with the theft of a woman's handbag in the short-term car park of Dublin airport. Bail was initially objected to by the Court Presenter because the defendants were unable to provide an address in the state. Their solicitor noted that they had been living out of a car since their arrival in Ireland and described them as being 'on a short stop-over in Ireland' (FN13). He also described them as having come to Ireland to look for work. On hearing this Judge DCJ8 said, 'they mustn't be listening to the radio so, or reading the newspapers' (FN13). When Judge DCJ8 established that each of the defendants had either a passport or national ID card he granted bail on condition that a €100 cash bond was lodged by each defendant. The defendants were remanded on bail to appear in SDC two weeks later. On that date none of the defendants appeared in court although at least one of the defendants was still in Ireland as it was noted that he was in custody in Cloverhill prison (FN19).

Judge DCJ8's decision to release them on bail seems to have been driven by pragmatism. He may well have assessed that there was a high probability that they would fail to appear in court but perhaps he hoped that they would leave the jurisdiction in the intervening period. By granting bail subject to a cash bond he ensured that at least the cash bond would be retained by the state if the defendants failed to appear in court as directed.

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6 This group comprised two men and two women who appeared to range in age from 30-45.

### 6.5.2 Roma Defendants

Roma defendants were common in CCC and to a lesser extent in SDC. Many members of the Roma community adopt a peripatetic lifestyle and move frequently between Ireland and their country of origin. It is difficult to know how many of the Roma observed in court considered themselves to be resident in Ireland or how many would have been enumerated in the 2006 census. When defendants move frequently between jurisdictions this inevitably results in them failing to appear in court on some occasions. One Roma man arrested on foot of a bench warrant explained his failure to appear in court by saying simply, 'I had to go home' (FN32). Another man similarly arrested claimed he had left the country owing to the death of a family member. He was released on his own bond (FN42).[7] A history of bench warrants makes it more likely that bail will be objected to by the prosecution. A number of judges seemed to allow Roma defendants more latitude than is normally shown other defendants when they failed to appear in court. Explanations presented by solicitors for the non-appearance of their Roma clients such as 'he's rung us from France' (FN 46), and 'he's actually in Romania and is returning tomorrow' (FN38), succeeded in securing adjournments when one might have expected bench warrants to have been issued. On other occasions the court was requested to schedule dates to take account of the defendant's travel arrangements.

### 6.5.3 Variations in Scale and Characteristics of Foreign Defendants

The proportion and composition of foreign defendants observed was not consistent and varied in each court location. The highest proportion of foreign defendants observed was in RC where foreign defendants accounted for 26.2% of defendants on court lists for court sittings observed. A significant proportion of the foreign defendants observed in RC were

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[7] When bail is granted on the defendant's bond no cash sum is required to be lodged but if the defendant later fails to appear in court the Court will make an estreatment order as required by the Bail Act, 1997 and the Courts Service will seek to collect the amount of the bond (Comptroller & Auditor General 2002).

charged under the provisions of s.12 of the Immigration Act, 2004. Persons charged under these provisions are routinely remanded in custody until they can produce proof of their identity.

In CCC almost a quarter of defendants on court lists were foreign (24.5%). However, CCC dealt with a large number of defendants who were not on the court list and therefore the court lists do not provide a complete picture of defendants who appear before the court. CCC is a custody court, and during the court sittings observed the court frequently dealt with persons arrested and not granted station bail who are required to be brought before the next available sitting of the District Court; consequently it was not unusual for persons, both Irish and foreign, to appear before the court who were not on the court list. This happened to a much lesser extent in SDC and NEC and almost never happened in RC.

The foreign defendants who appeared before CCC were very varied in every respect. Some defendants were not living in or near Dublin's city centre, and appeared before CCC because they had been charged with theft or public order charges while they were shopping or socialising in the city centre. Some seemed to have a network of social ties and support and were in employment. However, a proportion of foreign defendants in CCC were extraordinarily vulnerable. The combination of unemployment, homelessness, substance abuse, and LEP makes a defendant exceptionally vulnerable. Very few female defendants were observed with all of these characteristics. Most exceptionally vulnerable defendants were single foreign men, usually of Eastern European origin, with very limited social ties in Ireland. Unemployment can leave foreign defendants without any income if they do not have the work history or the required period of residency to qualify for social welfare payments. A few defendants who had only recently arrived in Ireland seemed to have arrived with little means of supporting themselves, and with very little in the way of a support network. It was not unusual to hear that such defendants were homeless, living in hostel accommodation, or 'semi-homeless' which equated to relying on a friend or friends to provide a couch to sleep on. It was also not uncommon to hear

stories of mental illness, alcohol and drug addiction. LEP often further isolated many of these vulnerable defendants.

While many of the foreign defendants before SDC had problems controlling their use of alcohol, drug abuse and especially homelessness were not commonly attributed to foreign defendants in SDC. Most defendants were employed or had only recently become unemployed after a history of employment since their arrival in Ireland. Many defendants were living in family units and indeed several foreign male defendants were observed in SDC as a result of charges arising from domestic disputes. The proportion of female foreign defendants (31.1%) was unusually high in SDC. This was because a significant proportion of foreign defendants who appeared before SDC were charged with breaches of immigration legislation. While males on immigration charges were remanded to appear before RC, females facing immigration charges were remanded in custody to appear before SDC. As defendants on such charges typically appeared before the court on multiple occasions the different treatment of male and female defendants remanded in custody resulted in SDC dealing with an unusually high proportion of female foreign defendants.

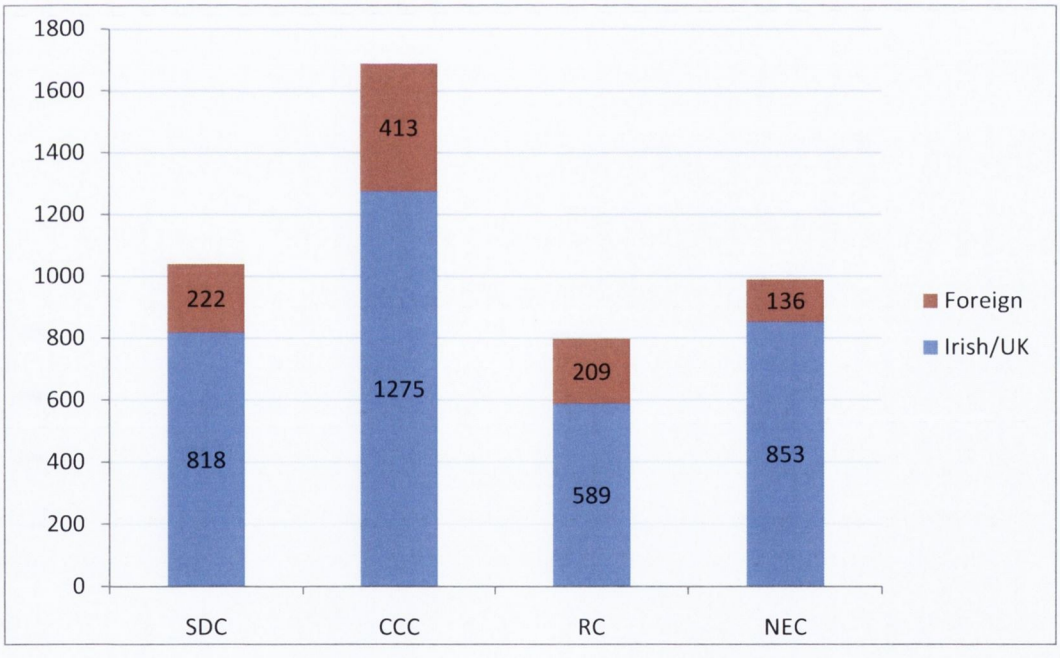
The lowest proportion of foreign defendants observed was in NEC where foreign defendants accounted for just 13.8% of all defendants on court lists of court sittings observed. Only a handful of foreign defendants appeared before NEC on immigration charges and many of the foreign defendants who appeared before NEC had lived in the environs of NET for some years and were embedded in the local community.

The proximity of NET to the border with Northern Ireland means that UK nationals frequently appear before NEC, most commonly in relation to motoring offences or minor public order offences. During the court sittings observed when residents of Northern Ireland appeared before the court the court was often told that the defendant 'lives outside the jurisdiction'. It was also not unusual to hear references to defendants who were resident in or near NET but who were employed in Northern Ireland or who perhaps were absent in court because they were attending job interviews or hospital

appointments in Northern Ireland. Overall it was very clear that there is a great deal of cross border movement with many of those living close to the border with Northern Ireland living lives which are partially played out in both jurisdictions. It was noted that UK nationals were normally required to lodge a cash sum before being granted bail and when the court imposed a fine they were directed to pay the fine before leaving the court. They were therefore treated in quite a different manner to defendants resident in Ireland.

African defendants constituted a substantial proportion of foreign defendants in NEC. As Nigerians form one of the largest groups of resident non-nationals in NET this was not unexpected.

Figure 10: Foreign Defendants on Court Lists




Overall the proportion of foreign nationals observed in each location was in excess of the proportion of resident foreign nationals. However, it should be borne in mind that the presence of foreign nationals in SDC and RC was particularly impacted by the high numbers before the court on immigration charges, and indeed if those on immigration charges were excluded in SDC the proportion of foreign nationals would be roughly consistent with the resident foreign population.

## 6.6 'Not Guilty' Pleas

It has been suggested that non-Irish defendants are more likely to plead 'not guilty' than Irish defendants (Riordan 2007). This is of concern to the court because when charges are contested they can take up a considerable amount of court time. The District Court simply would not be able to process the large volume of cases it currently handles without a very high proportion of guilty pleas. Matters listed for hearing in CCC are listed separately and it was therefore an easy matter to establish whether there was a disproportionate number of hearings scheduled in respect of foreign defendants. In fact during the period when fieldwork was conducted 22.7% of hearings scheduled were in respect of foreign defendants in CCC. During the same period 24.5% of defendants listed to appear before CCC were foreign nationals. This finding does not lend support to the contention that foreign defendants are more likely to plead 'not guilty' than Irish defendants. It should be remembered that most of the cases listed for hearing do not proceed because the matter is either struck out or a late guilty plea is entered.

### 6.6.1 Authenticity of Documents

There were occasions when charges were contested by foreign defendants when it seemed that there was little or no prospect that the court would not find the charges proven. A number of instances were observed when foreign defendants charged with using or being in control of a false instrument contested the charges even though they admitted that they had obtained the false instrument, normally a passport or a driving licence, in a manner that had in some way circumvented the official channels. The field note extract set out below provides an example of a foreign defendant who faced a criminal charge after the Romanian driving licence he produced to Gardaí was found to be false.[8] He contested the charge even though he readily admitted that he had not obtained the licence through official channels. He was found guilty.

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[8] He was charged under the provisions of section 26 of the Criminal Justice (Theft and Fraud) Act, 2001

> The defendant told the court that he had gone to a policeman with his driving instructor and his documents and money to get his licence. When asked if it was normal procedure in Romania to get a driving licence from a police officer he answered, 'no, but I wanted to save time'. The prosecution then suggested that by going to a policeman rather than the usual channels for his licence he must have realised that there was a risk that the driving licence was fake. The defendant's reply was, 'no, I'd no reason to believe it was a fake' (FN43).

It is difficult to understand the defendant's claim that he believed the driving licence was an authentic document, and even more difficult to understand why he would continue to contest its authenticity despite evidence to the contrary from documents experts in An Garda Síochána. It seems that while here in Ireland there may be an acceptance that there is only one valid source for important documents like driving licences or passports, in some other societies there may be a belief that one can obtain authentic identity documents through unofficial sources.

### 6.6.2 Trust in Criminal Justice Process

It is possible that sometimes 'not guilty' pleas may be entered because foreign defendants are especially fearful of the penalties that may be imposed by the court if they are found guilty. This may be particularly likely for defendants who come from countries where trust in criminal justice procedures is low. On two occasions observed during the course of the fieldwork African defendants who were found guilty after contesting s.12 immigration charges sank to their knees before the judge when they realised that they were free to leave the court. It may also be that this overt expression of relief and gratitude is expected from a defendant in some societies when the court has shown leniency.

> Mr Odunayo was sentenced to one month's imprisonment in respect of a section 12 charge but as he had already served

> 3 months and 24 days in Cloverhill prison while held on remand in respect of this charge he does not have to serve any further time in prison. Judge DCJ10 said to Mr Odunayo, 'you're free to go'. On hearing this Mr Odunayo sank to the floor on his knees, bowed his head and put his hands together as if in prayer. Judge DCJ10 looked quite startled and uncomfortable by Mr Odunayo's reaction (FN38).

## 6.7 Conclusion

Foreign defendants have greatly contributed to the diversity of District Court defendants, but diversity is not new to the court. The wide range of offences disposed by the District Court ensures that District Court defendants are a heterogeneous aggregation which includes persons from all social classes, and increasingly in recent years, persons of diverse national origins and ethnicity. However, the bulk of defendants, and in particular persistent offenders, both Irish and non-Irish, are young men from a low socio-economic class. Persistent offenders of all nationalities tend to be vulnerable individuals encumbered with a range of social problems such as substance abuse, mental health issues, unemployment and homelessness. The LEP of some persistent foreign defendants adds to their vulnerability.

The age, sex and occupational profile of foreign residents living in Ireland varies significantly by national group and the differences in the demographic profiles of resident national groups suggest that offending rates are likely to vary between national groups. The fieldwork conducted found that offending levels and patterns of offending varied considerably by national group with nationals from EU12 countries and African nationals over-represented and EU13, US and Chinese nationals under-represented among District Court defendants observed. While demographic differences largely account for the variations observed, cultural influences also appear to partially explain the observed pattern of offending. It is also possible that some national groups may be the subject of greater Garda surveillance than others (see European

Union Agency for Fundamental Rights 2009), which may contribute to their presence in the District Court.

Not all foreign defendants are resident in Ireland prior to their arrest and it is not clear if all foreign defendants with an irregular residency status are recorded among the resident population. Comparing the scale of foreign defendants in the District Court to the recorded foreign resident population is therefore problematic. The fieldwork conducted did not find any evidence to support the claim that levels of 'not guilty' pleas are higher amongst non-Irish defendants.

In chapter seven sentencing decisions in the District Court are explored. The chapter details the absence of any presumptive sentencing philosophy or sentencing guidelines and considers issues which impact the sentencing of both Irish and foreign defendants.

# 7 Sentencing in the District Court

## 7.1 Introduction

This chapter is concerned with the principal function carried out by the District Court in the area of criminal law: the sentencing of offenders convicted of minor offences. As the majority of District Court defendants plead guilty judges only have to reach a verdict in a very small proportion of cases. District Court judges, a relatively small group of men and women, have to decide on the appropriate form and severity of punishment for a very large volume of offences. They make these decisions with very little in the way of legislative direction, or information about court-wide sentencing patterns, but subject to the constraints of the limited sentencing power of the court. Courtroom observations are used in this chapter to probe the rationales which guide sentencing decisions and to consider what factors, legal and extra-legal, impact sentences imposed. The sentencing of immigration offences is examined separately in Chapter eight.

In order to understand the sentences imposed on foreign defendants it is necessary to examine the factors which influence all sentencing decisions. The chapter begins by considering the impact of criminal convictions and then examines the objectives that are generally understood to underlie the imposition of criminal sanctions. The international prominence of a 'just deserts' sentencing approach is noted as are the recommendations of the LRC (1996) in this regard. The LRC's emphasis on the importance of consistency in sentencing is contrasted to the reported views of the judiciary on this issue. The chapter outlines the key role played by the District Court in terms of the volume of offenders sentenced and the impact of sentences imposed on the Irish penal population. Sentencing decisions in the District Court are analysed using examples of sentencing decisions reached during courtroom observations. While the sentencing decisions explored relate to foreign defendants, many of the issues discussed have a wider relevance and should help to shed light on sentencing decisions for all offenders convicted of minor offences.

Courtroom observations point to the lack of a coherent court-wide approach to sentencing and the prominence given to previous criminal convictions, a prominence which at times seems inappropriate given the minor nature of the offences before the court. The chapter contends that the relevance of previous convictions for minor offences should be re-examined if proportionality is to be maintained in sentencing decisions.

## 7.2 Impact of Criminal Convictions

The sentencing decisions reached in our criminal courts can have a significant impact on the life of individual offenders, and on victims of crime, while also being of significant import to the wider Irish society. From the perspective of individual offenders a criminal conviction can derail career plans or even result in the loss of employment; it can place limits on foreign travel or plans to emigrate; it can prevent an individual from adopting or fostering a child; it carries a significant social stigma and it can result in any future breaches of the criminal code being penalised more severely. Criminal convictions leave a tarnish that can be life changing, and in Ireland a tarnish which is life long as criminal convictions cannot as yet be expunged (Spent Convictions Group 2009; IPRT 2008).

Convictions which attract custodial sentences are likely to have the greatest impact on the life of individual offenders. Even short custodial sentences can result in a major disruption to an offender's life; not only do they result in a loss of liberty, they may give rise to collateral consequences such as the loss of employment, eviction and loss of personal belongings, and the break-up of relationships. By placing an individual proximate to drug users and drug taking a custodial sentence may even result in a previously drug free individual experimenting with illicit drug use. The impact of a custodial sentence is not limited to those directly affected; it causes ripples of effects amongst prisoners' families and communities (Murray 2006; O'Donnell et al. 2007; Codd 2008).

Unduly lenient sentences may leave victims feeling unsafe, or be contrary to the public interest by undermining public confidence in the fairness and legitimacy of the criminal justice system (LRC 2004). Sentencing those convicted of criminal offences is therefore an onerous task which may be subject to a great deal of public scrutiny and criticism.

## 7.3 How Should We Understand Criminal Sanctions?

There is no unanimity about the purpose of criminal sanctions or indeed their impact on levels of crime or public safety. However, criminal sanctions are generally understood as serving a number of key purposes. These comprise punishment, deterrence, incapacitation, rehabilitation and reparation (DJELR 2010). In some jurisdictions such as England and Wales the purposes of sentencing have been formalised and are set out in legislation.[1] This is not the case in Ireland where in general there has been a marked reluctance to introduce legislation which could be viewed as encroaching on the independence of the judiciary. The rationale which guides sentencing decisions and the relative importance of the various, and at times competing, purposes which criminal sanctions serve may depend on factors relating to the offence and the offender, the penal philosophy of the individual sentencer, and the legislative framework within which sentences are imposed.

Criminal sanctions are now shaped by a legislative framework which extends beyond national boundaries and which seeks to ensure that the human rights of persons within the criminal justice system, and in particular those subject to incarceration, are adequately and appropriately protected. While only the human rights protections offered by the Irish Constitution and the European Convention on Human Rights have direct effect on Irish law, a process of monitoring exists by bodies such as the International Convention on Civil and Political Rights and the Council of Europe which

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1 In England and Wales the purposes of sentencing are set out in the Criminal Justice Act, 2003. The purposes listed include punishment, reduction of crime, rehabilitation, protection of the public and reparation (Roberts 2005).

constitutes a form of non-direct enforcement, and provides avenues of complaint to aggrieved individuals who consider their human rights to have been infringed (DJELR 2010). The authority of the state to impose criminal sanctions is therefore limited, and must be exercised with restraint. This is particularly the case in relation to the use of incarceration.

## 7.4 Sentencing Models and Guidelines

### 7.4.1 'Just Deserts' and Monitoring of Sentencing Practices

Internationally there has been a shift towards a 'just deserts' (Von Hirsch 1993; Von Hirsch & Ashworth 2005; Von Hirsch 2009) model of sentencing which is primarily oriented towards retribution. Such sentencing models seek to assess the severity of an offence based on considerations of harm and culpability with limited adjustment of penal tariffs for aggravating and mitigating factors. A 'just deserts' model of sentencing is consistent with a legal-rational model of justice which focuses chiefly on the offence rather than the offender. Proponents emphasise that punishment must be proportionate to the gravity of the offence. Critics contend that 'just deserts' sentencing models are associated with more punitive sentencing practices and place an unreasonable restraint on judicial discretion. Studies suggest that in some jurisdictions such models can result in a shift of discretion away from the judiciary to the prosecution through plea bargaining practices which can be difficult to monitor or regulate (Tonry 1981; 1982; Remington 1993; Dickey 1993). In the United States, Australia, Canada, England and Wales, Sweden and Finland the sentencing guidelines or reforms which have been introduced have largely been influenced by 'just deserts' principles (LRC 1996).

The introduction of sentencing regulations points to an increased emphasis on procedural rather than substantive justice which may be linked to an escalation in the monitoring of sentencing practices and a concomitant heightened awareness of sentencing disparities. Unduly high levels of sentencing disparities can lead to criticisms of sentencing decisions and their characterisation as whimsical, arbitrary, and even discriminatory. In

modern, complex societies which are culturally diverse and multi-ethnic, members of minority groups often have higher levels of contact with criminal justice processes than the general population, and claims of inconsistency and unfairness in sentencing decisions tend to focus on the treatment of minority group members. Such claims, if uncontested, can ultimately erode perceptions of the legitimacy of the criminal justice system.

Sentencing guidelines which emphasise the offence rather than the offender may make sentencing decisions more transparent, and hence raise perceptions of fairness. However, the increased emphasis on consistency and accountability in sentencing, and the use of actuarial devices such as statistical models to measure individual offenders' risk of re-offending, has led some critics to claim that there is a shift towards a technocratic model of justice which results in judges being deskilled, and sentences being formulaic and homogenised, rather than being devised and scripted on the basis of individual welfare and a substantive notion of justice (Franko-Aas 2005).

### 7.4.2 The Absence of Sentencing Guidelines in Ireland

In Ireland the question of the appropriate sentencing rationale was examined by the LRC (1993, 1996). The members of the Commission were unanimous in their view that any guidelines issued should be on a non-statutory basis. However, the Commission members failed to reach a consensus regarding an approach to sentencing and the views of both the majority and the minority were published in the report issued.

The majority supported a 'just deserts' approach to sentencing which was based primarily on considerations of retribution and involved the assessment of the seriousness of the offence by reference to the harm caused or potentially caused and the degree of culpability of the offender. The approach recommended also allowed for limited recognition of aggravating and mitigating factors. The minority rejected this approach arguing that judicial discretion should be maintained as this provides the

best means of ensuring that sentences imposed take account of both the offence and the individual offender. Given the lack of unanimity amongst the Commission members it is perhaps not surprising that the 'just deserts' policy recommended by the majority has not resulted in sentencing guidelines being issued.

While sentencing guidelines have not been introduced proportionality has in general been endorsed by the Irish courts (O'Malley 2006), and O'Malley claims that, 'Irish courts have shown little inclination to depart from proportionality as the dominant distributive principle of sentencing' (2009:107). It should be noted that the Irish interpretation of proportionality is that a sentence should be proportionate to the gravity of an offence and the personal circumstances of an offender (O'Malley 2009:118). Proportionality need not be incompatible with the aim of rehabilitation, and indeed O'Malley states that wherever possible sentences should be both proportionate and rehabilitative (2006).

#### *7.4.2.1Consistency in sentencing: a realistic aspiration?*

The LRC has stated that it is 'important for the public to perceive that there is consistency in sentencing, and that offenders in similar circumstances who have committed like offences should be sentenced in a like manner. Any public perception that there is inconsistency, or worse, inequality, in the criminal justice system should thus be avoided' (2004:90:6.33). The 'largely unstructured sentencing system' (O'Malley 2006) which operates in Ireland, and the lack of an adequate statistical database about sentencing decisions, make it difficult to promote a public perception of consistency in sentencing. Indeed, one might question whether such a perception would reflect sentencing practices. The LRC, however, believes that sentencing 'is in fact more consistent than its portrayal in the media would suggest' (LRC 1996:4.25).

The Commission's concern with consistency does not seem to be fully shared by the Irish judiciary. The LRC reported that the judiciary indicated in consultations regarding sentencing that judicial inconsistency was 'an

indication of health in the system' (1996:4.23). It would seem therefore that the judiciary may value the ability to tailor sentences according to individual circumstances, and perhaps individual penal philosophies, above the need to preserve public confidence in the criminal justice system.

One means of promoting consistency in sentencing without impinging on the much prized and guarded independence of the judiciary is through a sentencing information system which could provide a range of both quantitative and qualitative information on sentencing practices, key judgements and legislative changes. In preparing the *Report on Sentencing* (1996) the LRC canvassed the judiciary about proposals regarding a sentencing information system. While High Court and Circuit Court judges indicated broad support for such a system, District Court judges were less enthusiastic. The LRC noted that:

> ...the judges of the District Court felt less need for information, firstly because their sentencing jurisdiction was limited and, secondly, because in Dublin at any event they have little difficulty in keeping up with the sentencing norm for different offences. The Commission felt that this was perhaps a very Dublin Metropolitan perspective (LRC 1996:4.22).

This suggests a particular lack of appetite on the part of District Court judges to promote a court-wide approach to sentencing.

A steering committee established to plan for and provide information on sentencing, designated the Irish Sentencing Information System (ISIS), has undertaken a number of pilot projects in various tiers of the criminal courts (see Conroy & Gunning 2009). The information compiled by the ISIS can be accessed at www.isis.ie. The database compiled aims to provide a descriptive information source on sentencing. A pilot project was undertaken in Dublin District Courts in 2009 and a database compiled in relation to 121 cases. The database provides information about the offender

including details of nationality.[2] Although the database is modest in size it is a welcome initiative.

### *7.4.2.2The relevance of previous criminal history*

The role that previous criminal convictions should play in sentencing is a matter of some debate. Some commentators argue that taking account of previous convictions in sentencing is essentially a form of double punishment (Bagaric 2000). However, previous criminal history is considered a legally relevant factor in deciding sentence in most jurisdictions, and most studies indicate that previous criminal history can be a key influence on the form and severity of sentence. Roberts argues that 'considering previous misconduct is an inescapable element of contemporary penality' (2008:228). The key question is perhaps not whether, but to what extent, criminal history should impact sentence.

A 'just deserts' approach to sentencing seeks to ensure that the sentence is proportionate to the gravity of the offence. Such an approach would only allow previous convictions to play a limited role in determining the appropriate sentence. However, in some jurisdictions sentencing guidelines dictate that the severity of punishment is linked to the number of previous convictions. The habitual offender laws or 'three strikes' rule in certain American states provide that a third felony conviction, even if it is in respect of a minor offence, can attract a very lengthy and even at times a life sentence. This can mean that proportionality is entirely jettisoned in favour of punitiveness and incapacitation.

Another way of dealing with criminal history is to rank it in terms of seriousness and then apply progressively harsher penalties to offenders with the worst criminal history. Such an approach is set out in the Federal Sentencing Guidelines in America which grade offences into 43 levels and provide for progressively more severe punishments for offences at each offence level according to the score that the offender's criminal history attracts. Criminal history is then ranked into six categories according to

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2 Offenders are designated as Irish or 'foreign national'.

score. Sentences are therefore determined by both offence gravity and previous criminal history, with significantly harsher punishments being meted out to those with high criminal history scores (United States Sentencing Commission (USSC) 2009).

The treatment of minor criminal convictions in determining sentence is of particular relevance in examining sentencing practices in the Irish District Court.[3] O'Malley notes that Irish statute law provides little guidance on the issue of previous convictions and authoritative direction from the courts is limited (2009:113). Criminal history does not influence the sentence which attaches to the most serious of offences which carry a mandatory life sentence and neither does it impact the sentence for the most minor of offences which are punished by fixed penalty charges (O'Malley 2009). The majority of offences before the courts are subject to maximum rather than fixed penalties, and there is therefore room for judicial discretion in deciding what weight, if any, should be afforded to previous criminal convictions. There are, however, a number of statutory provisions stipulating higher sentences for persons reconvicted of the same offence (O'Malley 2009:112).

The approach adopted by Irish courts corresponds for the most part to a progressive loss of mitigation for previous criminal convictions. This

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[3] The treatment of previous convictions for minor offences in determining sentence varies from jurisdiction to jurisdiction. Under the Federal sentencing guidelines a small number of minor offences are never counted in calculating criminal history and others are only counted in certain circumstances (USSC 2009:379 S.4A1.2(c)). The Criminal Justice Act, 2003 introduced in England and Wales requires courts to treat 'recent and relevant' convictions as aggravating factors. This provision has been criticised by Ashworth, who has linked this requirement to the possible imposition of disproportionately harsh punishments for minor offenders (Ashworth 2005). Ashworth claims that the provisions inappropriately prioritise repetition above seriousness, fail to take account of the role of substance misuse and other social disadvantages, and do not take account of the limited efficacy of harsher sentences as a form of crime control. The Council of Europe's Committee of Ministers on Consistency in Sentencing (adopted on 19th October 1992) recommended that the effect of previous criminal history should depend on the characteristics of the offender's prior criminal convictions, and that when the present offence is minor, or previous offences were minor, the effect of previous criminality should be reduced or nullified (1993:33). This would suggest that very little, if any, recognition should be given by lower tier courts such as the Irish District Court to previous criminal convictions.

approach affords a person without previous convictions a certain amount of mitigation for their previous good behaviour. This mitigation is reduced with increases in the offender's criminal history. O'Malley points out, however, that in certain instances Irish courts have found previous criminal history to be an aggravating factor which effectively increased the gravity of the offence and hence increased the appropriate sentence (2009:115-118).

This outline of sentencing models and guidelines demonstrates that the discretion afforded to the Irish judiciary is significantly more generous than that enjoyed by many of their international counterparts. The importance of District Court sentencing decisions is discussed below before considering the manner in which sentences are reached and the key factors which influence sentences imposed.

## 7.5 District Court Sentences and the Irish Penal Population

As the District Court is the lowest tier of the Irish court hierarchy it might be thought that it does not have a significant impact on the Irish penal population. In fact sentences imposed by the District Court play a major role in shaping the Irish penal population. CS statistics indicate that the District Court imposed terms of imprisonment on 12,411 offenders in 2009 (11,747 in 2008) for the principal offence categories (CS 2010:56; 2009:64). The disposition of offences in the 'other' category is not analysed. This compares to the 2,158 (2,484 in 2008) terms of imprisonment imposed by the Circuit Court in 2009 (CS 2010:55; 2009:63). O'Malley notes the difficulty of calculating how many offenders go to prison on foot of District Court sentences because of the automatic right of appeal to the Circuit Court but concludes that, 'a very considerable number of offenders sentenced to terms of imprisonment by the District Court go to prison' (2010:3).

In 2009 10,865 (8,043 in 2008) persons were committed under sentence to Irish prisons (IPS 2010:19 2009:18) and it seems clear that the majority of

persons committed to Irish prisons are sentenced by the Irish District Court (O'Malley 2010). Therefore, the decisions of District Court judges dictate to a very large extent the flow of persons into the Irish penal population. This is borne out by an examination of the sentence length of persons committed to prison. In 2009 almost 89% (2008: 87%) of persons committed to Irish prisons were committed in respect of a sentence of less than two years. Just under 85% (2008: 80%) were committed in respect of a sentence of less than one year, while 70% (2008: 62%) were committed in respect of a sentence of less than 6 months (IPS 2010:22; 2009:22). So, despite the limited sentencing powers of District Court judges, their sentencing decisions are a key determinant of the Irish penal population.

## 7.6 Discretion without Reflection

Although the decisions made by Irish District Court judges carry great import and are often difficult and onerous, District Court judges normally do not retire to consider their verdicts[4] and pronounce sentence immediately after hearing the 'facts'; the defendant's criminal history if any; and the defence's presentation of mitigating factors. District Court judges usually therefore have little opportunity to reflect before reaching their decisions. A request for a report from the probation services creates a hiatus between conviction and sentencing and also provides judges with an independent assessment of the offender. The rate of referrals to the probation services varied considerably between court locations observed. Referrals were common in NEC, but in SDC and CCC they were considerably less common, and no probation officer was in attendance in RC.

The speed with which many decisions are reached suggests that a lot of decisions are arrived at in a relatively formulaic fashion with judges using an individualised yardstick to measure the seriousness of an offence and to weigh up aggravating and mitigating factors. Individual judges routinely use

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[4] Just one of the judges observed routinely retires before pronouncing sentence. On occasions other judges observed took a short recess before passing sentence or indicated that they would consider matters during the lunch recess.

standard fine amounts, and they also routinely specify a standard number of days imprisonment in default. The 'standard' is, however, an individualised standard rather than a court standard. So Judge X may routinely apply a fine of €100 for offences which are very minor, and routinely specify three days imprisonment in default. Judges Y and Z may, however, routinely apply fines of €200 and €500 respectively for the same offences and specify 7, 10, or even 45 days in default.

The individualised approach adopted by District Court judges can create an impression of an arbitrary system of justice in which outcomes crucially depend on the attitude of the presiding judge. Sentences can appear to be more dependent on who is imposing sentence than the offence that has been committed. The progress of cases may also depend on the presiding judge as defence lawyers may decide to seek adjournments when appearing before a judge considered to be punitive, or alternatively may seek to bring matters to a conclusion when appearing before a judge who is normally lenient.

## 7.7 Overview of Courtroom Observations

During the course of the fieldwork conducted, foreign defendants charged with a wide range of offences were observed in District Court sittings. The most common offences faced by foreign defendants were section 4 and section 6 public order offences; section 4 theft offences; and various RTOs, with drink driving and driving without insurance being particularly common. It was also not unusual to see foreign persons charged with offences such as burglary, criminal damage, assault, possession of a controlled substance, fraud, or being in possession of a false instrument. These charges are also habitually faced by Irish defendants although charges in respect of false instruments were more commonly faced by foreign defendants. Foreign defendants observed also frequently appeared before the District Court charged with an offence under the provisions of s.12(1) of the Immigration

Act, 2004; such charges cannot arise in the case of an Irish defendant.[5] Only one foreign defendant charged with sexual assault was observed, and he successfully contested the charge against him. A number of foreign defendants charged with very serious offences including rape and charges in relation to the importation and possession of illicit drugs for supply or sale were observed in the District Court, but these defendants were sent forward for trial to the Circuit or Central Criminal Courts.

Many defendants appeared before the court with no previous criminal history. Others had what could be described as an intermittent or occasional pattern of offending, having accumulated a small number of convictions at intervals over a period of time. Still others were persistent offenders who had amassed very large numbers of convictions and who frequently had very significant issues around alcohol and or drug abuse. Overall, the fieldwork provided opportunities to observe the sentencing of a comprehensive range of offenders charged with a large and diverse selection of charges.

### 7.7.1 Gravity of Offence

All of the offences dealt with by the District Court are considered minor offences. During the course of the fieldwork persons charged with offences ranging from murder and rape to parking offences appeared before the court. Those charged with serious indictable offences were sent forward for trial by indictment. Normally when the DPP directs that an indictable charge be dealt with summarily, District Court judges accept jurisdiction. However, judges may decide that the gravity of the offence warrants trial by indictment, and they may overrule the directions of the DPP and refuse jurisdiction.

The gravity of the offences dealt with varied in each of the courts observed. The composite case mix of NEC was the least serious. A significant volume of the cases dealt with in NEC were very minor RTOs which would not have

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5 Only a very small number of defendants charged under the provisions of s.12(1) of the Immigration Act, 2004 were observed in NEC.

necessitated a court appearance if the fixed penalty charge had been paid. A considerable portion of persons summonsed to court on such charges did not appear. In such cases the fines imposed were much greater than the fines imposed on those who did appear in court. Fines imposed on foreign nationals in such circumstances may prove particularly difficult to collect as at least some offenders may have left the jurisdiction. SDC, CCC and RC did not deal with very minor RTOs and overall dealt with more serious offences than NEC.

The gravity of an offence is a key determinant of sentence but the assessment of offence gravity varies from judge to judge. Some judges may consider drug offences to be especially serious while others may adopt a more benign view toward the same offences. Even when relatively serious charges are brought and prosecuted with vigour, as in the case set out in the field note extract below, the assessment of gravity will crucially depend on the presiding judge.

> Lech K was represented by a solicitor but was not assisted by an interpreter. He faces a charge of endangerment under s.13 of the Non-Fatal Offences Against the Person Act, 1997.[6] The facts of the case are presented to the court as follows. On 14/03 a shop assistant at the Esso garage on Whiterock[7] Road was threatened by the defendant. Two photographs were presented as exhibits. One showed damage to a sign and the other was a picture of the defendant at a counter in the shop attached to the petrol station. The court was also told that after threatening the shop assistant the defendant went to a petrol pump and put petrol on himself. His solicitor commented 'I think Mr K was under the influence of alcohol at the time of this incident'. Mr K has one previous conviction for a s.4 public order offence.

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6 The charge of endangerment is liable to a maximum term of imprisonment on conviction on indictment of seven years. On summary conviction the maximum term of imprisonment is 12 months and/or a fine of €1,500.

7 Pseudonym.

> His solicitor told the court that his client is Polish and has lived in Ireland for three years. He works as a kitchen porter in a restaurant near St. Stephen's Green and has worked there for 18 months. He admits he has a drink problem and asks for leniency given the very early guilty plea. The sentence imposed by Judge DCJ17 was 2 months imprisonment suspended for 12 months (FN42).

One solicitor expressed the view to the researcher that the critical factor in determining sentence in this case was not the gravity of the offence but the attitude of the presiding judge who he described as 'pathologically disinclined to commit anyone to prison' (FN42).

Proportionality is understood to be the central principle which guides Irish judges. This means that the gravity of the offence should always be a key determinant of sentence, but this may not always be the case in the sentencing of minor offences. For summary offences the absence of the defendant may greatly impact the penalty imposed, and the attitude of the presiding judge may also have a crucial impact on sentence.

### 7.7.2 Guilty Plea

The overwhelming majority of defendants in the District Court plead guilty to the offences they are charged with. Early guilty pleas are normally viewed by the court as a mitigating factor as the defendant's acceptance of his wrongdoing suggests that he is truly contrite and therefore is less likely to re-offend. Early guilty pleas also assist the court by truncating the pre-sentence court process. However, when, as is often the case, guilty pleas are entered when a hearing date has been sought and granted, the mitigation which normally attaches to a guilty plea may be lost. As the field note extract set out below highlights, when a defendant has no previous convictions this can mean the difference between having the charge dismissed under the provisions of the Probation of Offenders Act, 1907 and leaving the court with a criminal conviction.

Matthias Z looked as if he had dressed carefully for his court appearance. When his case was called he removed his rain jacket revealing his neat shirt and tie. This case was in for hearing but Mr Z's solicitor indicated that his client was pleading guilty. The charges faced by Mr Z relate to an incident some months previously when he was drunk in O'Connell Street.[8] He initially left the area when instructed to do so by Gardaí but later returned and became confrontational. A small knife was later found in Mr Z's backpack and in addition to public order charges he is charged with carrying an offensive weapon. The explanation given by Mr Z at the time was that he carried the knife because he felt he needed to have it to protect himself from danger. Mr Z's solicitor noted that his client was very drunk at the time that he gave this explanation. He now claims that he bought some fish and the knife was lent to him by a friend. Following this explanation the judge was obviously as puzzled as I was and said, 'sorry, could you just run that by me again'. The solicitor explained that the knife was to be used to prepare the fish. Judge DCJ11 didn't really seem too convinced by the fish story and said, 'what was said to the Garda at the time seemed to suggest that he was carrying it for protection', but the solicitor again asserted that his client had a valid reason to have the knife.

The solicitor noted that at the time of the incident his client, who had previously been employed, was refused social welfare because of the income of his girlfriend. This caused friction between the couple. The solicitor noted that his client has no previous convictions and that the incident was a 'one-off'. He produced a letter which indicated that Mr Z is now on a FÁS course. Judge DCJ11 indicated that he was going to convict and fine and asked how much Mr Z earns. He was

8 Details have been changed.

> told that Mr Z is in receipt of €204 per week. His solicitor made a last attempt to prevent his client being convicted and said 'I wonder if you would consider giving him the Poor Box?' Judge DCJ11 said 'there was a plea of not guilty...it's put in for hearing'. The solicitor noted that his client had changed his 'not guilty' plea to 'guilty', but DCJ11 was not impressed and said, 'sure isn't that where you come into play Mr O'Sullivan[9]...he's taken up court time.' Mr O'Sullivan replied 'he hasn't taken up much court time Judge'. Judge DCJ11 replied 'he has...the time for a hearing has been allocated'. Judge DCJ11 then ended this debate and announced his sentence which was a conviction and fine of €150 and ordered that the knife be destroyed (FN28).

The extract shows that despite the guilty plea the solicitor tries to construct a credible reason why his client was found with a knife on his person. It seems almost as if he is suggesting that the defendant is actually not guilty of the charge, but is willing to plead guilty. He then tries to cast the defendant's behaviour as being out of character by pointing to tension between him and his girlfriend at the time of the incident. Judge DCJ11's comments seem to suggest that the key factor which influenced his decision to convict and fine rather than apply the Probation Act was the late guilty plea. The extract also reveals that Judge DCJ11 views the late guilty plea as being at least partially attributable to the defence solicitor.

### 7.7.3 Previous Convictions

#### *7.7.3.1No previous convictions*

Observations indicate that previous criminal convictions, and indeed previous forms of sentences imposed, can critically impact sentencing decisions in the District Court. The standard practice in sentencing first offenders is to dismiss the charges or discharge the offender conditionally under the provisions of section 1(1) of the Probation of Offenders Act, 1907.

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[9] Pseudonym.

The application of the Probation Act means that although guilty, the offender will not have a criminal conviction. Judges typically apply the Probation Act saying, 'I find the facts proven, dismissed under the Probation of Offenders Act', or 'D.P.O.A. section 1(1)', or simply 'section 1(1)'. Judges will often then issue some kind of caveat to the offender such as 'don't do anything like that again', or 'remember, I won't be so lenient if you come before me again', or 'keep the peace in future'. Some will despatch the offender saying 'the best of luck to you'.

The legislative provisions and the attitude of the court clearly suggest that the agreed protocol is not to burden most people who commit one offence, subject to its gravity, with a criminal conviction. The courts therefore frequently adopt an assumption that many first offenders will not progress to be troublesome repeat offenders and the requirement for them to appear in court before a judge may be sufficient to deter them from further offending. This assumption is supported by the lower recidivism rates found for first time offenders (O'Donnell et al. 2008).[10]

Defence lawyers will often make it known to the court that their client has 'a sum of money' in court which they are prepared to pay into the Court Poor Box on application of the Probation Act. On occasions such as that set out in the field note extract below, when a judge indicates that a sum of money is to be paid into the Court Poor Box but the defendant does not have the money in court, the judge may stipulate that if an offender fails to pay the Poor Box 'donation' by a stated future date that he be convicted and fined, with the amount of the fine often being higher than the requested Poor Box donation.

> The solicitor for Mr Yuri K told the court that his client is a 30-year-old Georgian[11] national who has been in Ireland for ten years. He has recently found himself unemployed for the first time in his life. He is eligible to apply for citizenship this

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10 The study of recidivism carried out by O'Donnell et al. (2008) examined recidivism rates of persons released from prison and used a prior prison sentence as a proxy for previous criminal history.

11 Details changed.

> year and is anxious about the possible effect a criminal conviction would have on his application. The solicitor concluded by saying, 'I would ask the court to look on it as leniently as possible'. Judge DCJ1 then said 'I do take into account all you say counsel, I do take into account how you have outlined all your client's circumstances, I also take into account your client's plea and his co-operation with the Gardaí. If he makes a €300 donation to Temple Street children's hospital I will apply s.1(1) of the Probation Act. If this amount is not paid by 21/06 I will convict and fine €500.' The defence solicitor then asked that his client be excused attendance in court to pay the contribution to charity and the judge agreed, indicating that a receipt from the court office would be acceptable (FN39).

In some instances, convicted persons who make a contribution to the court Poor Box may have the charges against them struck out (FN51). This is contrary to the recommendations of the LRC (2005).

### *7.7.3.2Offenders with previous convictions*

Sentencing becomes more problematic when an offender has a history of criminal offending. Prior to sentencing, judges ask the prosecution 'any previous?' or 'any previous convictions?' The Court Presenter will then normally first indicate the total tally of previous convictions, if any, before going on to detail individual convictions. If an offender has amassed an unwieldy number of convictions[12] the Court Presenter might use his judgement to shorten the process by saying something like, 'they're mainly RTO's', or 'most of them relate to public order offences', but most judges like to be presented with details of the most recent convictions and sentences imposed, and some will seek a very complete history of convictions. Given the weight afforded to previous convictions in the sentencing process it was surprising that during court sittings observed only

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12 One Irish offender observed had 180 previous convictions.

one instance was recorded when a foreign offender's convictions were entered into evidence in court. During interview, when asked about her experience of foreign criminal convictions, FSC commented as follows:

> it would be quite rare actually to hear them recited, I've heard them certainly brought up and probably in more serious cases, when the case has taken longer to process and the Garda has had the time then to go to the trouble of making more far-reaching enquiries, and has established that the person has overseas convictions. It's rare enough but I have heard them brought up in the District Court.

This comment and observations of court proceedings suggest that the investigation of criminal convictions outside the state may be conducted in a discretionary manner. However, EU legislation directs that member states take account of previous convictions in other member states of the European Union in the course of new criminal proceedings (Council Framework Decision 2008/675/JHA, 24/07/2008). It seems that this requirement may not always be complied with in the prosecution of minor offences.

An episodic pattern of criminal charges may indicate that the offender engages habitually in criminal activity but is often able to avoid detection. Gaps in a criminal history can also emerge during periods of incarceration. If there is a very large hiatus between charges and the new offence is a very minor offence it may be treated as if it is a first offence. In other instances the pattern of charges may mirror the pattern of offending.

Periodic offending may be driven by circumstantial factors. Heavy alcoholic binges or periods of drug abuse may trigger offending behaviour in some people who would otherwise not come into contact with the criminal justice system. Loss of employment or delays in accessing social welfare support can also trigger offending.

If previous criminal convictions relate to minor road traffic infringements they will not usually result in a more severe penal tariff being imposed (unless the defendant faces similar charges), and some judges will treat such an offender as if they have no previous convictions. Previous criminal convictions make it more likely that legal aid will be granted and may also influence the form and severity of the sentence imposed.

> Stefan W, a Polish man, came before the court in relation to theft charges. He was assisted by an interpreter but initially was not represented by a solicitor. Judge DCJ8 spoke slowly and carefully to the interpreter saying, 'this gentleman is charged with stealing a bottle of vodka from Lidl in Whitetown.[13] Is he pleading guilty or not guilty?' The interpreter conferred with the defendant and answered, 'I'm pleading guilty'. Judge DCJ8 then asked the Court Presenter, 'anything previous?' The Court Presenter said 'yes Judge, three previous' and began to detail the previous convictions. Judge DCJ8 interrupted and said, 'all right I'm going to stop you there Sergeant ...Mr Fagan'.[14] So, with a nod from the judge in the direction of Mr Fagan the defendant was assigned legal representation. The case was put back to a second calling with Judge DCJ8 noting that he would allow the man to vacate his guilty plea if he so wished. When the case was recalled Mr Fagan told the court that the defendant 'wishes to progress with his plea of guilty'. The solicitor told the court that all three previous convictions were alcohol-related. The defendant is 39 years of age. He works in a printing company but work is scarce and his hours have been cut. He has problems with alcohol and has no recollection of the incident but he accepts that he stole the vodka. Judge DCJ8 pronounced sentence saying, 'convict and fine...I'll just fine him €20 ...have you €20 on you?' The

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13 Details changed.

14 Pseudonym.

> solicitor consulted with the defendant who did not have any money on him. The judge said 'Ok, seven days to pay'. Legal aid was applied for and granted (FN16).

In this case when the judge realised that the defendant had three previous convictions and that therefore he might be 'at risk' he immediately decided that it was inappropriate to proceed with matters unless the defendant had legal representation. He also made it clear that the guilty plea entered by the defendant before consultation with a solicitor could be vacated. This defendant's offending seems to stem from his misuse of alcohol, which is serious enough for him to have no recollection of events, but not serious enough to prevent him from working. The fine imposed suggests that Judge DCJ8 considered the offence to be petty and he appears to have given little weight to the offender's previous convictions. It also suggests that the defendant was not really at any risk of facing a custodial sentence. The amount of the fine imposed is unusually small and may have been influenced by the recent cut in the offender's income.

In addition to previous criminal history impacting the form and severity of sentence, the extract set out below highlights that a critical matter impacting the form of sentence imposed can be where on the penal ladder the offender has previously reached. Once a custodial sentence, including a suspended sentence, has been imposed judges may feel that their choice of penal tariff is limited.

> Maciej R was called a few minutes before three. He is a tall, heavily built man with tightly cut fair hair and a large, angry-looking scar on his face. He pleaded guilty to s.4 theft charges and his solicitor asked if the judge might hear the facts as his client was anxious to have the matter settled. Judge DCJ16 asked, 'does he have previous?' and was told, 'yes, Judge'. Judge DCJ16 indicated that he would hear the facts. The theft charge relates to goods valued at €10.28. The defendant has five previous convictions including a suspended sentence which has expired. When Judge DCJ16

> heard that the defendant had previously received a suspended sentence he got quite irate and said, 'you didn't tell me he already has a suspended sentence ... he's looking at a custodial sentence next given that he's already got a suspended sentence...what do you think I'm going to do ...go backwards rather than forwards? I have a heavy caseload and it's Friday evening ...you know as well as I do the way the system works ...now if he's ready for a sentence I'll give him one'. The solicitor consulted with his client and said, 'we're seeking a further remand' to which Judge DCJ16 rejoined, 'hopefully I won't be here' (FN37).

Here we see that despite the very minor nature of the offence Judge DCJ16's comments suggest that a critical factor likely to impact sentence in this matter is the suspended sentence previously imposed on the offender. His comments further suggest that a progression up the penal ladder is inevitable for a repeat offender. The phrase 'hopefully I won't be here' suggests that he finds the imposition of custodial sentences onerous and burdensome, and something he would rather avoid. It would seem, therefore, that even if individual judges are oriented towards rehabilitation their decisions will be influenced by the previous decisions of their fellow judges. Hence, a number of judges imposing harsh sentences, or quickly resorting to custodial sentences, can raise the level of custodial sentences imposed by less punitive judges on repeat offenders.

A repeat conviction for a similar offence makes it more probable that a more severe form of punishment will be imposed. It may not result in the imposition of a custodial sentence but judges will often issue a warning to offenders such as, 'she had a previous conviction for a similar offence ...we're getting closer to a custodial sentence' (DCJ16-FN36), if they feel the risk of a custodial sentence has heightened. When the time between a repeat conviction for a similar offence is short it is particularly likely that this will be viewed negatively by the court as it suggests that the previous punishment imposed was not sufficient to deter the offending behaviour,

and it also suggests that there is a lack of a will to reform on the part of the offender.

### *7.7.3.3Persistent offending and proportionality*

Those that persistently offend, particularly if there is an escalation in the seriousness of the offending, may be more likely to have the charges against them dealt with at Circuit rather than District Court level. Persistent offenders dealt with by the District Court usually have engaged in low level offending such as breaches of public order legislation or theft. The persistent offender before the District Court can often be described as a public nuisance rather than a public danger; his offending often stems from alcohol or drug abuse and is often unplanned and impulsive, and therefore more likely to be detected.

In each court location where District Court sittings were observed the researcher quickly came to recognise by name and face the 'local', both Irish and foreign, regular and persistent offenders. While many offenders may only engage in offending behaviour within a limited geographic area, normally close to where they live, others adopt a more peripatetic style of offending. A number of offenders were observed in more than one court location, and one was observed in three of the four courtroom locations where sittings were observed. It was also not unusual to hear references to court appearances in other locations when court dates were being scheduled. It seems likely therefore that many judges will recognise at least some persistent offenders, and will be aware before they ask, 'any previous convictions?' that the defendant has a long history of offending.

Judges in the Dublin Metropolitan Region are moved regularly to different courts so their exposure to the same repeat offenders is reduced. In courts outside Dublin judges may be permanently assigned to a specific location with movable judges being assigned as required to cover for judges absent on leave or due to sickness. This is the case in NEC where the familiarity of the judge with offenders was particularly evident.

At times judges display impatience and frustration dealing with persistent offenders; they may well have sentenced the offender leniently in the past and may express annoyance that the offender has not taken steps to modify their lifestyle. Roberts (2008) notes that a tendency to attribute offending to internal characteristics of the offender rather than external circumstantial factors increases with the rate of offending. So in the mind of a judge the offender may move from being a young man from a dysfunctional family who has developed an unhealthy dependence on alcohol which results in offending behaviour to an unruly drunk or an inveterate thief. This shift in perspective may make the decision to sentence persistent offenders more harshly seem fitting and logical.

However, most persistent offenders observed were vulnerable individuals with chaotic lifestyles characterised frequently by homelessness, drug and alcohol abuse, mental health issues and low levels of education. Their criminal behaviour is inextricably linked to their web of problems, and they may need ongoing assistance in a number of different areas of their lives before they will desist from offending. Persistent offenders with LEP are especially vulnerable, and on a number of occasions judges made comments such as, 'would he not consider going home? He's wandering around here like a lost soul' (FN24:DCJ8). Judges, however, normally react to persistence by imposing more severe penalties.

It was not unusual for a persistent offender to fail to appear in court, thus adding to their already lengthy criminal records. On other occasions one heard that the defendant was absent because he was in another court, in a Garda station, or in prison. One could not help but conclude that the accumulation of a very high tally of criminal convictions, particularly in a short period of time, was usually evidence of rampant substance addiction and/or psychiatric illness in tandem with fragile or absent social support networks, and not indicative of serious or organised criminal activity. Despite this, those who persistently offend typically receive harsher penalties in the District Court. The field note extracts set out below provide some examples of how persistent offenders are sentenced by the District Court.

Andrei K was in custody prior to his court appearance. He looks as if he is aged 40-45, is of slim build and is European in appearance. He was assisted by a Polish interpreter. His solicitor, Ms McCabe,[15] told the court that her client is entering a guilty plea in respect of all charges. The matter was put back to a second calling. It was after lunch before this matter was recalled. The facts were presented by the prosecuting Garda. Mr K is charged with theft and failure to appear. Judge DCJ20 asked, 'any previous convictions?' When he was told 15 previous convictions he said, '15!' as if this was a startlingly high number of convictions. Ms McCabe told the court that her client is a 44-year-old Polish man who has been in Ireland for three years. He hasn't worked for most of his time here and has resided in various hostels in the city centre. He is in the grip of a serious alcohol addiction. Judge DCJ20 said, 'he has learned absolutely nothing from his previous court appearances'. Ms McCabe asked Judge DCJ20 to deal with the matter leniently. Judge DCJ20 said, 'how can I?' Ms McCabe tried to secure some leniency by presenting her client as a redeemable character. She told the court that her client is hoping to get on a FÁS course. Judge DCJ20 asked, 'what has he done to assist himself in the last three years ...has he gone to the AA, to the HSE?' Ms McCabe said any courses have been in relation to learning English. Then, after Mr K conferred with the interpreter who in turn conferred with Ms McCabe, she added, 'I understand he is attending AA meetings'.

Judge DCJ20 sentenced the defendant to two terms of imprisonment. The first term was for two months and the second for seven months, both sentences to run concurrently. The severity of the sentence seemed to result in a sort of stunned silence settling on the court. Ms McCabe

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15 Pseudonym.

> went to the custody cells with the interpreter and Mr K. When the interpreter returned she said, 'seven months, can you believe it?' (FN46).

This extract highlights the expectation of the court that the defendant should be able to take steps himself to improve his life and the judge's impatience that the defendant had not taken measures which he considers he could and should have taken. The appeal for leniency is responded to by Judge DCJ20 saying 'how can I?' which illustrates that the judge feels an obligation to deal with the matter by imposing a harsh sentence. The late assertion by the defendant's solicitor that he is attending AA meetings is not very credible, and the defence solicitor distances herself somewhat from it by saying 'I understand he is attending AA meetings'. The severity of the sentence seems to breach accepted norms and suggests that there are courtroom 'going rates' (Eisenstein & Jacob 1977) or expectations as to the 'worth of the case' (Feeley 1979).

Some judges clearly recognise the need of offenders to receive assistance with rehabilitation but are still mindful of a responsibility to punish the offender. This is illustrated in the extract set out below.

> Grzegorz A has accumulated a large number of charges. Fifteen turns are listed on today's court list but Judge DCJ2 indicates that she has 30 sheets before her. He is represented by both a solicitor and a barrister and assisted by an interpreter. When his solicitor indicates that he wishes to enter pleas in respect of the charges the matter is put back to a second calling. Mr A is recalled at about 1.20pm. The facts are given by the Court Presenter in respect of the bulk of the charges. The majority of the charges are s.4 theft charges and there are a number of s.13 charges which 'speak for themselves'.[16] It appears that Mr A has been stopped after taking goods without paying for them from a

[16] S.13 charges are charges arising out of a defendant's failure to appear in court.

number of shops. Judge DCJ2 reviewed the charge sheets before her and commented aloud on the goods stolen and the shop from which they were taken. In one case the goods stolen included smoked salmon and caviar which brought a smile to Judge DCJ2's face. On a number of occasions Mr A was found in possession of a tinfoil-lined bag and a pair of pliers which indicate that the theft was planned rather than opportunistic.

Mr A has eight previous convictions. The court is told that the defendant is a 32-year-old Lithuanian man who has also lived for a while in the Ukraine. His family are still living in Lithuania. He has had a number of jobs but has been unemployed for some time and fell on hard times and became homeless. With the help of the social welfare services he obtained a place in a hostel but unfortunately then developed an addiction to heroin. His heroin use escalated and his offending was driven by the need to fund his habit. Prior to his arrest he had secured an address in Newtown[17] and had decided to seek medical help for his addiction. His solicitor said, 'he knows he's staring down a barrel of a gun today'. The solicitor reminded the court that the property had been recovered in all cases.

Judge DCJ2 noted that given the number of sheets, and that the defendant was habitually committing offences, the minimum sentence she could impose was five months imprisonment. She noted, however, that the sentences would be concurrent and not consecutive. She also noted that she was requesting that the defendant receive medical treatment for drug addiction. I overheard the solicitor tell the defendant in English, 'you've done very well...if you'd gone back to the Bridewell before Judge X .... (shrugs his

17 A fictitious name has been substituted for this location.

shoulders) you'd be looking at a lot longer of a sentence' (FN58).

In this instance although Judge DCJ2 feels obliged to impose a custodial sentence because of the habitual nature of the offending she does it somewhat reluctantly, and indicates that she is imposing what she considers to be the minimum sentence given all the circumstances. Her request that the defendant receive medical treatment for drug addiction recognises that the defendant's offending behaviour stems at least in part from his drug abuse. However, despite this, there is no suggestion that the custodial sentence can be waived. The defence solicitor clearly assesses the sentence to be as lenient as could be hoped for and points out to the defendant that he would have received a harsher sentence if the matter had been handled by a different judge.

Sometimes those who appear before the court are so vulnerable that punishment and sentencing may be a secondary consideration. The field note extract set out below provides an example of two particularly vulnerable offenders who the court recognised primarily needed assistance rather than punishment.

> Andrzej K and Mantas S were dealt with jointly as co-accused. Both men were in custody prior to their court appearance. Andrzej K is a tall man with grey hair, Mantas S is smaller but heavier in stature and has a shaved head. Both men appeared to be about 50 years old and both looked weather beaten as if they spend a lot of time outdoors. Mantas S had several cuts and abrasions on his face and the area around Andrzej K's left eye was bruised. Both defendants appeared before the court on public order charges. Andrzej K also faces a s.13 charge arising from a failure to appear in court. It was noted in court that both men are Latvian nationals. They were assisted in court by a Russian interpreter and were represented by a solicitor, Mr

Fagan.[18] The s.13 charge was contested on the basis that Mr K was actually in prison on the date that the bench warrant was issued. The matter was put back to a second calling to allow the dates of Mr K's incarceration to be confirmed. When the defendants were recalled it was confirmed that Mr K had been in Mountjoy on the date of the bench warrant and the warrant was cancelled. The men were arrested after they became aggressive and abusive to Gardaí when they were asked to move on (they were apparently sitting under an ATM machine at the time). Both have a very lengthy list of criminal convictions. Andrzej K has 82 previous convictions and Mantas S has 43 previous convictions. Their solicitor told the court that the men have been in Ireland for 4-5 years and the offending behaviour of both men stemmed from their chronic alcohol abuse. He noted, 'if they have money they go to hostels, but mostly they're on the streets'. The court was told that the men do not have any qualifications but did work as labourers at one stage. Judge DCJ11 asked if they had done anything to address their alcohol addiction. Mr Fagan said that Mr K had gone to an AA meeting at one point but as it was in English it was of no value to him. He also noted that in prison the lack of English resulted in the men being left largely on their own. Judge DCJ11 then turned to the probation officer and asked her if Mr K could be visited in prison to try and set up some support structure when he gets out. The judge noted that this would depend on the co-operation of the defendant and asked the defendant if he would be willing to co-operate with the probation services. The defendant indicated that he was willing to co-operate with the probation services. It was agreed that the probation services would prepare reports in respect of both men. The probation officer indicated that normally it would take two weeks to prepare reports on

[18] Pseudonym.

> persons in custody but the reports for these defendants might take a little longer because of the need for an interpreter. Judge DCJ11 commented, 'on purely humane grounds something should be done...if it doesn't work out... (shrugs)... but we should try.' Both men were remanded in custody for one week (FN28).

In the space of the four or five years that these men have lived in Ireland they have amassed a very large number of convictions. They have both received a number of custodial sentences that total to several years but it seems that when committed to prison they have been released on several occasions after only completing a short portion of their sentence. Judge DCJ11 could have imposed sentence immediately, and if he had it seems likely that he would have imposed a custodial sentence. However, he probably anticipated that given the minor nature of their offending these men were likely to secure temporary release from prison and be back on the street within a short time with the same lack of support. By remanding them in custody pending the preparation of a probation report he ensured that they would not be released until the probation report was prepared and therefore created the opportunity for support structures to be put in place, which may help to stop the cycle of re-offending.

## 7.8 Extra-legal Factors that Influence Sentencing

### 7.8.1 Race/Nationality

Internationally a great deal of research has been directed at the impact of race on sentencing decisions (see Hagan 1974; McConville & Baldwin 1982; Hagan & Bumiller 1983; Zatz 1987; Hood & Cordovil 1992; Brown & Hullin 1992; Chiricos & Crawford 1995). The research has been driven by the disproportionate presence of minorities amongst those processed by the criminal justice system and a widespread perception that minorities are unduly targeted and unfairly treated by the criminal justice system. Research results have not been conclusive and suggest that the impact of race on sentencing decisions may depend on a variety of factors including

local area features, gender of offender and victim, and type of crime. The interaction of several variables may also increase the pertinence of race in sentencing decisions (Spohn & Holleran 2000).

Concern about the presence and treatment of minorities within the Irish criminal justice system has previously focused on the Traveller community. In Ireland there is anecdotal evidence to suggest that Irish Travellers have for many years faced a greater likelihood of being involved in the criminal justice system than the general population. Although the inadequacies of our statistical database do not allow us to chart the presence of Irish Travellers within the criminal justice system there is a widespread perception that they are disproportionately represented at all stages of the criminal justice process (see Linehan et al. 2002; Drummond 2006, 2007). Certainly the courtroom observations of this researcher indicate that Travellers are over-represented amongst those who appear before the District Court. It is possible that their presence in the criminal justice system is partially attributable to prejudicial attitudes held by members of the wider community and by some persons working in the criminal justice system.

As has been highlighted already, details of the nationality/race of accused persons are not recorded by the CS. District Court judges use cues such as appearance, level of proficiency in English, accent and name to assess whether or not a defendant is non-Irish. While on most occasions it may be possible to identify foreign defendants in this manner it is often impossible to attribute nationality or indeed race without specific information. One may be able to say that a defendant appears to be foreign, but is he Algerian, Italian, Syrian, Mauritian or perhaps Iraqi? Is the Portuguese speaker from Portugal or Brazil? Similarly a French interpreter may be required for a defendant from the Democratic Republic of Congo or Sierra Leone.

Race and nationality may also intertwine in a variety of ways. No definitive racial image is linked, for example, to Brazilians or South Africans. Judges often ask questions such as, 'where is he from?', 'does he speak English?', 'what language does he speak?', or 'what is his residency status?' Those

who don't ask may make assumptions which may not always be accurate. Information regarding the nationality/residency status and English proficiency of the defendant may be relevant to court processes, or to the substantive charge before the court in the case of an immigration offence, and it seems more appropriate that it should be recorded and made available to judges rather than judges making enquiries in court.

There have been occasions when the reported comments of District Court judges regarding immigrants who appear before them as defendants have been criticised (Lally 2003; Pope 2003; Joint Committee on European Affairs 2009). It would seem therefore that we cannot assume that all judges will consider foreign nationals who appear before them on criminal charges in the same light as they would Irish defendants.

Courtroom observations did not reveal any instances of overtly inappropriate racial or ethnic comments on the part of any persons involved in the courtroom process. Judges were of course aware of the presence of the researcher in court and this may have caused them to temper their remarks in some instances. At times it did seem, however, that some foreign nationals were treated with a degree of impatience which verged on discourtesy; this was particularly the case when defendants with LEP required interpreters. Observations indicate that at times efforts to ensure that foreign defendants with LEP are provided with interpreters are prompted by concerns that the absence of an interpreter might provide grounds for appeal rather than a real concern that fair procedures be applied. On one occasion when a Garda disputed a solicitor's assertion that his client had no English and required an interpreter Judge DCJ9 interjected in an impatient tone and said 'oh look, he'll be off to the European Court of Justice if we go ahead without the interpreter' (FN80).

Solicitors FSA and FSC indicated that they were concerned at times about the attitude of judges towards foreign nationals. FSA pointed to an instance when she felt a foreign national client had been unfairly refused legal aid. She claimed that some judges displayed racist attitudes and commented, 'I see it every day with District Court judges, no question.' FSC, however,

pointed to more subtle differences in the way foreign nationals are treated by the court. She said:

> Well, I think there is a casual kind of disrespect that comes out, where there is no serious attempt to pronounce their name properly for example, where there is a presumption that their English may be better than they're letting on ... I mean I've seen terrible examples of that over the years, there's just a kind of an expectation that it's going to take a bit longer than is convenient sometimes, there is a weariness that sometimes you see the judges approach the case with... it's certainly not true of all of them, and I think it's an easy attitude to slip into but it's not desirable really.

This 'casual disrespect' may not be consciously or actively displayed but it is nevertheless evident at times as the following field note extract shows.

> When Aleksandr S was called his solicitor Mr Kelly[19] told the court, 'he is in the confines of the court, I have spoken to him'. Two separate charges are listed against this defendant. I understood that one of the charges is a drink driving charge. The matter proceeded even though it seemed that the man was not actually in the courtroom. Mr Kelly said, 'my problem with this client is his English is atrocious - I'm having great trouble taking instructions'. Judge DCJ9 said, 'is it his English that's the problem?' and Mr Kelly replied 'well he has other problems, Judge'. Both men seemed to think this exchange was very humorous (FN81).

After this exchange Judge DCJ9 directed that the defendant be provided with an interpreter. In this instance the defendant's LEP was used as a bargaining tool by his solicitor and seemed to provide a source of amusement to both his solicitor and the judge. Even when the defendant is

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19 Pseudonym.

provided with an interpreter an adjournment is sought and it is clear that this was the desired outcome all along.

Casual references to someone having 'atrocious English' may not seem to be a matter for concern but they attest to an attitude which views LEP defendants as being somehow inferior and something of a nuisance. Comments such as these can amount to a subtle form of discrimination and detract from the general respect and courtesy that is normally afforded by the court to defendants. However, we cannot infer that the attitude that gives rise to such comments would necessarily translate into discriminatory sentencing practices.

The Irish District Court now processes defendants from very diverse origins. While it continues to deal with local offences the offenders have become global in character. There is a danger that the sentencing discretion enjoyed by the judges of the District Court could be recast on occasion as discriminatory sentencing practices. The field note extract set out below highlights how such a claim could arise. The defendant in the case was an African woman. Nothing in the proceedings in court suggested that this factor influenced the decision in this case. But the sentence was perceived by courtroom regulars as being harsh, and one cannot rule out the possibility that the offender, or her legal representatives, might consider that race influenced the sentence imposed.

> When Destiny B was called she was not in court. Her solicitor asked for the court's patience as he believed his client to be on her way. The matter was put back to a second calling. Later, when the case was recalled Ms B was present, but with a young child in a pushchair. She initially stood at the back of the court beside her child but moved to the front of the court when indicated to do so by her solicitor. The child had already complained intermittently but when she lost sight of her mother she launched into a full pitched screeching. A male Garda approached the buggy tentatively and the child cried even more ferociously. Reinforcements

arrived in the form of a female Garda who removed child and buggy to the courtroom foyer. This at least muted the sound of the child's cries for those in the courtroom. Judge DCJ6 said, 'the fact that she has brought a baby to court does not in the slightest impress the court'. I wondered if the woman had thought the presence of the child might ensure that the judge would treat her more leniently, or if she simply had no-one she could ask to mind the child for her.

While the rumpus with the baby was taking place the arresting Garda gave evidence that the charge arose out of a burglary[20] and the theft of a suite of furniture. Ms B was observed committing the burglary. Judge DCJ6 clarified with the Garda that the residence was vacant at the time of the burglary. The Garda confirmed that it was, noting that the defendant had moved out of the residence six days prior to the burglary during which time the landlord had changed the locks. When the Garda called to the home of the defendant she admitted the theft and showed him the furniture.

The defence solicitor valiantly ploughed on with the case; he and everyone else in court was aware that the disturbance caused by the baby was irking the judge. He indicated that his client was pleading guilty to the charge, noting that she accepted that her actions were wrong, and then began to present her personal circumstances. He told the court that his client is a 39-year-old Nigerian woman who has lived in Ireland for the last 12 years. She has five children. The solicitor told the court that the furniture was taken from a residence at which the defendant had resided for six years.

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20 Burglary can attract a very lengthy term of imprisonment. S.12 of the Criminal Justice (Theft and Fraud Offences) Act, 2001 provides that a person guilty of burglary on conviction on indictment may be liable to a term of imprisonment of up to 14 years. On summary conviction the maximum term of imprisonment is 12 months.

> He said that there was an issue with a deposit and his client was pursuing this through the PRTB.[21] At this a solicitor from the State Solicitor's office stood up[22] and said that as the defence had raised the issue of the deposit she felt it appropriate to advise the court that the landlord was in court and was prepared to testify about the condition in which the apartment had been left. The defence solicitor looked like he wished he had never mentioned the deposit. Judge DCJ6 did not call the landlord and after establishing that the defendant had no previous convictions he proceeded to pronounce sentence. He noted that the maximum sentence permissible is a 12 month term of imprisonment but in light of the defendant's guilty plea he would reduce this to nine months. There was a slight pause during which I saw that a number of solicitors and Gardaí looked a bit taken aback. Judge DCJ6 then continued to say that the lack of previous criminal convictions warranted a further reduction in the sentence to six months and in light of the mitigating circumstances put before the court he would suspend this sentence for a period of two years. He commented to the defence solicitor 'you might advise your client of the consequences of a suspended sentence' (FN19).

The body language of the courtroom regulars made it clear that this sentence was viewed as being harsh. Judge DCJ6 started at the maximum sentence possible and reduced this to take account of mitigating factors. The circumstances in this case suggest that the maximum penalty might not have been an appropriate departure point for this sentencing decision. The practice of using the maximum allowable penalty as a starting point for sentencing decisions seems likely to result in harsher sentencing decisions than might otherwise be made.

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21 Private Residential Tenancies Board.

22 This intervention was unusual in that the prosecution was handled by the Court Presenter but clearly directions had been sought from the DPP.

While no system can be put in place that will eliminate claims of discrimination, perceptions of discrimination might be avoided if sentences for minorities could be shown to be in line with those for the general population. This would require the collection and reporting of more detailed statistical information about defendants and convicted persons and the sentences imposed by the court. It would also require the monitoring of sentencing decisions of individual judges.

### 7.8.2 Gender

A number of studies have sought to explore the impact of gender on sentencing decisions. Research findings have not been conclusive but offer tentative support for the thesis that female offenders are sentenced more leniently than male offenders. During the course of this research 14.2% of foreign defendants were female. This proportion varied significantly by location with no foreign female defendants in RC and 31.1% in SDC. A large proportion of foreign female defendants in SDC appeared before the court on immigration charges whereas in NEC most foreign female defendants faced charges in respect of RTOs or theft. Foreign female defendants in CCC most commonly appeared before the court on theft charges although many also faced immigration charges. In this court the profile of defendants was especially vulnerable and a small number of foreign female defendants were homeless and/or struggling with substance abuse.

Overall however, foreign female defendants differed from their male counterparts in the type and frequency of their offending behaviour. Observations indicate that foreign male defendants often appear before the District Court on public order offences. This is especially the case for male defendants from EU12 countries. Observations indicate that African and Asian males rarely face public order offences. Foreign female defendants hardly ever appeared before the court on public order charges during the course of the observations conducted. It was also unusual for Irish female defendants to be charged with public order offences. Foreign female defendants also rarely faced charges of assault or criminal damage. The rate of offending of males and females also differed. Most foreign

defendants before the court had no previous convictions but those with a previous criminal history, especially persistent offenders with lengthy criminal histories, were overwhelmingly male.

In summary, the vast majority of foreign female defendants observed appeared before the court on minor offences with little or no previous history of offending. Consequently they were normally dealt with very leniently by the court. Given the differences in offending patterns of foreign male and female offenders it is not possible to conclude that the leniency shown to foreign female defendants was related to their gender. It was noted, however, that the caring responsibilities of female defendants of all nationalities were commonly mentioned in mitigation and it was perhaps therefore easier for the court to view them as persons worthy of leniency than young men with no dependants.

### 7.8.3 Income/Employment Status

A significant proportion of the criminal charges dealt with by the Irish District Court are RTOs. Persons from all socio-economic classes are charged with RTOs. Those charged with other offences are, however, overwhelmingly persons of lower socio-economic class, dependent on social welfare or with low levels of earned income.

Observations indicate that foreign defendants before the District Court are more likely to be in employment, or to have had a recent history of employment, than Irish defendants. Many foreign defendants who were working indicated to the court that they were earning very low weekly wages. It is difficult to assess the accuracy of such representations; defendants may be reluctant to reveal their true earnings if they think they will receive a higher penalty. The weekly wages revealed to the court tended to range from €250-€400 per week. Very occasionally a defendant would indicate that he earned a 'significant' income the amount of which was left ambiguous. A number of those who appeared before the court were asylum applicants in receipt of a weekly allowance of €19.10, or no allowance at all when they were not living in Direct Provision Centres.

Others were described as having no income as they were not in employment and did not qualify for social welfare. Such persons were often said to be relying on the goodwill of friends. When a defendant has no income or a very low level of income, as in the case set out below, a financial penalty may not be considered appropriate by the court.

> The solicitor indicated that his client was pleading guilty and the arresting Garda presented the facts of the case. Mr Gariashvilli was stopped in T K Maxx after he had passed the last point of payment with a bag containing more than €900 worth of goods. The property was recovered. The solicitor told the court that his client is 29 years of age and comes from Chechnya.[23] He is an asylum applicant who has opted to stay with friends rather than in designated refugee accommodation and consequently does not receive the €19.10 payable to asylum seekers in accommodation centres. The solicitor noted that the Chechen community in Dublin are a close-knit community who look after new arrivals as best they can but Mr Gariashvilli was naturally frustrated by his lack of means and inability to work. His solicitor claimed that the crime was motivated by poverty and frustration. He asked that the judge give his client the benefit of the Probation Act. Judge DCJ8 commented, ' I think that €19 is appalling....I've seen highly qualified people who are not allowed to work and end up before me....OK s.1(1)....and I've certified for your interpreter as well' (FN10).

Although the defendant in this case had no previous conviction the value of the goods stolen is not insignificant and therefore the offence may well not have been viewed as 'trivial' warranting dismissal under the provisions of the Probation Act, 1907. Certainly, the defendant could not assume that the Probation Act would be automatically applied. It would seem that the

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23 Details have been changed.

defendant's lack of material means may in this case have been interpreted as 'exceptional circumstances' which did then warrant the dismissal of the charges. However, as the field note extract set out below highlights, a lack of means does not always mean that financial penalties will not be imposed.

> Omar Presensingh is a man I have observed in court on several occasions previously. He is Asian and of slim build and appears to be aged 35-40. Today his solicitor indicates to the court that his client is pleading guilty. This man is charged with two separate charges of theft; the second charge arose about three weeks after the first. His solicitor told the court that he has lived in Ireland for a number of years working as a kitchen porter and studying English. He hasn't worked for six months and the college he was attending has closed down. Judge DCJ20 asked why he had committed the thefts and the solicitor replied that they were committed out of desperation. The man was convicted on both charges and fined €150 in respect of the first offence and €400 in respect of the second offence with seven days imprisonment specified on default for each fine (FN41).

In this instance there can be no expectation that the defendant will be in a position to pay the fines imposed. The defendant has no income and is in receipt of no support from the state and seems to be living precariously, as on each successive court appearance that he was observed his physical appearance was increasingly dishevelled. Effectively the fines imposed will almost certainly translate into a custodial sentence unless this man leaves the jurisdiction.

### 7.8.4 Offences by New Arrivals

In a number of instances when offences were committed within a short time after arrival in Ireland this was treated by the judge as an aggravating factor in deciding on the sentence to be imposed. The rationale for this seems to have been that the short interval between arrival in the country

and offending was indicative of a likely future offending trajectory. In the cases observed suspended sentences were imposed for first offences when one might otherwise have anticipated that the Probation Act would be applied. As the extract set out below shows, the choice of sentence in such matters seemed to be primarily influenced by a desire to send a message to the offender that he would be wiser not to remain in Ireland.

> Marius R was recalled after the solicitor assigned by the court had an opportunity to consult with him with the assistance of an interpreter. At the first calling of this matter an objection to bail was raised by the prosecution as no satisfactory address was available for this defendant who only arrived in the country some days previously. Now the solicitor indicates to the court that his client is pleading guilty. Evidence is given that this man was caught by a Garda stealing a wallet with €180. The defendant is described by his solicitor as a 28-year-old married man with three children. His wife and children are in Romania. He came to Ireland to stay with friends. DCJ11 asks, 'is there some talk about him leaving?' The solicitor looks at the judge rather blankly as the judge notes that the defendant told the arresting Gardaí that he would be returning to Romania shortly. Judge DCJ11 asks again, 'when is he due to leave?' The solicitor then consults with his client and replies, 'he's going to stay about a month'.
>
> Judge DCJ11 indicates that it is of concern to him that this offence occurred within days of Mr R arriving in Ireland. He imposes a three month suspended sentence on the condition that the defendant leave the jurisdiction within four days and stipulates that he is not to return for one year (FN29).

The practice of imposing a custodial sentence suspended on condition that the defendant leave the jurisdiction has been noted elsewhere (Riordan 2007). In this case, given that the defendant was an EU citizen, it is not

clear whether the sentence imposed is in keeping with EU law. This practice is a curious variation on the previous habitual 'banishment' of Irish offenders who were often 'encouraged' to take the boat to England with the alternative being a custodial sentence in Ireland (Russell 1964).

## 7.9 Custodial Sentences and Foreign Nationals

On a number of occasions Irish courts have found that the vulnerability of foreign nationals should be considered a mitigating factor when imposing a custodial sentence. McEvoy's review (2005) of the sentences imposed on persons convicted under the provisions of section 15(a) of the Misuse of Drugs Act, 1977 (as amended) highlights that in certain circumstances the Circuit Court found that a term of imprisonment was more difficult for a foreign national than for an Irish national and this warranted shorter terms of imprisonment being imposed on some offenders. This approach was also adopted in a number of decisions by the Court of Criminal Appeal.[24] McEvoy explains that:

> The rationale behind this approach is that a foreign national (1) is separated from family and friends and would not have the benefit of visits and other contacts that an Irish prisoner might have, (2) may have socialisation difficulties where, for example, he cannot speak English which might prevent him communicating with other prisoners, (3) may encounter various cultural difficulties in custody (for example difficulties with the food, religious practices, racism and so on) (2005:5).

McEvoy's review makes it clear that custodial sentences are not considered to be particularly burdensome for all foreign nationals, especially those who are well educated and reasonably able to communicate, and that the

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[24] These were the decisions in *People (DPP) v. W.B.* (CCA, 21/12/1994, O'Flaherty, Keane and Carney JJ), and *People (DPP) v. A.C.* (CCA, 17/11/1997, Barron, Laffoy and O'Donovan JJ (see McEvoy 2005:5).

relevance of a person's status as a foreign national will therefore depend on the particular circumstances of each case. It is perhaps surprising that during the course of the District Court sittings observed, although many foreign nationals received custodial sentences, no judge indicated that they had considered the person's status as a foreign national as a mitigating factor. Mitigation statements by defence lawyers frequently made references to the foreign nationality of defendants. The court was often told 'my client has lived here for three years and is from Poland', or 'my client is an asylum applicant and is from Zimbabwe'. However, such statements never made explicit reference to a custodial sentence being potentially more onerous for their client than for an Irish national.

## 7.10 Conclusion

This chapter has pointed to the limited constraints on judicial discretion in Ireland and the absence of sentencing guidelines, either descriptive or prescriptive. The chapter has noted that proportionality is understood to be the dominant rationale which guides the sentencing decisions of Irish judges. Efforts to establish an Irish sentencing information system have been noted, but as yet the information compiled has been very limited. In the District Court the girth of discretion afforded to judges, combined with the absence of court transcripts or audio recordings, very limited statistics about sentencing patterns, and no requirement for judges to provide reasons when imposing a custodial sentence, results in the sentencing decisions of the court having a somewhat impenetrable quality. In this chapter courtroom observations were used to probe sentencing decisions of District Court judges and to consider the factors which influence them.

All of the offences dealt with by the District Court are minor offences.[25] The maximum term of imprisonment which can be imposed for a minor offence

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[25] Minor offences are offences which attract not more than one year's imprisonment and/or a fine of €3,000. However, the LRC (2003) exhorted District Court judges to reconceptualise the maximum penalty for minor offences. They considered that a more appropriate maximum penalty for minor offences is six months imprisonment. Article 38.2 of the Irish

is 12 months, although the District Court can impose a period of imprisonment up to 24 months for multiple offences. Despite the limited sentencing powers of the District Court it is responsible for the majority of committals to Irish prisons. In 2008 a term of imprisonment was imposed by the District Court in 13% of all cases not dismissed (DJELR 2010). As all the cases dealt with by the District Court are minor one must question whether imprisonment is truly being used as a punishment of last resort.

The offences dealt with by the District Court range in gravity from petty offences, which only attract a financial penalty, to offences which, if tried by indictment, could potentially attract lengthy custodial sentences. Non-custodial sentencing options other than financial penalties are limited and observations indicate that they are only used for a small proportion of offenders. Proportionality in sentencing requires that the gravity of the offence is a key determinant of the sentence imposed. While some guidance on the gravity of an offence can be gleaned from the maximum sentence which is stipulated by legislation, by and large District Court judges have to assess the gravity of offences using personal indices which measure harm and culpability. Gravity is therefore not an objective, externally measurable characteristic but a dimension which is subjectively evaluated. Inevitably, as such indices of gravity will vary from judge to judge, this means that sentences are very much dependent on the individual presiding judge. Inconsistency in the sentencing decisions of District Court judges and the awareness of this inconsistency amongst courtroom regulars are highlighted in the chapter.

The issue of previous criminal convictions is addressed in this chapter. It is noted that foreign criminal convictions are rarely presented to the court. Overall, previous criminal convictions are shown to have a profound influence on the sentences imposed for minor offences. This influence is contrary to the recommendations of the Council of Europe (1993) and at times threatens the proportionality of sentences.

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Constitution states: "Minor offences may be tried by courts of summary jurisdiction."

The chapter explores the impact of a number of extra-legal factors. Observations indicate that familial responsibilities were more likely to be recited as mitigating factors for female defendants, but the different offending pattern of females made it impossible to reach any conclusion regarding the impact of gender. Some, but not all, judges took account of the very low income levels of some foreign defendants. Observations indicate that criminal offending by newly arrived foreign nationals is treated by some judges as an aggravating factor in imposing sentence. Although Circuit Court decisions have alluded to the greater penalty that certain vulnerable foreign nationals may face when serving custodial sentences no evidence was found that this factor was taken into account by District Court judges. While there was no evidence of overt discrimination in the treatment of foreign nationals by the court, at times a certain amount of impatience and disrespect was displayed. Inconsistencies in sentencing patterns can create a perception that sentences are influenced by the race/nationality of the defendant. Without court-wide robust statistics regarding sentencing patterns such claims cannot be easily refuted.

We entrust the onerous task of criminal sentencing to our judges. We can expect our judges to carry out this task responsibly and diligently, but we should not assume that they will have extraordinary levels of wisdom or benevolence. At present District Court judges are expected to make sentencing decisions with little or no time for reflection, and with little or no support or guidance. It is expected that judges will very quickly be able to assess the gravity of an offence; will be able to take account of an offender's criminal history, and fairly assess the personal circumstances as presented; and then without hesitation pronounce a sentence which takes all these factors into account. Current arrangements ignore the possibility that judges may be influenced by 'situational' factors such as a very busy caseload; a noisy and crowded court; the demeanour of an offender; a personal friendship/dislike for an individual Garda or defence lawyer; or even a crying child.

Despite the LRC's assertion regarding the importance of consistency in sentencing, the current arrangements suggest that consistency in the

sentencing of minor offences is not promoted or valued. This seems regrettable. A mechanistic, technocratic, grid-determined sentencing approach is not advocated, but a more appropriate balance between affording judicial discretion and endorsing consistency in sentencing is surely possible.

In chapter eight immigration offences disposed of by the District Court are considered. The chapter addresses a range of issues including the criminalisation of breaches of immigration legislation, the scale of offences, the circumstances in which offences arise and the origins and treatment of those accused of immigration offences.

# 8 Immigration Offences

## 8.1 Introduction

Immigration legislation is, for the most part, introduced to regulate the movement and right to work of non-citizens. When immigration legislation provides for criminal sanctions the immigrant population is more likely to have greater contact than the native population with the criminal justice system. Immigrants are more likely to be stopped by the police, to appear in court on charges and to be detained in prisons if immigration breaches are subject to criminal sanctions. Some breaches of immigration legislation in Ireland are punished by criminal sanctions. As this chapter shows, criminalising breaches of immigration legislation can result in the differential policing of the immigrant population. This may corrode social cohesion and efforts to integrate immigrants into the wider community. It also results in the detention of irregular immigrants, in prison which in the Irish context adds to overcrowding in prisons, and may create an impression in the wider community that criminality is more widespread amongst the immigrant population.[1]

The chapter begins by considering the different issues which modern states have to consider in formulating immigration policies and the impact of EU enlargement on migration patterns. It notes the lack of unanimity within the EU about sanctions for breaches of immigration legislation, and provides details of the various alternative approaches adopted. Irish immigration legislation is detailed and the importance of section 12 of the Immigration Act, 2004 is highlighted.

The chapter draws on courtroom observations to highlight the variety of circumstances in which immigration offences are detected. The chapter also points out that pre-trial detention is a routine feature of immigration charges, and at times the period of pre-trial detention can be extensive. The attitude of judges to those before the court on immigration charges is

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1 The term 'irregular' is used in preference to 'illegal' in relation to migrants who are in breach of immigration legislation. The use of terminology relating to the status of migrants is discussed in Koser (2005:4-6) .

explored, and the use of immigration legislation in relation to the Roma population and those claiming asylum is also considered. Procedures in relation to persons detained under the provisions of s.9(8) of the Refugee Act, 1996 are also outlined.

## 8.2 Policy Challenges Posed by Immigration

Modern states must grapple with a number of complex, and at times competing, issues when it comes to immigration and border controls. Considerations of national security, national identity, supranational agreements and allegiances, human rights, and economic imperatives, all impact on immigration policies, and the type of measures used to deal with irregular immigrants detected at points of entry to the state, and within the state. While robust border controls are imbued with symbolic value, the borders of modern liberal democracies are in practice porous and the state's ability to control who moves in and out of its borders is limited.

Border controls are used as a means of preserving national security and controlling access to states. The state exercises its sovereignty by allowing or refusing access to its territories. An individual's nationality has a major influence on how easily he can embark on international travel. States may require citizens of certain countries to apply for a visa before granting them access to their territories and may waive visa requirements in respect of citizens of other countries. Therefore, an individual's freedom to travel outside his country of origin may be constrained because of inter-governmental issues rather than individual characteristics. Citizens of countries in conflict and without a recognised government may have no legitimate means of travelling outside the boundaries of their state.

Border security measures and immigration policies are also shaped by economic considerations. The significance of revenues from overseas tourists mean that immigration controls cannot be so stringent as to unduly discourage short-term visitors. They must be also flexible enough to accommodate foreign students, investors, and business travellers, as all of

these visitors provide a positive stimulus to the domestic economy. Some immigration may also be needed to meet labour shortages in the domestic economy. Immigration policies therefore have to balance a number of often competing objectives and, perhaps not surprisingly, are often the subject of criticism and debate.

### 8.2.1 Immigration in an Enlarged EU

The commitment of EU member states to the free movement of EU citizens[2] (and their family members of any nationality) within the EU has meant that border controls at EU states differentiate between EU and non-EU citizens, and controls are primarily directed towards non-EU citizens. Within the 'Schengen' area[3] internal border controls have been removed and freedom of movement is a reality for most EU citizens.

The EU objective of creating an area of 'freedom, security and justice'[4] has been criticised by some commentators who claim that it will contribute to the creation of 'Fortress Europe', and make the borders of the EU almost impenetrable to immigrants and asylum seekers from non-EU countries. The substantial enlargement of the EU in 2004, and the further enlargement in 2007, has provided an impetus for movement between East and West in the European continent (Alscher 2005). Migration from EU accession states accounted for the biggest source of inward migration to Ireland between 2005 and 2008 (CSO 2009) although the pattern of inward migration reversed in 2009 (CSO 2009, 2010b).

As intra-EU migration has increased, efforts to curb migration by third-country nationals[5] have been introduced. Within the EU tougher asylum

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2 The exclusion of EU citizens may only be justified on the basis of public policy, public security or public health.

3 All EU countries with the exception of Ireland and the UK are parties to the Schengen treaty (see Menz 2009:40-1). Norway, Switzerland and Iceland are also Schengen countries. Third-country nationals can obtain a Schengen visa which allows them to travel within the Schengen area. Passports or national ID cards may still be required for air travel and for hotels.

4 As set out in the Treaty of Amsterdam, 1997.

5 The EU commission defines a third-country as any non-EU country (see

policies (Lavenex 1999; Hatton 2005), and the introduction of measures to secure the co-operation of sending and transit countries (Boswell 2003; Alscher 2005), are linked to a substantial fall in asylum applications. In 2006 asylum applications to EU27 countries were only half the level they were in 2001. Since 2006, however, the downward trend in applications has reversed (Eurostat Undated; Eurostat 2009).[6] EU expansion has also been associated with restrictions on employment opportunities for non-EU citizens.

In Ireland, as in the wider EU (see Table 3, Chapter two), asylum applications have declined in recent years, but unlike the composite EU27 asylum application trend there has been no recent increase in applications. First time asylum applications peaked in 2002, and after an initial rapid decline they have steadily decreased since then. This pattern is generally attributed to a number of key policy changes which are discussed more fully in chapter two. The principal change was the change in citizenship rights introduced by a constitutional amendment in 2004 which removed an automatic right to citizenship to children born in Ireland (Garner 2007). Provisions making carriers liable for transporting unauthorised migrants, and the implementation of a 'safe country of origin' concept whereby applicants from countries designated as 'safe' are *prima facie* presumed not to be in need of protection (Ruhs & Quinn 2009), are also associated with a decline in asylum applicants. Increased restrictions on the right of asylum applicants to social welfare support and the use of Direct Provision Centres (FLAC 2010; Ugba 2007), and the policy of fingerprinting resident non-EEA nationals (Ring 2008), have also been associated with a decline in asylum applications. Despite this decline, asylum applications in Ireland remain substantially above the EU average (Cahill 2009).

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http:// www.europa.eu/abc/eurojargon/index_en.htm ). A third country national is a non-EU citizen.

6 In 2001 asylum applications to EU27 countries totalled 424,180. In 2006 the total had fallen to 197,410. In 2007 total asylum applications were 222,635 and the indications are that this figure increased in 2008. The vast majority of applications are made to EU15 countries (Juchno 2007).

While the Irish government opened its labour markets to EU10 nationals in 2004 it also introduced restrictions on occupations eligible for work permits, thus limiting job opportunities for non-EEA nationals (see Employment Permits Act, 2003; 2006). The thrust of the policy changes introduced has been to restrict employment opportunities for non-EEA nationals to highly skilled individuals. A significant reduction in the number of work permits issued and renewed has been observable since 2003 (Ruhs & Quinn 2009). The effect of efforts to reduce asylum applications and to make the asylum process less attractive, and reductions in employment opportunities for non-EEA nationals, is unclear. It is possible that reduced access for non-EEA nationals through regular immigration channels may have increased levels of irregular migration.

### 8.2.2 Sanctions for Breaches of Immigration Legislation

Despite common EU policies on many aspects of border and immigration control (see EC 2006) there is no unanimity amongst EU member states regarding the appropriate form or severity of sanctions which should be imposed on irregular immigrants. EU legislation requires member states to apply criminal penalties to persons involved in smuggling, trafficking or, in serious cases, employing third-country nationals with irregular immigration status. EU law does not oblige member states to provide criminal penalties in relation to third-country nationals who enter or stay in the country in contravention of immigration regulations (EMN 2009).

Many argue that such breaches should be viewed as administrative offences sanctioned by fine. Others consider that the importance attaching to immigration and border control warrants the criminalisation of irregular immigration. In countries such as the Netherlands, Bulgaria, Hungary, Portugal, Slovenia and Spain, breaches of immigration legislation by third-country nationals are not criminalised (EMN 2009). In Finland irregular immigrants from third countries are subject to a criminal sanction but punishment is limited to a fine. In Latvia criminal penalties are reserved for those who repeatedly illegally cross the national border (EMN 2009). In other countries such as the UK, Luxembourg, Poland and Ireland, criminal

sanctions, including terms of imprisonment, may be imposed on irregular immigrants.

#### *8.2.2.1Concerns about criminalising irregular immigration*

The practice of criminalising irregular immigration contravenes the stance of the Council of Europe Commissioner for Human Rights (COECHR) who has stated that 'criminalisation is a disproportionate measure which exceeds a state's legitimate interest in controlling its borders' (Hammerberg 2008). The COECHR also notes that 'the adoption of criminal laws establishing offences which can only be committed by or in respect of foreigners presents important challenges for human rights norms' (COECHR 2010:6-7). The Commission is especially concerned about the effect of the criminalisation of breaches of immigration legislation on asylum seekers and contends that 'governments appear to have invested too much political capital in "being tough" on asylum seekers' (COECHR 2010:20).

## 8.3 Irish Immigration Legislation and Immigration Offences

Current Irish immigration legislation is set out in an array of Acts including Aliens Act, 1935; Aliens Order, 1946 (as amended); Refugee Act, 1996 (as amended); Immigration Act, 1999; Illegal Immigrants (Trafficking) Act, 2000; Immigration Act, 2003; Employment Permits Act, 2003; Immigration Act, 2004; and Employment Permits Act, 2006 (Becker 2008). The primary focus of these acts are persons who are not citizens of Ireland who are variously described as 'aliens' and 'non-nationals'. Offences under the Acts arise from the failure to present to an immigration officer; the failure to possess a visa; the failure to report to the relevant immigration registration office; the failure to produce documentation or to provide information; the failure to leave the state; and the breach of conditions of a permission to enter and be in the state. In addition, offences may arise from landing at unapproved ports, or the unauthorised engagement in a business profession or employment (Becker 2008). The Immigration Residence and Protection

Bill, 2008 was withdrawn in 2010 after hundreds of amendments were scheduled (O'Halloran 2010). A new Bill, the Immigration Residence and Protection Bill 2010 was published in July 2010.

Courtroom observations indicate that the overwhelming majority of those charged with breaches of immigration legislation in the Irish District Court are charged under the provisions of s.12 of the Immigration Act, 2004. This provides that:

> (1) every non-national shall produce on demand, unless he or she gives a satisfactory explanation of the circumstances which prevent him or her from so doing, (a) a valid passport or other equivalent document, issued by or on behalf of an authority recognised by the government which establishes his or her identity and nationality, and (b) in case he or she is registered or deemed to be registered under this Act, his or her registration certificate.
> (2) a non-national who contravenes this section shall be guilty of an offence.

'On demand' means on demand made at any time by any immigration officer, or a member of An Garda Síochána. A person found to be in breach of this legislation may be arrested without warrant, and on summary conviction may be liable to a maximum fine of €3,000 and or a maximum term of imprisonment of 12 months. The provisions of section 12 apply to all non-Irish nationals including EU citizens.

### 8.3.1 Variation in Incidence of Immigration Offences Observed

The scale and pattern of immigration offences varied very significantly in each of the four court locations observed. Immigration offences were very rare in NEC. It had been anticipated that the proximity of NET to the border

with Northern Ireland would result in irregular immigrants being detected and charged, but this was not found to be the case.

In SDC immigration charges were common. In the majority of instances the charges arose after a foreign national was arrested and detained at Dublin airport. It seemed that such persons almost invariably made an application for asylum as the practice of defence lawyers was to inform the court that an asylum application had been made. The stated policy of the Garda National Immigration Bureau (GNIB) is to facilitate asylum seekers and it may be that many, and perhaps most, of those who claim asylum at a point of entry to the state are not arrested but are directed to the Office of the Refugee Applications Commissioner (ORAC). It was not always apparent why the decision had been made by a GNIB officer to arrest persons observed in court under the provisions of s.12 of the Immigration Act, 2004. It seems that the decision to charge irregular immigrants who present at ports of entry may crucially depend on the attitude of individual GNIB officers, and on such factors as the timing of asylum applications, and the discovery of false documents.

In CCC immigration charges were also not uncommon but there was far greater diversity in the type of situations which gave rise to such charges. In RC the proportion of foreign nationals before the court on immigration charges was very high and charges had arisen in a wide variety of situations. This was the only court where persons detained under the provisions of s.9(8) of the Refugee Act, 1996 were observed.

Observations highlighted that while breaches of immigration legislation may be detected at a point of entry to the state it is also not unusual for such breaches to come to light during the course of routine Garda work. Those charged with immigration offences may never have lived in Ireland or may have lived here for some time. Some of those charged may have entered the state with all required documentation but over time their status may have changed and they may have become irregular immigrants. It is clear therefore that our border controls do not eliminate irregular immigration. It

is not possible to accurately calculate the presence of irregular migrants living in Ireland (Migrant Rights Centre of Ireland (MRCI) 2007).

### 8.3.2 The Process is the Punishment

Courtroom observations indicate that many judges understand the process of charging foreign nationals under the provisions of s.12 of the Immigration Act, 2004 to be a tool used by Gardaí to allow them to detain persons until they can satisfactorily establish their identity, rather than an ordinary criminal charge which requires censure. Persons charged under these provisions are therefore by and large punished by the process of being detained until they can produce a passport or 'an equivalent document', rather than by the sentence imposed by the court. During interview solicitor FSC expressed frustration at the efforts required to produce documentation for clients in custody on section 12 charges and summed up the process as follows: 'It's a saga while we try and get [ID] for them ...and the case goes away when we get it for them...it's really all about nothing in my view'.

In the majority of cases observed those charged with offences under this legislation had the charges dismissed under the provisions of the Probation Act. A small number were bound to the peace for a period of time and others had the charges struck out when their identity was established. However, it was the practice of one judge observed to routinely impose a custodial sentence in respect of section 12 charges.

It can be difficult to construct an effective defence to section12 charges and a 'not guilty' plea may carry a risk of attracting a higher penalty. Observations indicate that most of those charged plead guilty. However, as explained in detail below, the provisions of section 12 have been challenged both in the District Court and by judicial review.

*8.3.2.1The process*

The accepted protocol for handling section 12 charges seems to be that no application for bail is made and no plea is entered until some progress has been made in establishing the identity of the defendant. Court appearances in 'ID matters' tend to be perfunctory and last a matter of seconds rather than minutes. Typically the defendant is produced and provided with an interpreter if necessary, and normally is granted or already has legal representation. The Court Presenter may indicate that, 'it's an identity matter judge', or 'ID is still an issue', and the defence will simply seek another adjournment noting something like, 'at this stage no meaningful application can be made', or 'we haven't got ID papers as yet'. Normally the matter will be adjourned for two weeks, with leave to apply for an earlier court appearance. Occasionally the defence will secure a one week adjournment if they indicate that 'documents are on their way', or have already been submitted to the Gardaí. Such court appearances are usually very brief and interpreters often have little or no chance to translate what has been said to the defendants.

The process of obtaining a passport or satisfying the GNIB by some other means as to the identity of an individual can take several weeks or even months. This can mean lengthy periods of pre-trial detention for defendants charged under the provisions of section 12.

Some judges will allow defendants to plead guilty to such charges when they have begun the process of establishing their identity. Some will even almost invite defendants in custody to plead guilty. Judge DCJ3 commented regarding a man held on remand for two months for a minor theft and a s.12 charge, 'even if he were to plead guilty today he's likely to be as free as the birds in five minutes' (FN67). The man immediately entered a guilty plea and was sentenced in relation to the theft charge to a period of imprisonment equal to the period he had already been detained (which was 63 days), and a peace bond was imposed for 12 months in relation to the s.12 charge conditional on his supplying satisfactory ID within two weeks and co-operating with ORAC in processing his asylum application (FN67).

Other judges will accept a guilty plea noting that the defendant is entitled to plead guilty.

Other judges, however, will simply not accept a guilty plea until such time as the Gardaí indicate that the defendant's identity has been satisfactorily verified. In one instance observed when a solicitor indicated that her client, who was in custody, wished to enter a guilty plea to a section 12 charge, Judge DCJ5 said, 'identity is still an issue Ms McColgan,[7] I can't convict him' (FN57). A lengthy exchange followed, the flavour of which can be gleaned from the following field note extract.

> Ms McColgan argued at some length that her client has engaged with the asylum process and that he cannot produce documents he does not have. She claimed that it is not acceptable simply for the state to say that identity is still an issue; the onus must be on it to verify the defendant's identity. She said, 'we say who we are and the state are saying we're not who we are. He's saying he has identified himself as best he can, and it is the state's job to establish if he is someone else'. Judge DCJ5 said with an air of exasperation, 'Ms McColgan, he is charged with a criminal offence'. Judge DCJ5 clearly felt that there should be no question of progressing the matter when identity was still subject to verification, and the defendant was unable to produce an 'equivalent document'. Ms McColgan repeated that her client could not produce what he did not have and Judge DCJ5 suggested rather extraordinarily that he would therefore have to continue in detention, for life if necessary (FN57)!

Exchanges went on in this vein for some time with Judge DCJ5's determination not to convict the defendant hardening when he learned that the man had previously been refused asylum, and that deportation

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7 Pseudonym.

proceedings were ongoing. He became a little exasperated at one point and said, 'it's quite conceivable he's from Kerry Ms McColgan' to which Ms McColgan simply replied, 'yes, Judge'. Matters concluded as follows.

> Judge DCJ5 said, 'he is obliged to produce a passport or an equivalent document'. Ms McColgan rejoined, 'if he can Judge', to which Judge DCJ5 retorted, 'no, there's no if he can'. At this point Judge DCJ5 decided to wrap up matters and announced that he was remanding the defendant for two further weeks. Ms McColgan asked, 'would you consider marking that peremptory against the state Judge?' and Judge DCJ5 retorted, 'no, I would consider marking it peremptory against you though!'

However, Judge DCJ7, in dealing with a young Somali man whose identity had not been established, accepted a plea of guilty after the barrister representing this man told the court that as Ireland has no diplomatic ties with the government in Somalia, and indeed for all intents and purposes there is no government in Somalia, the defendant has no prospect of being in a position to furnish the state with ID documents. The arresting Garda pointed out that the man had been able to source documents to travel half way around the world, and that as there are no direct routes from Africa to Ireland he must have travelled through at least one other EU state prior to his arrival in Ireland. The case concluded as follows.

> The barrister put forward the view that as her client was pleading guilty to the charge he could not be remanded in custody solely on the basis of identity concerns except for sentencing. The arresting Garda pointed out that if released the man would still be in breach of Irish law (because of his lack of a passport/ID) and he would be liable to arrest again and again. Judge DCJ7 indicated that he was proceeding to sentence.

> In mitigation the court was told that the defendant is 19 years of age and his only living relative is his mother, as his father, brother and two sisters were killed in the hostilities in Somalia. He has been unable to make telephone contact with his mother since his arrival in the state. His barrister claimed that he is not here to frustrate the system and he simply is not in a position to produce documents. Judge DCJ7 interjected and said, 'he also knew what he was doing'. The barrister reiterated her position saying, 'he wasn't coming here to beat the system, he came here to seek refuge'. Judge DCJ7 imposed a three month sentence suspended for four months and also directed that the defendant enter into a peace bond for 24 months. Turning to the prosecuting Garda from the GNIB he said, 'he has to be given the opportunity to get to ORAC', and the Garda replied 'oh of course...I'm not going to be hiding outside in the bushes' (FN55).

This sentence was a departure from Judge DCJ7's observed practice of imposing a peace bond on persons convicted under the provisions of section 12 of the Immigration Act, 2004. It could be interpreted as a penalty for effectively forcing the court to accept a guilty plea before the state was able to satisfactorily verify the identity of the defendant. Judge DCJ7's direction to the Garda that the defendant be given the opportunity to process his asylum application is made in recognition that the defendant will continue to be unable to comply with the requirements of section 12 of the Immigration Act, 2004 and is therefore liable to re-arrest.

### *8.3.2.2Lack of co-operation may extend period of detention*

At times the actions of defendants hamper efforts to establish their identity and may lengthen the period of their detention (see Fallon 2008). Some of those arrested at the airport may be reluctant to reveal any information, such as the route by which they arrived into Ireland. This will mean that it

may prove impossible to identify their luggage which may contain documents which would allow them to establish their identity.

> Adam Badmus was called and was produced from the custody area of the courthouse. A Garda from the GNIB told the court that a French interpreter was required. None was in court although the Garda told Judge DCJ6 that one had been requested. The matter was put back to a second calling. When the case was recalled the interpreter was in court. The GNIB officer told the court that the defendant had been arrested at Dublin airport on the previous day. The defendant is apparently from Togo, although there is some doubt about this as the official language of Togo is French, and this man doesn't seem able to speak French. The judge asked the interpreter if the defendant understood French. The interpreter spoke to the defendant and replied, 'he indicates he understands but he can't express himself well in French'. The judge said rather acerbically, 'there will be time for expression later'. Up until this point this man had no legal representation.[8] Judge DCJ6 asked, 'does this gentleman want me to assign him a lawyer?' The defendant indicated that he did wish to have a lawyer. A solicitor was assigned and the matter was put back to allow the solicitor to confer with his client. When the case was recalled the defence solicitor said, 'I don't think we can do anything today...we're not able to progress anything today'. The solicitor indicated that his client may have some means of identification in his luggage and asked if this was in the possession of the Gardaí. The GNIB officer looked a bit exasperated as she explained that the defendant hadn't indicated where he came from, or on what airline, and they were therefore not currently in a position to redeem his luggage. Judge DCJ6 noted, 'if the Garda is to assist you he

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8 Usually in immigration matters a solicitor has been provided prior to the case coming to court.

must assist the Garda'. The man was remanded in custody to Cloverhill (FN19).

### 8.3.3 Immigration Offences at Ports of Entry

The majority of those appearing before SDC on immigration charges were persons arrested at Dublin airport who were not previously resident in Ireland. Most of those who appeared before the court on immigration charges were of Chinese or of African origin. Persons charged under the provisions of s.12 of the Immigration Act, 2004 do not normally apply for bail at their first court appearance as they are unable to establish their identity to the satisfaction of the Gardaí and in these circumstances bail is almost certain to be refused.

In the Dublin Metropolitan Region male defendants refused bail are normally remanded in custody to Cloverhill prison and subsequent court appearances are in RC. Female prisoners are, however, remanded in custody to the Dóchas prison and appear before SDC, or the court where they were initially produced, for subsequent court appearances. When a man and woman travelling together are arrested they will usually be treated as co-accused, and the man will then be remanded to appear before SDC rather than RC. This means that in SDC and CCC one would only normally get an opportunity to see a foreign male charged under the provisions of s.12 on his first appearance in court, or if the person had secured bail when the matter was referred back to the original court. However, it was easier to track the progress of females before the court on immigration charges. Multiple remands are not unusual in such cases.

One such case involved a young Zimbabwean couple, who were treated as co-accused. M and D Nwachi were observed on seven separate occasions in SDC. Both defendants lodged an asylum application after their arrest in Dublin airport. The solicitors representing this couple intimated to the court at each court appearance prior to their release on bail that documents were expected imminently, and on this basis sought and secured weekly court appearances. The delay in procuring their identity documents was attributed

to problems in Zimbabwe. They were released on bail after being remanded in custody for six weeks. Ms Nwachi was pregnant during her time in custody and her solicitor requested that she receive medical attention. Neither of these defendants ever addressed the court during any of their court appearances. They normally appeared very impassive in court as if they were resigned to their fate, but Mr Nwachi did smile brightly when the court granted them bail. The following field note extract is from their last appearance in court.

> I have observed M and D Nwachi in court on many occasions. Although the GNIB were not fully satisfied regarding their identity they were finally granted bail at their last court hearing. When their names were called Judge DCJ8 said, 'are they here?' I wonder if he has anticipated that they will not present themselves in court. Both defendants are in the courtroom. They are represented by two separate solicitors who enter a plea of guilty on their behalf. Garda McNulty[9] from the GNIB tells the court that the defendants were stopped at Dublin airport on 18/10 after arriving on a flight from Geneva. They presented South African passports which were found to be false. Garda McNulty notes that as the defendants were unable to produce documents to satisfy the GNIB as to their identity they spent a number of weeks in custody but tells the court that satisfactory documents have now been produced. Judge DCJ8 pronounces 'section 1(1) in both cases' (FN23).

It is possible that the use of false passports was a key factor in deciding to arrest these asylum applicants. The timing of the application for asylum may also be crucial in that it appears that this couple only applied for asylum after their arrest and not immediately upon presenting themselves to immigration officials.

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9 Pseudonym.

*8.3.3.1 Whose children?*

When adult immigrants accompanied by minor children are arrested for breaches of immigration legislation at a port of entry to the state, the children are not simply assumed to be the children of the adult with whom they arrived into the country. The possibility of human trafficking has to be considered.

During the course of the fieldwork two African women were observed who were accompanied by minor children when they arrived in Dublin airport. One woman charged under the provisions of s.12 of the Immigration Act, 2004 was accompanied by two children who were both initially placed in the care of the HSE. DNA tests confirmed that she was the mother of the five-year-old boy who accompanied her. She claimed that the young teenage girl who accompanied her was her cousin but this could not be satisfactorily confirmed by DNA testing. A social worker from the HSE told the court that this older child would not be placed in the care of the defendant but the young boy would be returned to his mother's care.

This woman was released on bail after a period of 30 days in custody. She was observed in court on four occasions (FN7, 12, 17 & 18). Contrary to normal practice bail was granted prior to this woman's identity being satisfactorily confirmed as her solicitor convinced the court that as she came from a country in conflict there was substantial uncertainty regarding how long the process of securing a passport would take and it was unreasonable to detain her further. The fact that her young child would be re-united with his mother also seemed to influence the decision of Judge DCJ8 to grant bail (FN18). Due to the lack of a conclusive DNA link between this woman and the young girl who accompanied her, the girl will remain in the care of the HSE while enquiries regarding her identity are pursued. A doubt remains as to the motivation of the defendant in bringing the girl to

Ireland. It is possible that she could remain in the care of the HSE until she is 18.[10]

In the second case observed the female defendant, Kerina Mwake, was accompanied by three minor children on her arrival at Dublin airport (FN13). She appeared in court charged with being in possession of a false instrument as she presented a false passport at Dublin airport. A social worker gave evidence in court that the defendant is not believed to be the mother of any of the three children, two boys aged five and ten and a 12-year-old girl, who accompanied her. All three children were placed in the care of foster parents on their arrival in Ireland. Prior to the court hearing, contact had been made with the putative mother of these children who is an asylum applicant in the UK. A GNIB officer told the court that DNA testing was underway to confirm the identity of the children's mother.

It appears that Ms Mwake cared for the children after their parents moved to the UK. She was sent money to purchase tickets for herself and the children and she also had a substantial sum of money on her person that had been provided to her as a means of proving that she had independent means and would not be seeking any support from the state. The GNIB officer indicated that this woman was being refused permission to land and would be detained in custody until arrangements for her departure could be put in place. Judge DCJ8 applied the Probation Act in relation to the charge before the court. In this latter case the woman accompanying these children could be construed as being involved in human trafficking, or alternatively could be seen as having been manipulated by the parents of these children.

### *8.3.3.2Unaccompanied minors*

Once immigration officers have identified an unaccompanied child seeking entry into the state under s.8 of the Refugee Act, 1996 they are required to refer the unaccompanied child to the Health Service Executive. However,

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10 Although there are no legislative provisions which prevent the deportation of unaccompanied minors or separated children the practice is not to deport such children (Joyce & Quinn 2009:46).

the process of identifying unaccompanied minors is not straightforward. A large proportion of children identified as unaccompanied minors are between the ages of 14 and 17. This proportion has grown in recent years (Joyce & Quinn 2009:16). Distinguishing between children aged 16 or 17 and young adults can be especially difficult. In addition, some minors may initially present themselves as being over the age of 18, and may have travel documents which present them as adults. Others who claim to be unaccompanied minors may in fact be adults seeking to benefit from the extra protection afforded to minors. Joyce & Quinn (2009) note the absence of a written policy on age assessment and point out that a variety of approaches are adopted by different actors. They point out that:

> ...there is an inherent tension between immigration concerns and the principle of the best interests of the child taking precedence at all times. These two imperatives may conflict particularly at the border. The issue of age assessment at the border is crucial and certain NGOs argue that minors have been detained and/or returned due to a lack of age assessment or an incorrect conclusion being drawn (2009:xiii).

The provisions of section 12 of the Immigration Act, 2004 only apply to non-nationals aged over 16. In theory therefore, a child of 16 or 17 could be charged with a breach of this legislation but the practice appears to be to apply these provisions only to adults.

During the course of the fieldwork conducted, a young Chinese woman who had presented identity documents which gave her age as 16 appeared in court on immigration charges. It was impossible to determine this woman's age from a cursory inspection. She was small and thin which probably meant she was more likely to be assessed as being younger than her chronological age. However, despite presenting these documents the woman did not pursue a claim to be a minor in court (FN11, 13 &19). A second defendant who did claim to be a minor was, however, assessed to be an adult.

> Ahmed Awoko is a young African man who, despite wearing a hooded woollen jumper under his coat, looked as if he was very cold. This man was on bail prior to his court appearance which is unusual for an immigration charge. The barrister representing him indicated that his client wishes to enter a not guilty plea. A hearing date some three months hence was set. The barrister went on to further note that his client arrived in the country as an unaccompanied minor, and as such requests that he be placed in the protection of the HSE who should act in 'loco parentis'. Judge DCJ6 noted rather dryly as he looked at the defendant, who is of a muscular build and has a patchy beard on his face, 'those are your instructions'. Certainly the defendant looks more like he is in his 20s than he is 16 or 17 but this is hardly definitive evidence that he is an adult. A Garda from the GNIB said that it is the state's belief that the defendant is over 18 years of age. The judge asked, 'do you know who he is?' The Garda replied, 'we do, and is he aged considerably older than 18, Judge'. Judge DCJ6 then announced, 'I won't make any such order in those circumstances' (FN20).

### 8.3.4 Persons Resident in the State Charged with Immigration Offences

Many persons resident in the state appeared before the court on immigration charges. The irregular immigration status of several defendants observed came to light after they were arrested in relation to other charges. In one instance a man charged with theft was also charged under the provisions of s.12 when Gardaí found him to be in possession of two sets of ID, one Polish and one Latvian.[11] The solicitor representing this man told the court that the Latvian ID was in the name of a comedian, and the man's friends had got it made with his photograph as a joke. The solicitor said her client had always identified himself to Gardaí as a Polish national and had

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[11] The name of the country has been altered.

never claimed to be a Latvian national. The court was told, however, that internet searches had not confirmed the existence of the Latvian comedian and the assistance of Interpol had been requested. When Judge DCJ12 asked, 'is he on holiday here?', he was told that the defendant has lived in Ireland for five years and has a girlfriend and child here (FN44). This man was remanded in custody pending clarification of his identity.

Two defendants observed had been arrested at social welfare offices after they represented themselves as EU nationals and produced false passports with a view to securing a PPS number. One was a Nigerian man who represented himself as a Dutch national. Within days of his arrest this man lodged an asylum application with ORAC. Judge DCJ7 imposed a peace bond for 24 months and directed that he liaise and comply with ORAC (FN56). The other defendant was a Pakistani man who produced a false French passport and a false French ID document. This latter defendant had lived in Ireland for almost ten years prior to his arrest, having originally come to Ireland as a student of hotel management. Judge DCJ11 applied the Probation Act (FN29).

Immigration charges also stemmed from routine traffic checks. On a number of occasions the defendant was the driver of a car stopped at a traffic check and was arrested when he produced a false driver's licence. In such circumstances the defendants were normally charged in relation to the false instrument[12] as well as under s.12 of the Immigration Act, 2004 if they were unable to produce a valid passport.

One woman observed faced s.12 and s.29 (see footnote 12) charges that arose when she was asked to produce her passport by a Garda after a car she was a passenger in was stopped at a routine traffic check. The woman, a Nigerian national, was arrested when she was unable to produce a passport. After spending a week in custody she produced a passport and was released on bail. However, on examination the passport proved to be

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12 Persons charged in relation to a false instrument are generally charged under the provisions of section 26 or section 29 of the Criminal Justice (Theft and Fraud) Offences Act, 2001. Section 26 refers to the use of a false instrument while section 29 refers to the control of a false instrument.

false. Detailed evidence was given in court by a Garda from the documents section as to the differences between a genuine Nigerian passport and the document produced by this woman. The woman, through her barrister, contested the finding that the passport was false, even though it was admitted in court that she did not apply for her passport through official channels in Nigeria but had instead paid a 'Mr Joe'[13] a sum of money to procure a passport for her. The argument presented by the defence regarding the validity of the passport seemed to lack any substance, and as the field note extract set out below shows, only served to irritate the judge.

> Judge DCJ8 looked exasperated as the barrister persisted in trying to make a case that this woman could have reasonably thought that the passport she got from 'Mr Joe' rather than through official channels was a valid passport. Judge DCJ8 said to the defending barrister, 'if you needed a passport would you go to Chapel Street for a passport Mr Moloney?'[14] When he didn't get an immediate reply he answered the question himself, 'no you would not, and neither would any right thinking person, and if they did they would not come into this court and try and make a case that they thought the passport was valid' (FN23).

The defendant was ultimately convicted of the section 29 charge and fined €50 with the s.12 charge 'taken into consideration' (FN24).

This woman was a passenger in a car stopped at a routine traffic check. There was no suggestion that her behaviour excited any alarm or suspicion on the part of the Gardaí conducting the traffic stop. One can only conclude therefore that she was requested to produce a passport because she doesn't look 'Irish'.

This woman had breached the law and was convicted, but does her arrest point to a practice of stopping people whose physical appearance suggests

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13 Pseudonym.
14 Pseudonym.

they are not Irish? If people are stopped in similar circumstances and arrested but are later able to produce a valid passport the charges against them may not proceed and hence the extent of this practice may not be measurable by observing courtroom proceedings.

Legislation recently enacted in Arizona requires non-citizens to carry immigration documents and gives the state police the power to detain illegal immigrants. The provisions introduced in the Arizona legislation are not dissimilar to those contained in section 12 of the Immigration Act, 2004. However, the Arizona legislation has provoked demonstrations and discussions across the US amid claims that the law is a recipe for racial and ethnic profiling by the police (Archibold 2010). It is contended that there are grounds for similar concerns about possible racial and ethnic profiling by Irish police as a result of the provisions of section 12 of the Immigration Act, 2004.

In Britain the MacPherson (1999) report finding of institutional racism on the part of the British police has led to greater monitoring of the presence of ethnic minorities at all stages of the criminal justice process. Despite this, black, and to a lesser extent Asian, people are still disproportionately targeted by the police during stop and search exercises (Equality and Human Rights Commission (EHRC) 2010; Delsol & Shiner 2006).[15] This potentially damages relationships between ethnic minorities and the wider community and corrodes trust in the police force.

We cannot point to similar statistics for Ireland. We do not know with certainty if those who look or speak differently to a stereotypical Irish person are more likely to be targeted by An Gardaí. However, the role of An Gardaí in relation to immigration matters has been identified as a possible impediment to building positive relationships with minority communities (Ionann 2004). The European Union Minorities and Discrimination survey

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15 There is some variation in the reported over-representation of minorities in stop and search exercises but it seems that black people are around six times more likely than, and Asians about twice as likely as, whites to be subject to stop and search by the police in England and Wales.

carried out in 2008 also presents findings which suggest inappropriate targeting of minorities by Irish police. The survey indicated that 59% of sub-Saharan Africans surveyed had been stopped at least once by Gardaí in a 12 month period, and one in three Eastern Europeans had been stopped in the same period. The stop-rate for sub-Saharan Africans was the highest for any ethnic minority in the EU and compares to stop-rates in Malta of 8%, in Portugal of 9% and in Sweden of 19% (European Union Agency for Fundamental Rights 2009:102). The findings of this survey were challenged by the Integration Minister who claimed that the methodology used in Ireland differed from that used in other countries and that respondents were only based in Dublin (McCarthy 2010).

The limited evidence available suggests that some Garda activity may be unduly directed at ethnic minorities, and there should be concern that in some instances at least the provisions of s.12 may be interpreted as licensing Gardaí to unduly target non-citizens, or those who appear to be non-citizens. This issue is explored further below in relation to the policing of the Roma community.

### 8.3.5 Immigration Charges and the Roma Population

In a number of cases observed in court no explanation was presented as to why Gardaí demanded foreign nationals to produce their passport. If a Garda forms the view that a person is a non-citizen they can demand that they produce their passport or equivalent document. It would seem therefore that non-nationals who speak in a foreign language, or have an obvious accent, those who dress differently, and those who are visibly different in appearance from a stereotypical Irish person, are most likely to be asked to produce their passport under the provisions of s.12 of the Immigration Act, 2004. As solicitor FSC noted, 'the more you look like a non-national then the more likely you are to get picked up on [a s.12 charge]'.

Courtroom observations indicate that most persons charged under the provisions of section 12 of the Immigration Act, 2004 are non-EU nationals.

If EU nationals are charged under these provisions it seems that the charges are usually dropped when the person's nationality is satisfactorily established. An exception to this rule is the treatment of members of the Roma community who are EU nationals. Solicitors MSB and FSA identified as a particular matter of concern the use of section 12 of the Immigration Act in relation to the Roma community. MSB noted that it is a 'community law' issue, and specifically referred to the EU directive on freedom of movement.[16] FSA commented that section 12 was used as a means of controlling members of the Roma community and said:

> ...it's absolutely abused, there is no question but that it is abused by the authorities ... the way that they are noticed on the street is generally through begging ...but because begging is no longer an offence[17] then they are no longer able to stop them from begging so ....they can charge them with sort of jumped-up public order issues, or under the Children Act is another one, and then s.12 is another.

Later in the interview FSA characterised section 12 offences as 'a sort of offence of last resort'. This description seems to imply that at times persons are charged with section 12 offences when their behaviour is considered undesirable but they have not otherwise breached the criminal code.

### *8.3.5.1Spatial variations in targeting of Roma population*

Observations indicate that the use of section 12 as a means of controlling members of the Roma community may be a local rather than a general practice. No Roma defendants charged under the provisions of section 12 appeared in NEC during the course of observations. Indeed, it was unusual to see a Roma person in court at all in this location, although Roma women were visible in the streets selling copies of the 'Big Issue'. In SDC most Roma appeared before the court on theft charges, and in RC no Roma were

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16 Directive 2004/38/EC.

17 However, the Criminal Justice (Public Order) Bill 2010 (No.7/2010), when enacted, will criminalise certain types of begging.

identified as being held on remand in relation to immigration charges. However, in CCC it was not unusual to see Roma defendants charged under the provisions of this Act even though they were identified as Romanian nationals. Most of these charges were essentially undefended with the defendant pleading guilty and reference being made to a Romanian ID card having been furnished to the Gardaí.[18] The charges were usually dismissed under the provisions of the Probation Act, 1907 and effectively therefore no penalties were applied. Unlike other persons charged under the provisions of s.12, most Roma persons charged were released on bail after the lodgement of a cash sum. It seemed therefore that there were really no substantive concerns about the identity of the individuals arrested.

### 8.3.6 Challenges to Section 12 Charges

Although no defence was offered to the majority of section 12 charges, not all charges went uncontested. Section 12 charges brought against two Roma women, who were both Romanian nationals, were contested ardently and at length firstly in CCC (FN34) and then in another court[19] on three further occasions. The circumstances surrounding the arrest of these women were that while begging in Dublin city centre they were approached by Gardaí and asked to produce proof of their identity. When they did not immediately produce the required documentation they were arrested and brought to a Garda station. They were searched 'for their own safety' (FN34) and were found to be in possession of Romanian ID cards. Hence, when these women were charged Gardaí were aware that they were Romanian nationals.

Each of the two defendants had separate legal representation, and at the first hearing the two lawyers conducted a kind of legal tag game with each taking it in turn to argue their case. The first lawyer argued that, 'section 12 of the Immigration Act is used by the "executive" in a discriminatory manner and in a manner which is not consistent with the EU directive on the right of movement and residence of EU citizens' (FN34). She contrasted

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18 All of the Roma observed in court were described as Romanian nationals.
19 The case followed Judge DCJ11.

the position in Ireland to the position in EU countries with national ID systems. Such systems effectively place the same obligation to carry appropriate ID documents on all EU citizens. However, as there is no obligation on Irish nationals to produce ID on demand, she contended that the provisions of section 12 of the Immigration Act, 2004 are contrary to the EU directive on freedom of movement because they fail to treat all EU nationals in the same manner. She further argued that the punishment specified by the legislation is disproportionate to the offence. She noted that plans to introduce a national ID system in Britain would require residents to hold a valid ID card, but not produce it on demand, and the planned penalties for non-compliance would be civil rather than criminal. She told the court, 'section 12 is frankly abused. Time and time again it is used to criminalise, particularly the Roma community which is already marginalised' (FN34). She also referred to a regular practice of the 'executive' of confiscating Romanian ID cards from Roma on the grounds that they were being verified, leaving individuals open to further charges.

The second solicitor took up the baton and argued that the provisions of section 12 were 'not really disposed towards non-nationals who are EU citizens'. He also argued that in the absence of a national identity card system it was discriminatory to apply the provisions of section 12 to EU citizens.

The prosecution for this case was handled by the solicitors' division of the DPP. The solicitor in court struggled to combat the submissions of the defence. She claimed the EU directive had no bearing on the case and referred the court to the statutory instrument which she described as a 'weaker and more limited instrument than the parent document' (FN34). This was contested by the defence who claimed that the statutory instrument (S.I.) is the Irish government's attempt to transpose the directive, and it was claimed in this case that the S.I. is fundamentally flawed. The prosecuting solicitor claimed that the free movement of EU nationals was actually constrained by 'multiple criteria which must be fulfilled by non-nationals'. She then claimed that the Garda had to establish if the women were EU nationals and said, 'she could have been African, she

could have been Indian...he simply did not know' (FN34). Why this was necessary if the legislation applied equally to EU nationals was not clear. The solicitor for the prosecution then made the rather extraordinary claim that in any event the defendants' free movement had not been impeded by the charge. At this Judge DCJ11 interjected and said, 'well she was arrested, charged and brought before a court, and only granted bail subject to a cash lodgement, I think her free movement could be said to have been impeded' (FN34).

Throughout this lengthy[20] hearing Judge DCJ11 looked uncomfortable and ill at ease. He asked a number of times whether the District Court was the appropriate place for this matter to be decided. On one occasion he said, 'I'm asking you again, is this court competent to decide the proportionality of section 12?' Ultimately he deferred sentencing saying, 'I'm not going to determine the issue today...I'm not entirely clear in my own mind how it all fits together or if it fits together ...I'm not sure if this court has jurisdiction to decide if a penalty is proportionate' (FN34).

At the next court hearing the state withdrew the section 12 charge against one of the women with Judge DCJ11 commenting, 'yes, there was a question as to whether she understood the charges' (FN83). Further submissions by the defence made it clear that there was no claim that the defendants had entered the state illegally and what was at issue were the demands made on the defendants to prove their identity while in the state. Judge DCJ11 again stated that he did not consider the District Court to be the appropriate place to decide whether the provisions of the Act are discriminatory or provide for disproportionate punishment. The matter was again adjourned. The absence of an interpreter prevented any progress at the next hearing date (FN84) but at the final hearing the second section 12 charge was also withdrawn by the state. In effect the question as to whether or not the provisions of section 12 are discriminatory and provide for a disproportionate punishment was never resolved.

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[20] The hearing lasted over an hour which in the context of the District Court is lengthy.

*8.3.6.1Asylum applicants and section 12 charges*

The circumstances which impel some asylum applicants to flee their country of origin may be such that they are unwilling to seek identity documents from their country of origin. This can mean that some undocumented asylum applicants are liable to arrest and re-arrest under the provisions of section 12 of the Immigration Act, 2004. One woman observed in CCC appeared in court charged under the provisions of section 12 having previously been convicted under the same provisions. Her legal representatives told the court that the matter was the subject of a judicial review. This review was scheduled to take place in March 2010 but was deferred. At the time of writing the case is still pending.

## 8.4 Persons Committed to Prison in the Absence of Criminal Charges

During the course of the fieldwork the researcher observed foreign persons who were not charged with a criminal offence but who were detained in an Irish prison. She also became aware of other categories of foreign persons who do not appear in court but are subject to detention in prison although the detention is considered civil in nature.

### 8.4.1 Persons Refused Permission to Land

The statistics published by the IPS indicate that a very high proportion of persons detained in Irish prisons for breaches of immigration law are detained for periods of less than eight days. In 2007 55.1% (2006: 39.4%) of persons detained for breaches of immigration law were held in prison for 0-3 days with a further 17.9% (2006: 22.9%) held for 4-7 days.[21]

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[21] It is not possible to provide these statistics for 2009 or 2008 as the bar charts included in the 2009 and 2008 Annual Reports of the IPS do not indicate numbers in each category. However, in both years the charts indicate a very significant proportion of those detained for breaches of immigration legislation were detained for less than eight days.

These statistics highlighted an anomaly between the observed time taken to process immigration charges in the District Court and the time spent in custody as recorded by the IPS in respect of those detained for breaches of immigration legislation. As already noted, those observed in court charged with immigration offences frequently spend weeks and sometimes even months in prison in pre-trial custody. The duration of the pre-trial detention is normally determined by the length of time it takes the defendant to prove his/her identity to the satisfaction of An Garda Síochána. When identity has been established defendants will be granted bail. Observation of District Court proceedings and interviews with defence solicitors indicate that when a person is charged with an offence under section 12 of the Immigration Act, 2004 a period of pre-trial detention is normal, and generally exceeds eight days.

Enquiries were made with officials from the IPS in an effort to fully understand the prison statistics. These enquiries revealed that included within those detained for breaches of immigration offences are persons arrested and detained under the provisions of s.5(2)(a) of the Immigration Act, 2003 after they have been refused permission to land. Persons refused permission to land are removed from the state as soon as is practicable, and may only be detained for a maximum period of eight weeks. In many cases it may be possible to remove them on the same day, but in other instances travel arrangements may dictate that a short period of detention is necessary. Persons refused permission to land are not charged with a criminal offence and do not appear before an Irish court unless they seek to challenge their removal from the state. Such challenges are rare but a number of high profile cases have received media and political attention amid claims that immigration procedures are arbitrary, and rely unduly on the exercise of discretion on the part of individual immigration officers (MacCormaic 2008; Joyce 2009a:16). Unfortunately the IPS have not up to now kept records which separately identify non-nationals detained in prison following refusal of permission to land, but it seems likely that a significant proportion of those detained in Irish prisons for short periods of time in relation to breaches of immigration offences are persons who have been refused permission to land.

### 8.4.2 Persons Subject to Deportation Orders

Persons subject to deportation orders may also be subject to a period of detention in an Irish prison prior to the execution of the deportation order. Such persons do not face criminal charges but are not separately identified in the statistics produced by the IPS.

### 8.4.3 Persons Detained under the Provisions of the Refugee Act, 1996

In accordance with s.9(8) of the Refugee Act, 1996 where an immigration officer or a member of An Garda Síochána, with reasonable cause, suspects that an applicant:[22]

(a) poses a threat to national security or public order in the state,

(b) has committed a serious non-political crime outside the state,

(c) has not made reasonable efforts to establish his or her true identity,

(d) intends to avoid removal from the state in the event of his or her application for asylum being transferred to a convention country pursuant to section 22,

(e) intends to leave the state and enter another state without lawful authority, or

(f) without reasonable cause has destroyed his or her identity or travel documents or is in possession of forged identity documents,

he or she may detain the person concerned under s.9(8) of the Refugee Act, 1996. The maximum period of detention is unspecified as a judge may commit an asylum seeker to successive periods of 21 days in detention while their application is being determined. Persons detained under the provisions of s.9(8) of the Refugee Act are not charged with a criminal offence; their detention is civil rather than criminal.

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[22] An applicant is a person who seeks asylum and leave to remain in the state (see s.8 Refugee Act, 1996).

Observations indicate that the provisions of s.9(8) of the Refugee Act are not widely used to detain asylum applicants. Indeed, a GNIB officer indicated to the researcher that just a small number of GNIB officers use these provisions. RC was the only location where persons detained under these provisions were observed. In the two month period during which fieldwork was conducted in this location seven detained persons were observed; several were observed on more than one occasion. All of the detained persons were male. Of these one man's asylum application was transferred to another country, four had been released, and two were still in detention at the date that fieldwork concluded.

Persons detained under s.9(8) can be detained for lengthy periods. One man observed was released after having been detained for 16 weeks. Another man had been arrested and charged under the provisions of section 12 of the Immigration Act, 2004 on his arrival into the state. When questioned by immigration officers on arrival in Dublin he initially claimed that he was here as a tourist. On cross-examination he explained that he did not lodge his asylum application immediately because he wished to take legal advice first. He was sentenced to three months imprisonment but was released after just two weeks. On release he was immediately detained under the provisions of s.9(8) of the Refugee Act, 1996. When Judge DCJ13 ordered his conditional release after a further six weeks detention he commented as follows:

> The applicant's asylum application is at appeal stage. No date has been set for the appeal hearing and it seems uncertain as to when this will take place. It could be July, August or September. The applicant was released on TR[23] and there was no breach of the terms of the TR. He was released on 03/06 and had barely stepped out when he was re-arrested. He gave his reasons for coming here and proceeding as he did at Dublin airport. He has been in custody since 03/03, part of that on remand and has served

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23 Temporary release.

> part of a sentence. Having regard to all of that I have come to the conclusion that we are running into excessive delay. At this stage this delay is not the fault of the applicant. We should therefore prepare for a conditional release (FN66).

In conversation later with the GNIB officer who detained this man the researcher learned that the asylum appeal hearing was indeed not expected until September at the earliest. Despite this the prosecution claimed in court that the appeal was expected imminently. The same GNIB officer claimed that the circumstances that warranted a detention under s.9(8) were different to those that warranted a person being charged under s.12 of the Immigration Act, 2004, yet one of the instances that he indicated might warrant detention was when a non-national charged under the provisions of the Immigration Act was released on bail prior to their identity being established. However, observations do indicate that District Court judges will not sanction the continued detention of persons detained under these provisions when they consider the period of detention to be excessive and unreasonable.

## 8.5 Irregular Migration Status Viewed as an Active Choice

It was evident from various comments made by judges that they tended to view persons charged with immigration offences as persons who had actively engaged in a process of dissembling to circumvent the laws of the state, rather than persons who may have had to resort to extraordinary measures to ensure their own safety. Almost every defendant charged with an immigration offence, and particularly those arrested at Dublin airport, was presented to the court as an asylum applicant. Judges therefore listened to the information that the defendant before them had lodged an asylum application with a certain amount of jaded ennui. The designation of defendants charged with immigration offences as asylum applicants was so commonplace it effectively lacked any currency in court.

It was not unusual to hear a sort of disbelieving tone in the comments made by District Court judges who at times seemed to find it almost impossible that a person had arrived in Ireland without any ID. This scepticism was bolstered if the court was told that defendants had taken a circuitous route to get to Ireland, passing through a number of different countries before reaching Dublin, or when defendants simply refused to provide any details of their travel routes. DCJ3's comment, 'they arrive in on the last flight on a Saturday night, the ID is flushed down the lav, and they take an emory board to their finger tips' (FN67), encapsulates this view of irregular immigrants as actively trying to dodge the immigration laws of the state. Efforts to present clients as desperate, persecuted persons were generally responded to with trite comments regarding the person's ability to get him/herself half way around the world. Despite this view regarding the agency of defendants, as the field note extract set out below highlights, generally once the identity of the defendant was established to the satisfaction of the Gardaí judges did not seek to impose any additional punishment on defendants charged under the provisions of section 12 of the Immigration Act, 2004.

> Yu Wong is before the court on immigration charges. This woman appears very young. She is extremely thin which makes her appear especially vulnerable. A Garda from the GNIB gives evidence and notes that the defendant is claiming religious persecution. Hearing this Judge DCJ8 comments, 'that's a good story...but you don't get on a plane without a passport...and then you arrive here with no passport...the mystery is what happened to the passport in between'. The solicitor indicates that the defendant claims that she gave it to another traveller. The solicitor also tells the court that the defendant has lodged an asylum application. Judge DCJ8 says, 'nothing previous?' and the solicitor replies 'no, Judge'. The charges are dismissed under the provisions of the Probation Act and the woman is released (FN3).

The claim by this defendant that she had given her travel documents to another traveller echoes the claim of a solicitor in SDC who said that Chinese traffickers have people in the departure airports to collect passports/documentation from would-be immigrants who then arrive in Ireland and are unable to establish their identity (FN4).

## 8.6 Identity an Issue for Some Irish Defendants

It should be noted that question marks may also arise at times regarding the identity of Irish defendants. Gardaí are currently only allowed to fingerprint persons arrested in relation to specific offences. This means that the majority of persons arrested and charged with minor offences are not subject to fingerprinting (Lally 2010).

The lack of a means to verify a person's identity can lead to some defendants using one or a number of aliases. On several occasions the same person was included on the court list under a number of different names. Sometimes the names were very similar, suggesting no real attempt to deceive, but on other occasions the names listed were quite different. Doubt over the identity of a defendant can lead to a period in custody before bail will be granted. During one court sitting observed a young woman with a history of bench warrants came before the court. This woman may have feared that because of her past failures to appear in court she may not have been granted bail. In any event she gave Gardaí a false name and address, and then compounded this by signing the custody sheet with another name. Perhaps not surprisingly the state initially objected to bail. During the bail application her solicitor told the court, 'I'm satisfied she is Anne Joyce, and I think she's now satisfied she is Anne Joyce!' (FN9) Another Irish defendant with a history of using aliases observed in RC was refused bail and remanded in custody because of doubts about his identity. The court was told that the man had applied for a passport to satisfy Gardaí regarding his identity.

## 8.7 Conclusion

Immigration policies seek to achieve a number of competing objectives and can be contentious. National borders are permeable and the immigration status of non-citizens can change over time from regular to irregular. The EU aims to create an area of freedom, security and justice for citizens of EU member states but it has been criticised for failing to meet its obligations to third-country nationals who seek asylum. Ireland's decision to criminalise irregular migrants is contrary to the recommendations of the Council of Europe Commissioner for Human Rights.

Observations indicate that those charged under the provisions of s.12 of the Immigration Act, 2004 are frequently subject to a period of pre-trial detention which in some instances can be lengthy. Judges at times refuse to allow persons charged under these provisions to enter guilty pleas until their identity has been verified. Persons convicted under these provisions are rarely sentenced to imprisonment or indeed to any penalty, leading to the conclusion that these provisions are used as a device to allow persons to be detained while the Gardaí verify their identity. Particular concern has been expressed about the use of s.12 of the Immigration Act, 2004 as a means of controlling members of the Roma community and to inappropriately harass asylum applicants. There is also concern that the provisions of s.12 may licence inappropriate policing of ethnic minorities and there is some evidence that certain ethnic minorities in Ireland are subject to an inordinate level of police stops.

Foreign nationals may be detained in Irish prisons for breaches of immigration legislation but may not face criminal charges and indeed may not in some instances appear before a court. It is regrettable that the statistics published by the IPS do not distinguish between those subject to civil or administrative detention and those detained pursuant to criminal charges.

Chapter nine considers the provision and quality of interpretation services in the District Court. The chapter also highlights a reluctance on the part of

courtroom actors to modulate the pace of proceedings to accommodate interpreters.

# 9 LEP Defendants and Interpretation Services

## 9.1 Introduction

Foreign nationals now regularly appear before Irish courts charged with criminal offences, and many need the assistance of an interpreter to ensure that they fully understand the court proceedings. As the number of foreign defendants has increased the presence of court interpreters in Irish courts has changed from being almost an exotic oddity to become quotidian and unremarkable. Most interpreters are themselves foreign nationals and in many courts they may be the only non-Irish persons, apart from the defendants, who play a role in the courtroom proceedings.

While the CS has put in place arrangements to ensure that when requested by a District Court judge interpreters are provided for criminal defendants, this does not ensure that court proceedings are organised in such a way as to ensure that they can be fully interpreted, or that an interpreter is provided for all defendants with LEP. There are also ongoing concerns that the service provided is not appropriately regulated, and that the standard of interpreting is not uniformly high.

This chapter points out that at least some court interpreters do not adequately interpret court proceedings, and do not always interact appropriately with defendants. The chapter also presents evidence which suggests that District Court proceedings are frequently not paced in such a manner as to allow interpreters to interpret proceedings fully and accurately. In addition, it appears some courtroom actors in the District Court view the provision of an interpreter for LEP defendants as being something which can be dispensed with if an interpreter is not readily available. This is particularly the case when court appearances effectively only constitute an application for an adjournment. Even when interpreters are provided there seems to be no expectation that they should diligently endeavour to accurately translate all the court proceedings, and at times their presence constitutes little more than window dressing.

It seems therefore that while interpreters are now frequently present during District Court sittings there is a reluctance to change the way in which proceedings are conducted to allow the interpreter to accurately and fully translate all courtroom exchanges. The evidence presented suggests that all District Court actors – judges, solicitors, barristers, Court Presenters, registrars, probation officers and Gardaí – need guidance regarding the work of the court interpreter and the rights of defendants with LEP. This chapter begins by outlining how and by whom interpretation services are provided in the District Court, and draws on courtroom observations to highlight concerns about the competency of some of those appointed as interpreters and the behaviour of both interpreters and other courtroom actors.

## 9.2 Provision of Interpreters

Until recent years discussions around language and the issue of court interpretative services in Ireland centred round the rights of native Irish speakers (Waterhouse 2009). However, the sustained and extensive inward migration experienced by Ireland between 1996 and 2008 (CSO 2009) has resulted in the rapid transformation of Ireland's population so that the proportion of foreign nationals resident in Ireland in 2008 is estimated as being higher than that in traditional immigrant destination countries such as Britain and France (Vasileva 2009). In addition, cheaper and more extensive air transport has made Ireland more accessible leading to greater diversity in short-term visitors to Ireland. A consequence of Ireland's more heterogeneous population and its greater accessibility is greater diversity amongst criminal defendants in Irish courts. This has meant that whereas in the past interpreters were rarely required for court proceedings they are now commonly present, especially in the District Court which deals with a far higher number of defendants than any other court.

Waterhouse notes the absence of a statutory right to an interpreter in Ireland and adds, 'there is effective reliance for the right on the court's interpretation of the due course of law and the principles of natural justice,

and on the ECHR' (2009:60). Article 6(3)(e) of the European Convention on Human Rights stipulates that a person accused of a criminal offence must have the free assistance of an interpreter if he cannot understand or speak the language used in court. In its judgement in *Kamasinski v Austria* the European Court of Human Rights also stipulates that authorities have a duty not just to provide an interpreter but to exercise control over the adequacy of the interpretation provided (ITIA 2008:3). In practice, the absence of an explicit statutory right to the assistance of an interpreter does not seem to impede the provision of interpretative services in the Irish District Court, and no instances were observed during the course of the fieldwork conducted when a request for the assistance of an interpreter was refused.[1]

The response of the DJELR to the Green Paper on procedural safeguards for suspects and defendants in criminal proceedings throughout the European Union indicates that defence lawyers for defendants awarded legal aid may also independently appoint an interpreter for the defendant (DJELR Undated). Based on courtroom observations it does not seem to be normal practice for solicitors representing defendants in the District Court to appoint independent interpreters. On occasions solicitors did indicate that an interpreter would be required for a consultation with their client and the court was requested to certify the interpreters required for these consultations. Judges certify for an interpreter either following the request of a defence lawyer, a Garda or the Court Presenter, or as a result of their own assessment of the needs of the defendant.

Some defendants may erroneously think that requesting an interpreter may somehow derail the court proceedings or result in the court adopting a more lenient approach to the charges. Observations indicate that even when a defendant who has previously displayed good English requests an

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[1] However, it was reported in *The Sunday Times* on 03/10/2010 that a judge queried the use of a court interpreter for two Polish men who have lived in Ireland for seven years (p.17). The ITIA submission on the Courts Service Statement of Strategy 2008-2011 also highlights an instance reported in the Galway Advertiser in January 2007 when a judge refused to certify an interpreter because she thought it was ridiculous that a defendant who had been living in Ireland for five years could not speak English (ITIA 2008:11).

interpreter in court he will, despite any protests by the arresting Garda, be provided with an interpreter.

> Adam Mabiele was not in court when his name was called and a bench warrant was issued for his arrest. A French interpreter came forward when his name was called and when he failed to appear the interpreter immediately went to the court clerk with her attendance sheet and as soon as it was signed she left the courtroom. Adam Mabiele later appeared and the case was recalled. Judge DCJ8 asked 'does the man speak English?' The arresting Garda said, 'yes Judge he has very good English'. Judge DCJ8 then asked the defendant again 'Mr Mabiele, do you speak English?' The defendant raised his hands as if to suggest that he was unclear what was being said. The Garda looked in disbelief at the defendant. Judge DCJ8 asked the defendant 'do you understand the charge? It's a charge of drink driving'. The defendant then said, 'yes' but waved his hands as if to indicate he disagreed with it. Judge DCJ8 put it back until a French interpreter was in court (FN22).

The Garda believed that the defendant in this case was feigning an inability to understand the proceedings. While in most other instances when a Garda and a defendant present different versions of the facts the Garda will almost always be believed, when a defendant indicates that they need an interpreter observations indicate that the court will accede to this request even when this request is considered unreasonable by a Garda.

### 9.2.1 Increased Demand for Court Interpretation Services

The demand for court interpretation services has increased very markedly in recent years. In 2000 the cost of court interpretation services was €103,000. Costs increased dramatically between 2000 and 2005 when they reached €1,257,000 (CS 2006:38). From mid 2006 the CS contracted out the provision of interpretation services, and costs are no longer disclosed

but are estimated to be in the region of €2m annually (Siggins 2009; Tighe 2009). The rapid increase in costs suggests that court interpreters have quickly become part of the everyday fabric of Irish courts. The 2008 Annual Report for the Courts Service notes that over 10,000 requests were made for interpretation services in 71 languages. The most common languages for court interpretation services in 2008 were Polish, Romanian, Lithuanian, Russian, Mandarin Chinese, Latvian, Portuguese, French, Czech and Arabic (CS 2009:34). Language cannot always be conflated with nationality or ethnicity. French is an official language of several European countries as well as a range of African countries. Similarly, Portuguese is spoken in a number of African and South American countries as well as in Portugal.

Observations indicate that sometimes when an interpreter in a defendant's first language is not immediately available they may be offered an interpreter in a language other than their own in the hope that they might understand that language. Many, but not all, defendants from Eastern European countries understand Russian and may be willing to accept a Russian interpreter. On occasion it seemed as if courtroom actors did not quite believe that defendants needed interpreters for a specific language, and that for example Cantonese speakers could not understand Mandarin interpreters. There was also often an unreasonable expectation that because an interpreter was in court they would be able to assist any defendant with LEP. Gardaí were often surprised that the interpreters present could not assist defendants who spoke only Hungarian, or Czech, or Slovak.

### 9.2.2 Improvement in Service

The view consistently expressed to the researcher by a variety of court actors was that while the present structure within which interpretative services are provided is not entirely satisfactory, it nevertheless represents a very substantive improvement on the sort of *ad hoc* arrangements in place some years ago when the demand for interpretative services began to increase. Solicitor FSC described the situation a number of years ago when

interpreters began to be required regularly in court as 'very chaotic'. She also added:

> It was also somewhat unseemly where interpreters were kind of jostling for business, ... it's bad enough when solicitors are but when interpreters were somewhat involved in, you know trying to promote themselves, and get work in the court ...then my impression was that they were developing relationships with particular solicitors and sort of almost acting as go-betweens and bringing them the business. It was all *highly* [emphasis in transcipt] undesirable.

### 9.2.3 Contract with Private Contractor

Following a public tender process the CS entered into a four year contract in 2006 with a private company, Lionbridge Ireland, to provide court interpretative services. When Lionbridge are unable to provide an interpreter promptly CS staff may use other, often locally based, companies to secure an interpreter. Interpreters are paid directly by Lionbridge and receive a modest hourly rate (Tighe 2009). Interpreters who are hired for the day rather than by the hour receive a lower hourly rate of pay.

In many courts interpreters will only be present in court if they are requested by CS staff. However, in courts with a high proportion of foreign defendants a small number of interpreters who interpret the most commonly requested languages may be present during all court sittings. Polish, Russian and Romanian interpreters were always present in CCC during the fieldwork period. For the initial period of the fieldwork a Chinese interpreter was also present in CCC but due to low numbers of Chinese defendants it was decided that a full-time Chinese interpreter was not required. Full-time interpreters were also present towards the end of the fieldwork period in SDC.

### 9.2.4 Competency of Interpreters

Court interpreting is a highly skilled job. If court interpreters do not faithfully interpret court proceedings a defendant's right to a fair trial may be infringed. If those employed as court interpreters are not appropriately qualified they are unlikely to discharge their duties adequately. Some disquiet was expressed by solicitors regarding the uneven quality of court interpretative services. Solicitor MS2 commented:

> Interpreting live is probably, just from my own limited experience of different languages, it's probably one of the hardest things a linguist can do, and I don't feel that the standards are there, I'm not aware of standards actually being applied at the moment ...it's very unsatisfactory and I think there really needs to be a system of regulation and accreditation for interpreters who work in formal court or quasi-judicial type hearings.

It has been claimed that the qualification standards required for court interpreters are not sufficiently rigorous and not all those employed as court interpreters under the current system are adequately or appropriately qualified (Bacik 2007). Lionbridge indicated that it would be in a position to provide interpreters with the highest level of qualifications (Level 4)[2] stipulated by the CS for the most frequently used languages in court (Bacik 2007:121). The most frequently used languages in court have changed over time, and it is not clear if in fact the qualifications of individual court interpreters are being monitored by the CS. The ITIA have claimed that even Level 4 interpreters may not be qualified to act as court interpreters as:

> a person with a third-level qualification in translation and interpreting would probably not have studied legal

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2 Four levels of qualification are specified. For a person to be considered a Level 4 interpreter they must be a native speaker of the language concerned with a third-level qualification, and qualifications specific to translating or interpreting (Bacik 2007:121).

> terminology and would not be aware of the ethical challenges that can arise in court. Untrained interpreters may be tempted to act as advocates, to give legal advice or to speak on behalf of a defendant or witness (2008:6).

Discussions with interpreters in court indicate that a very large proportion of interpreters provided by Lionbridge do not have any qualification in translating or interpreting and therefore do not have Level 4 qualifications. It should also be noted that the present payment structures do not reward those with higher qualifications or incentivise inadequately qualified persons to upgrade their qualifications (ITIA 2008). Nor do they encourage the service provider to recruit qualified interpreters. Lionbridge provides newly recruited interpreters with training in the form of a short induction course and a day spent observing court proceedings in the company of an experienced interpreter.

The Irish Translators' and Interpreters' Association note that:

> Interpreters need advanced linguistic skills that include legal terms, Latin expressions, idioms and slang. They need to actually be able to interpret simultaneously and consecutively. To do this they need to have a good memory and to have note-taking skills. They may be asked to do sight translation of documents in court where they are given a document in a foreign language and asked to read it aloud in English. They also need to have the confidence and integrity to tell the court if they cannot hear what is being said or to ask for clarification if they have not grasped a particular concept. An understanding of court procedures is essential (2008:6).

The extensive skill set identified by ITIA as being essential for a court interpreter was often lacking in the court interpreters observed in court. On several occasions the researcher was asked by interpreters to explain basic legal terms such as 'bench warrant' or 'remand' or 'bail bond'. A number of

interpreters were also unclear as to the role of the probation officer. Several did not seem to understand the court proceedings at all. Some left the court when a matter had been 'let stand' and therefore did not seem to understand that the matter would be recalled later in the court sitting. Others remained in court after an adjournment had been granted and the defendant had been remanded on continuing bail even though they were not required to give assistance to any other defendants. Many had excellent English but a small number observed did not appear to have fluent English.

*9.2.4.1Interruption of proceedings*

District Courts can be noisy places and many witnesses, Gardaí and solicitors do not use the microphones provided. This can mean that only those positioned very adjacent to persons speaking will be able to fully hear what they say. When asked by the researcher if she ever had difficulty hearing testimony in court, one of the interpreters said this was a frequent problem and did a parody of someone mumbling incoherently (FN15). Despite proceedings often being inaudible, interpreters almost never told the court that they were unable to hear clearly enough to interpret properly. One or two interpreters were confident enough to put up their hand and ask that evidence be repeated, but most seemed reluctant to intervene in the flow of proceedings. Sometimes judges will intervene in proceedings when they realise that the interpreter may not be able to hear, or the speed at which evidence is being given needs to be slower.

> When Yu Wang was called a young Chinese man was produced from the custody cells and the Chinese interpreter stepped forward to assist him. The court was told that this man's identity had now been verified. The prosecuting Garda was sworn in and began to rattle off evidence regarding this man's arrest. Judge DCJ7 looked at the interpreter and said to her 'can you hear?' He clearly realised that the interpreter could not accurately translate the Garda's evidence because of the speed and the volume at which it was being delivered. The interpreter said 'can you speak a little louder and a little slower please...thank you'. Judge DCJ7 turned to the Garda

and said 'louder and slower'. The Garda repeated the evidence he had already given, pausing at intervals (FN55).

### *9.2.4.2Silent interpreters*

Despite the general perception that the arrangements for the provision of interpreters have improved in recent years, and that the quality of interpretation services has also improved, observations indicate that some of the interpretative services provided are still of an unacceptable standard. During the court sittings observed, on multiple occasions it was noted that interpreters quite simply made no attempt to interpret court proceedings and just stood mutely beside the defendant. Solicitors and Court Presenters generally stand in front of the defendant and face the judge, and hence have their back to the interpreter, and so may not be in a position to assess whether the interpreter is endeavouring to translate the court proceedings. Judges, however, do have a good view of how interpreters perform their duties, but despite this many did not intervene even when interpreters were doing nothing except standing silently beside the defendant. Judge DCJ12 did interject when he realised that a Chinese interpreter was not translating the evidence of a Garda and said, 'you're giving evidence and she's not translating' (FN43). On another occasion he took a Polish interpreter to task when he felt he wasn't interpreting the court proceedings and said 'are you translating all this?' The Polish interpreter told him that he had agreed with the defendant to assist him when necessary (FN44).

While in many instances appearances by defendants before the District Court will be very brief and the interpreter may be able to easily explain the substantive content of any courtroom exchanges to the defendant, in other instances when matters are contested, or bail applications are opposed, matters can be before the court for quite a considerable length of time. Even on such occasions several interpreters were observed who simply made no attempt to interpret the court proceedings to the defendant. A hearing observed in CCC regarding immigration charges brought against two Roma women lasted well over an hour (see chapter seven) and

involved complex legal arguments. As this brief field note extract highlights the bulk of this hearing was not interpreted.

> While both defendants were assisted by a Romanian interpreter it was very notable that for large tracts of time the Romanian interpreter simply sat on the bench beside the defendants and said nothing. He didn't attempt to translate the lengthy representations made to the court by both the prosecution and defence in relation to the legal substance of the charges (FN34).

It should be noted, however, that the pace of the exchanges in this matter took no account of the fact that an interpreter was provided to assist the defendants. There could have been no reasonable expectation that the interpreter would have been able to fully translate everything that was said in court.

Another almost silent interpreter was observed during a lengthy bail application made on behalf of a woman charged under the provisions of s.12 of the Immigration Act, 2004 who had been remanded in custody for four weeks and separated from her minor child whilst in custody. During the application the interpreter spoke no more than a handful of words to the defendant (FN17). The outcome of this bail application was of the utmost importance to the defendant, and one would have thought that it was absolutely essential that if the process was to be fair the procedures in place had to ensure that the defendant could understand everything that was said in court; but the procedures in place failed to ensure this.

The interpreter was not within the range of vision of the defence solicitor, and so he did not realise that the interpreter was not endeavouring to interpret the proceedings for the client. The bail application was not successful but the matter was relisted just two days later. The same interpreter was in court for the second bail application but it seems that the defence solicitor had been told by other courtroom actors that she had done a very poor job as he approached her prior to the court session and said, 'I

want you to interpret every word that is said in court...it is very important that you interpret everything that is said' (FN18). The solicitor later confirmed in a conversation with the researcher that he had been unaware of the interpreter's silence until after the first bail hearing had concluded, but he added, 'mind you, she [the defendant] does speak English' (FN18).

### *9.2.4.3Inappropriate behaviour of interpreters*

On a number of occasions observed, the behaviour of interpreters appeared not to accord with generally accepted codes of behaviour for court interpreters (see Edwards (1995). At times interpreters engaged in conversation with defendants and did not simply seek to interpret what was said in court. Rather than an interpreter primarily relaying court proceedings, at times it was clear that there was a two-way, and occasionally an animated conversation, between the defendant and the interpreter, which sometimes began before the court proceedings commenced, or extended after court proceedings were concluded.

One instance was also observed were the interpreter inappropriately intervened in a case. The defendant was charged with using a false instrument. The case against the defendant centred around the authenticity of a Romanian driving licence. A Garda from the documents section was in court to support the state's claim that the licence was not authentic. The interpreter intervened by producing his own Romanian driving licence and passing it to the defence solicitor, who then passed it to the expert from the documents section suggesting that it could be used as a comparator. Judge DCJ8 rebuked the interpreter sharply and said it was not his role to assist the defence (FN44).

### *9.2.4.4Interpreters aware of poor interpreting standards*

Many court interpreters are aware that some of those who are employed as interpreters in the District Court are not competent. On several occasions interpreters asked the researcher 'have you come across interpreters who

don't speak English yet?' One said she was often appalled by the quality of court interpretative services (FN15). Whilst observing proceedings in CCC the researcher saw what appeared to be two Chinese defendants, a man and a woman, before the court, standing silently side by side. However, as details of the case were disclosed it became apparent that only the man was a defendant. The researcher turned to the Romanian interpreter who was sitting beside her and asked, 'is the woman an interpreter?' The Romanian interpreter nodded and said 'yes, but not a very good one' (FN39-DCJ1).

Interpreters are also aware that proceedings in the District Court are not recorded and therefore the accuracy of their work cannot subsequently be reviewed. One interpreter told the researcher that he no longer took assignments in the Circuit Court because his work was subject to scrutiny via court transcripts and audio recordings. He told the researcher 'I'm not paid enough for that - I can work here [District Court]'.

### 9.2.5 Which Foreign Defendants Receive the Assistance of an Interpreter?

While the CS previously expressed a commitment to providing an interpreter for defendants for whom neither Irish nor English is their first language (CS 2005), this commitment has not been restated in the most recent strategy document (CS 2008b) and the policy of the CS regarding the provision of interpreters to foreign criminal defendants is now unclear (Waterhouse 2009:60). Observations indicate that in practice interpreters are provided when requested by defence solicitors or Court Presenters or when a judge assesses the defendant's English to be too limited to allow him to fully comprehend the court proceedings. However, sometimes, as can be seen from the following field note extract, even though it may seem clear that a defendant's English is poor, no effort will be made to provide the defendant with an interpreter.

> When Lukasz Grozinski was called, a young man with a fair complexion came forward. When asked 'who is your

> solicitor?' he answered 'my name is Lukasz Grozinski'. When Judge DCJ8 was told by the Court Presenter that his solicitor was not in court the matter was put back to a second calling. When the matter was later recalled it proceeded without an interpreter even though it seemed that this man had little or no English. His solicitor indicated that the defendant wished to enter a plea of guilty to a charge of criminal damage. The court was told that the man has no previous convictions and wishes to return to Poland when this matter is concluded. The damage to the property was valued at €210. An amount of €100 had been paid but the solicitor indicated that his client had now lost his job and was not in a position to pay the balance. Judge DCJ8 applied the Probation Act (FN44).

Pragmatism seems to have greatly influenced both court procedures and the outcome in this case. Presumably the solicitor was aware that his client's English was poor, but his primary objective was to bring the case to a conclusion, and so he did not request an interpreter in case this resulted in an adjournment. Similarly, while Judge DCJ8 would have preferred if the defendant had paid an amount equivalent to the damage caused his decision to waive the amount unpaid seems almost certainly to have been influenced by the declaration that the defendant was returning to Poland.

#### *9.2.5.1Delays in providing an interpreter*

When persons arrive in court on foot of a summons there may be no advance notice that the defendant is not sufficiently proficient in English to understand the court proceedings without the assistance of an interpreter. Interpreters may also not be on hand if Gardaí have not indicated to the courts service that an interpreter is required. This can mean that the defendant is asked to remain in court while efforts are made to locate an interpreter or matters are adjourned. Both courses of action are subject to misinterpretation and misunderstanding on the part of the defendant. On other occasions observed, defendants with LEP were in custody and no efforts were made to ascertain what language they spoke until they were

called in court. If the defendant is Polish or Romanian or Ukranian there may be an interpreter on hand but this will not be the case if the defendant is Iraqi or from Brazil. Delays in obtaining an interpreter can result in defendants being unnecessarily detained in custody.

## 9.3 Defence Counsel and Interpreters

Observations indicate that in practice the provision of interpreters is somewhat *ad hoc* with the same defendant appearing on occasions with an interpreter and on other occasions without an interpreter. While solicitor FSC commented during interview that in her view, 'it's just unacceptable that people don't have an interpreter if English isn't their first language. There's too much at stake... too much can be missed if they're not following everything', observations of court proceedings indicate that other solicitors are not quite as concerned that their clients fully understand court proceedings. Solicitors seem willing on occasions to dispense with interpreters when they are not readily available. This attitude is clearly revealed in the following brief field note extract.

> A solicitor called out prior to the commencement of the court session, 'is there a French interpreter in court?' Getting no response he spoke to a plain-clothes Garda and said 'sure we can fire ahead without the interpreter if need be' (FN7).

Whether or not a defendant is assisted by an interpreter may depend on who represents him in court. Tomas Varannai was observed in CCC without an interpreter (FN42), and then in RC some ten weeks later where he was assisted by a Russian interpreter (FN67). Lech Rutyna was assisted in court in CCC by a Polish interpreter (FN32), and then was observed in court some six weeks later without an interpreter (FN47). This man's seemingly shifting requirement for an interpreter was noted and commented on by Judge DCJ11 who said simply, 'I think he has been here without an interpreter on other occasions' (FN32). During the court proceedings observed when this man was provided with an interpreter, his solicitor described him as a man

who had studied literature at third level and who had 'an excellent grasp of the English language' (FN32). Perhaps the solicitor did not realise how incongruous this statement seemed given that his client was assisted by an interpreter in court.

Many instances were observed when solicitors representing foreign nationals who were not assisted by interpreters in court indicated that an interpreter would be required for future court appearances or for a hearing date. It seemed that amongst some solicitors at least there is a belief that interpreters are only really necessary when a case comes to a conclusion. On other occasions, despite the court having previously certified for an interpreter, on finding that an interpreter was not immediately available, solicitors waived the provision of an interpreter claiming that their client's English was in fact adequate.

> When Robert Rukas was called Judge DCJ11 asked if there was a Slovak interpreter in court. The judge, the registrar and the solicitor turned towards the interpreters' bench and were met by shaking heads. The defendant's solicitor told the court that he was satisfied to proceed without the interpreter and that his client's English was good. The judge was clearly irritated by this remark and said, 'what is the point of having an interpreter assigned when it doesn't appear to be necessary...I don't see why the state is paying for interpreters that are not required' (FN32).

Sometimes proceedings are 'let stand' to allow time for an interpreter to be procured but eventually go ahead without the interpreter (FN42), or commence when the interpreter is not present (FN45). There seems to be a very widespread view amongst District Court actors that the provision of an interpreter for defendants with LEP is something that can be dispensed with when the procurement of an interpreter results in an inconvenient delay. Interpreters are not viewed as being essential to ensure fair procedures are applied in respect of defendants with LEP.

Frequently interpreters are asked by defence lawyers to accompany them to explain matters to their clients after the matter has come before the court. Gardaí may also ask interpreters to assist them to communicate with defendants. The general view seems to be that pre- and post-court conversations with the aid of an interpreter can adequately explain to the defendant what is expected to happen in court or what has just happened in court and it is not critical that actual courtroom proceedings are fully interpreted.

## 9.4 Adjusting the Pace of Court Proceedings to Accommodate Interpretation

If interpreters are to fully interpret courtroom exchanges the conduct and pace of courtroom proceedings must be adjusted. It is essential that as far as possible courtroom actors speak in turn and when speaking at length adopt a slower speech pattern, or pause at intervals to accommodate the interpreter. Observations indicate that very often there is no adjustment to the pace of courtroom proceedings when an interpreter is provided, and there almost seems to be an expectation that the interpreter will be able to explain matters to the defendant afterwards, and so not take up any additional court time. Much of what is said in court is routine and formulaic. Courtroom actors may not be conscious that they are speaking at a pace which hampers efforts to interpret. When defendants are assisted by an interpreter, courtroom actors must accept that it is necessary to adopt a slower pace of speaking as otherwise interpreters will not be able to fully interpret what is said.

When District Court judges are faced with very lengthy case lists they may feel that the dictates of the court list preclude the allocation of the extra time needed to allow interpreters to do their job properly. FSC commented in interview on how District Court proceedings can be rushed and noted:

> Sometimes you definitely get the impression that things are being missed and that the defendant hasn't quite followed

> the significance of the proceedings or got all the nuances of it... it's probably to do with the turnover in the District Court and the time allotted to each case...

On occasions even though defendants are provided with an interpreter they may answer questions in English. As solicitor FSC noted:

> It can get frustrating sometimes where a defendant has been assigned an interpreter but he or she has relatively good English and then they're inclined to answer in English, perhaps when a hearing is being run, and the defendant himself or herself is giving evidence, and then whilst the question is being translated into their own language for them they reply in English but not so well ...and then you're in a position where you just say look would you just answer in your own language and then we're not missing anything and then that can be interpreted ...so sometimes that can happen.

When a defendant is being cross examined by a Garda or a prosecutor they can be reluctant to accommodate the interpreter. They may interrupt the defendant, speak rapidly and adopt a hectoring and even an intimidating stance. Some defendants may then feel pressured to answer questions in English. In one case observed the defendant was provided with a Russian interpreter. The charges against him were contested and the subject of a hearing. The defendant gave his evidence partially in English and partially in Russian. The defendant was interrogated by the arresting Garda who largely ignored the interpreter. The rapid-fire nature of the Garda's questioning made it impossible at times for the interpreter to interpret fully. The interpreter did not ask for the pace of the proceedings to be adjusted and the judge (DCJ20) did not seek to choreograph the proceedings in a more orderly fashion so that the interpreter could do her job properly. Only the defending barrister seemed to feel that the proceedings were not being conducted in a fair manner and at one point he did speak sharply to the Garda (FN47).

## 9.5 Defence Lawyer's Interpretative Role

It should perhaps be remembered that the language used in legal settings and in the District Court may at times be impenetrable to many English speaking defendants. The social milieu of many District Court defendants bears little resemblance to that of many legal professionals and as can be seen from the following field note extract this is evident from differences in the language used by both groups and can lead to misunderstandings and frustration on both sides.

> At one point during today's proceedings the background noise grew to an unacceptable volume. The courtroom was very crowded and quite a number of people were standing at the back of the court. Judge DCJ9 addressed one man and said, 'have you any business in court?' He replied, 'yeah'. Judge DCJ9 asked, 'what business?' and the reply was, 'I'm in court'. Judge DCJ9 looked exasperated and asked, 'as what?' The man who was being interrogated now looked puzzled and repeated, 'I'm in court'. Judge DCJ9 then asked 'are you a defendant?' and the man replied 'yeah', as if to say, 'that's what I already told you' (FN82)!

Courtroom discourse is framed in formal, measured phrases, some of which are commonly used only in legal settings, and in the District Court some of the phrases used are specific to the District Court. The argot of the court is quite frankly an alien language to most of those who appear as defendants, whether or not they are Irish nationals. Defendants are not expected to be proficient in the argot of the court, and generally are given very limited opportunities to speak in court. Unrepresented defendants have more opportunities to address the court than those who have legal counsel but are often encouraged to seek legal representation. The court may recommend that a defendant seeks legal representation primarily to ensure that the interests of the defendant are protected, but such recommendations may also be partially motivated by the recognition that the work of the court will generally proceed at a faster pace when matters

are handled by legal professionals who effectively interpret courtroom exchanges for their clients. It is routine for defence lawyers to explain to defendants, either outside the court or within the body of the courtroom, the substantive outcome of their court appearance in a language which more closely approximates to their vernacular.

## 9.6 Conclusion

The rapid growth in demand for court interpretation services in Ireland has resulted in a compromise between the speedy delivery of interpretative services and the quality of the services provided. The view seems to have been taken that it is better to have any interpreter, however poorly qualified, than no interpreter at all. While there is evidence that the standard of court interpreting has improved, the continued absence of audio recordings of District Court sittings makes it impossible to adequately monitor or assess the quality of interpreting in the court.

The need for interpretative services has not been fully embraced by many courtroom actors who continue to view it as something which can be dispensed with or used intermittently and sparingly. Many courtroom actors seem to expect the interpreter to simply present the defendant with a précis of the court proceedings rather than to fully interpret all courtroom exchanges. Currently the CS are paying for court interpreters but are not ensuring that court proceedings are conducted in a manner which allows interpreters to do the job that they are being paid for. Properly accommodating defendants who require the assistance of court interpreters will mean reducing the current length of court lists and allowing more time for the court to deal with defendants with LEP. All courtroom regulars need to be educated regarding the role of the interpreter and there must be recognition that the interpreter is essential to ensuring that LEP defendants are treated fairly.

The European Commission (EC) passed a directive on 20/10/2010 regarding the right to interpretation and translation in criminal proceedings (EU

2010). Article 5 of the directive sets out the requirement to safeguard the quality of interpretation and translation provided to those facing criminal charges. EU member states[3] now have an obligation to ensure that interpreters used in criminal court settings are appropriately qualified. The implementation of this directive will require the establishment of a system which will provide for the accreditation and regulation of interpreters and the management of a register of qualified interpreters. The recommendations of the European Parliament Committee on Civil Liberties, Justice and Home Affairs (LIBE), which have been supported by the ITIA (2010), point to specific issues which need to be addressed to implement the directive. The recommendations are as follows:

- Training for judges, lawyers, the police and relevant court personnel so they have a better understanding of when it is appropriate to call an interpreter and of what exactly is involved in the interpreter's work.
- A right of appeal against a decision that there is no need for interpreting.
- A system of training, qualification and accreditation of translators and interpreters for legal work.
- A national register of independent professional translators and interpreters.
- Sufficient time to produce translations and to provide interpreting.

If these recommendations were embraced and implemented the District Court could claim that fair procedures are applied to LEP defendants in the District Court. At present no such claim can be made.

In the final chapter of this thesis the key findings are summarised and discussed. The chapter outlines the conclusions reached and the contribution to existing literature made by this thesis.

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[3] With the exception of Denmark which is not adopting this directive.

# 10 Conclusion

## 10.1 Introduction

This thesis focuses on the lowest tier of the Irish criminal court system, the Irish District Court. The primary research subjects were District Court defendants who are non-Irish/non-UK nationals, who are referred to as foreign nationals. The thesis set out to determine whether there are structural biases within the Irish criminal justice system which contribute to the criminalisation of foreign nationals; to assess the scale of the presence of foreign nationals in the Irish District Court; to consider whether fair procedures are applied to all defendants before the court; and to assess the influence of nationality/ethnicity on sentencing decisions. However, as it became clear that the research findings pointed to the salience of class, rather than nationality/ethnicity, both in determining the composition of District Court defendants and as a mediating factor in influencing District Court outcomes, the research focus shifted somewhat and became more concentrated on issues of class than was initially intended. As the research evolved the general organisation and sentencing practices of the District Court, and some Garda activities, also came under scrutiny.

As the Irish District Court accounts for the overwhelming majority of committals to Irish prisons it provided the ideal location to study the processes which culminate in the committal of both Irish and non-Irish nationals to Irish prisons. In addition to providing an insight into the work of the District Court the observation of courtroom processes also provided a means of evaluating Garda practices and the level of referrals to the probation service.

In this, the final chapter, the central propositions of this thesis are set out, and the contribution to knowledge provided by this thesis is outlined. The chapter begins by considering the theoretical perspective which has informed this thesis.

## 10.2 Immigration, Crime and Penal Expansionism

The initial theoretical framework for this research was provided by grounded theory (Glaser & Strauss 1967; Glaser 1992). This 'rolling style of theorising' (Flood 2005:46), or emergent research process, ensures that theoretical insights are informed by data, and data collection is informed by evolving theory. As the research was essentially exploratory in character this theoretical approach ensured that the research was conducted in a reflexive manner (Davies 1999), and that the analysis and interpretation of the research findings was not constrained by any presumptive theoretical perspective.

A presumed link between immigration and crime may have shaped some at least of the theoretical explanations that have emerged to explain the immigration-crime relationship. Despite the somewhat contradictory empirical evidence, perceptions of an immigration-crime nexus are long-standing (Abbott 1931), and can be linked to historical rituals and practices, and especially the practice of transportation which was adopted by several European countries. Immigration is a force which has also been linked to the insecurity of life in modern developed societies, and to the widespread fear of crime. The perception that immigration is linked to crime has been used by right-wing politicians to stoke up support and inflame anti-immigrant sentiments (Collins 2003). In recent years research suggests that the perceived immigration-crime nexus has strengthened (Simon & Sikich 2007; Watson et al. 2007).

A number of theoretical perspectives that seek to provide an explanation of the impact of immigration on crime are noted and discussed in this thesis. Until recently social theorists have largely provided us with a selection of heuristic frameworks which explain why immigration is a force which will increase crime, either through the actions of immigrants themselves or due to the disproportionate targeting and harsher treatment of immigrants by criminal justice processes. Immigration has also been linked to increasing levels of social disorder and instability which undermine the informal social controls which discourage criminal behaviour.

Newly emerged theoretical perspectives on the relationship between immigration and crime suggest that immigration may not contribute to increases in crime, and indeed may be associated with a reduction in crime in certain contexts (Hagan & Palloni 1999; Martinez & Lee 2000; Sampson 2006, 2008; Hagan et al. 2008; Lee & Martinez 2009). The crime-reducing impact of immigration has been explained by reference to factors such as selective migration, higher levels of traditional family structures and economic revitalisation of poor areas.

Theoretical understandings of immigration as a criminogenic force are not supported by the bulk of the available empirical research. Recent North American research suggests that immigration does not increase crime and may even be a crime-reducing force (Lee et al. 2001; Reid et al. 2005; Sampson 2008; Ousey & Kubrin 2009). Research findings from Europe, however, suggest that recent immigrants have a greater involvement in criminal activity than the native population (Vazsonyi & Killias 2001; Martens 2007; Sun & Reed 2007; Killias 2009).

It is argued that the relationship between crime and immigration is not fixed. Diversity in the profiles of recent immigrants, host country characteristics, and local area features all influence the relationship between crime and immigration. This thesis contends that 'soft' versions of the political economy of punishment which take account of variations in capitalist regimes, and which also take account of the key characteristics of immigrants, provide us with the best framework for understanding the impact of immigration on crime.

Migrants in Ireland are more at risk of economic marginalisation than the native population. Although in 2006 most national groups of migrants had very high rates of employment, and low rates of unemployment (CSO 2008a), the contraction in employment that has accompanied the current economic recession has disproportionately affected foreign nationals so that the unemployment rate of foreign nationals in Ireland is now higher than the unemployment rate of Irish nationals (OECD 2010). Discrimination may also contribute to the unemployment rate of foreign nationals (McGinnity et

al. 2009). Foreign nationals are also more likely than natives to have difficulty satisfying the habitual residency condition which is necessary to receive state income supports. As Irish legislation provides that certain breaches of immigration legislation are criminal offences, non-Irish nationals also face a higher risk of criminalisation and may be subject to greater police surveillance than the native population.

One might therefore expect that a significant contraction in the labour market, such as that recently experienced, would result in a higher proportion of foreign nationals being committed to Irish prisons. However, the proportion of non-Irish nationals committed to Irish prisons fell in 2008, and again in 2009 (see chapter two) when the number of jobs in the Irish labour market fell sharply. This fall coincided with a very substantial reduction in the number of PPS numbers allocated to foreign nationals joining the Irish labour market in 2008 and 2009 (OECD 2010), and a return to net outward migration (CSO 2009). Therefore, since 2008 fewer new migrants have arrived in Ireland and some existing migrants have left. This suggests that migrants' response to economic conditions and economic marginalisation may be as important as structural conditions in determining the risk of criminalisation.

As migrants may be more likely than the native population to respond to unemployment by moving to a location where employment opportunities are more plentiful (see Schundeln 2007), the impact of greater levels of economic marginalisation may be different for both groups. While greater levels of economic marginalisation may contribute to higher rates of offending in the native population, offending rates in the migrant population may not increase, or increase to a lesser degree, if economic marginalisation results in a reduction in the migrant population because migrants opt to leave, or choose not to come. Migrants with higher levels of education are more likely to match the skill profiles sought by other host countries,[1] and are also more likely to have the financial resources to

[1] High skill migration schemes exist in the Czech Republic, Austria, UK, Ireland, Latvia, Estonia and Sweden. Schemes are also under consideration in France and Germany (Menz 2009:2).

relocate. As on average migrants to Ireland in recent years have had very high levels of education, many may be able to easily relocate if they so choose.

Ireland's migrant population also includes the highest proportion of EU citizens of any EU member state with the exception of Luxembourg (Vasileva 2009). As EU citizens can move freely within the EU, and as many EU member states have intra-EU oriented labour policies, EU migrants are likely to have higher levels of mobility than non-EU migrants.

In comparison to most OECD countries family-based migration to Ireland is small (see Crosscare Migrant Project 2008; Lowell 2009). This reflects Ireland's very short history as a destination country for migrants. Most Irish migrants in recent years were pulled to Ireland by the strength of its economic performance and the prospect of employment. As Ireland's economy is now shedding jobs it is unlikely to remain an attractive location for unemployed migrants who are motivated largely by economic considerations. Thus, economic migrants without work who view Ireland as a temporary destination may well choose to return home or move elsewhere. Migrants who were pushed into migration because of conflict or religious or political persecution are unlikely to respond in the same way to changes in the labour market.

This thesis proposes therefore that the extent to which immigrants drive penal expansionism will be greatly influenced by the characteristics of the immigrant population. Penal expansionism is less likely to be fuelled by foreign nationals in European countries which attract mainly economic migrants, especially economic migrants who are well educated and therefore likely to be more mobile. Within Europe EU citizens are especially mobile. Penal expansionism is more likely to be driven by foreign nationals in countries which attract a large proportion of migrants who are relatively immobile. The mobility of irregular, and low skilled migrants, is likely to be especially limited and hence the presence of a large cohort of such migrants may be linked to penal expansionism. Therefore, the socio-economic status of migrants is likely to be a key indicator of their risk of criminalisation.

As discussed in chapter five, unexpectedly low numbers of several of the largest national groups of foreign nationals were observed amongst the District Court defendants observed. Despite the greater mobility of EU citizens and the ease with which EU citizens can access the Irish labour market, EU citizenship or the absence thereof was not found to be consistent with low or high levels of offending. This thesis therefore contests claims that in Europe non-EU citizens are subject to hyper-criminalisation (De Giorgi 2010).

## 10.3 Immigrants, Criminal Courts and Criminal Justice Processes

As the evidence regarding the impact of nationality or immigration status on courtroom outcomes is very limited, the literature review also examines a wide body of literature on the influence of a number of extra-legal factors on sentencing decisions with particular emphasis on race. The evidence suggests that sentencing outcomes are very largely dictated by legal variables.

Studying courtroom outcomes can only provide a limited understanding of what actually happens in criminal courtrooms. This understanding is greatly supplemented by a review of courtroom-based qualitative research reported in the existing literature. This review establishes that criminal court outcomes are influenced by a diverse range of factors including the organisation of courtroom workgroups, the judicial appointment system and the size of the court's caseload. It also shows the importance of sentencing rationales, the role of different courtroom actors and the largely minor and often silent role played by defendants.

The literature review also explores relevant literature in relation to the Irish criminal justice system, and in particular the Irish District Court. Despite the pivotal role played by the Irish District Court in disposing of the vast bulk of criminal offences and in shaping the Irish penal population, little research attention has been directed at the court. The lack of transcripts or audio

recordings of court proceedings has hampered research to date and has greatly reduced the transparency of the work of the court.

The limited evidence available suggests that the lack of any sentencing guidelines and the broad sentencing discretion enjoyed by Irish judges results in widespread inconsistencies in sentencing. Some insight regarding judicial attitudes and penal philosophies has been provided by a number of studies which suggest that District Court judges may overestimate the possible positive impacts of incarceration (Vaughan 2001); may largely understand offending as being within the power of individuals to control; may be optimistic about the ability of individuals to desist from offending (Healy & O'Donnell 2010); and may adopt a policy of cumulative sentencing (Maguire 2008).

Research has questioned the impartiality of the sentencing process by pointing to the substantially higher risk of a custodial sentence faced by young males from deprived areas (Bacik et al. 1998). The court's use of short-term custodial sentences has also been criticised (Hamilton 2005), as has the lack of any requirement for District Court judges to provide reasons for imposing custodial sentences (LRC 2002). The presence of immigrants in the District Court has been identified as slowing the work of the court because of the requirement for interpreters and because immigrants are claimed to be more likely to enter 'not guilty' pleas than native defendants (Riordan 2007). The evidence presented by this thesis does not support this latter claim.

Diversity in immigration patterns and structural conditions in host societies are not adequately accommodated in some long-standing theoretical perspectives which seek to explain the relationship between immigration and crime. It is evident that an exploration of differences in European and North American research findings regarding the relationship between immigration and crime would provide a valuable contribution to our knowledge base.

Our existing knowledge about how and why foreign nationals come into contact with European criminal justice systems, and how they are treated by such systems is remarkably limited, especially when one considers the growth in the proportion of foreign nationals in European prison populations (Van Kalmthout et al. 2007). Claims of hyper-incarceration and hyper-criminalisation of immigrants (Wacquant 1999; De Giorgi 2010) lack authority because of the absence of supporting empirical evidence. However, research efforts are constrained by limitations in statistical databases. While details of nationality appear to be routinely collected by European prison authorities there is no standard practice regarding the collection and publication of the nationality and residency status of individuals who come into contact with other arms of European criminal justice systems such as the police, the courts and the probation services.

## 10.4 Contributions to Knowledge made by this Thesis

This thesis provides a number of notable contributions to our existing knowledge. The relevance of a number of these contributions extends beyond the Irish criminal justice system and is of international significance. The contributions made are discussed below.

### 10.4.1 Knowledge Regarding the District Court

This thesis provides an important addition to the limited existing literature regarding the Irish District Court. Due to the lack of transcripts or audio recordings of District Court proceedings to date the work of the District Court has not been subject to a great deal of scrutiny and has remained somewhat cloaked in obscurity. Previous research has focused on courtroom outcomes (Lyons & Hunt 1988; Bacik et al. 1998; Hamilton 2005), or on the attitudes and penal philosophies of the judges (Vaughan 2001; Maguire 2008; Healy & O'Donnell 2010), but no previous research has examined the court in a holistic manner, and sought to fully analyse and assess the court's organisation and procedures as well as the decisions of the court. This thesis therefore provides an important addition to our knowledge about

the Irish District Court as well as providing a much needed study of the presence of foreign nationals in the Irish criminal justice system. The accounts of courtroom exchanges which are peppered throughout the thesis bring the court to life, and provide the reader with a clear understanding of the work of the court and the roles played by various key actors. Each exchange included adds an additional layer to the 'thick' description provided.

This thesis highlights a number of issues of concern regarding the work and organisation of the District Court which collectively serve to undermine the court's important role in the Irish criminal justice system. The issues identified are discussed below.

A number of issues of concern stem directly from the inconsistent sentencing that is evident in the Irish District Court. One of the by-products of the widespread sentencing inconsistency in the Irish District Court is a tendency by courtroom regulars to dismiss proceedings as unimportant and inconsequential. District Court outcomes are unduly dependent on which judge passes sentence, and consequently applications and representations made by defence advocates are at times little more than rituals invested with symbolic rather than instrumental value. The description of courtroom proceedings by one defence solicitor as a 'game' (FN3) encapsulates a widely held frustration amongst defence solicitors that outcomes are uncertain and affected by chance rather than being primarily determined by the facts of the case. This thesis contends that sentencing inconsistency devalues the work of the court to such a degree that even courtroom regulars question the legitimacy of court outcomes, and the value of the work of the court.

Many of the offences dealt with by the court are offences defined by law in an unequivocal manner, even though the moral character of the actions which constitute those offences may be subject to a variety of interpretations. The law overrides any individual moral uncertainty by creating a boundary between what is legal and what is illegal. The court's role is to reinforce the moral boundaries as defined by the law, and to

reduce the ambiguity of the law (Cohen 1966). However, the sentencing inconsistency that is a feature of District Court decisions does little to dispel ambiguity and can even call into question the law itself when convictions are not returned, or are returned in respect of lesser charges, despite evidence of a breach of the law.[2]

This thesis argues that the inconsistency in the sentencing decisions of Irish District Court judges is an inevitable product of the absence of sentencing guidelines and information on sentencing practices. As judges are not directed to adopt specific sentencing rationales, and are not in a position to assess sentencing norms for specific offences, there can be no expectation of sentencing consistency. Consistency in sentencing will not emerge in an organic fashion; it has to be designed into the system.

Greater consistency in sentencing would increase public confidence in the work of the District Court. Addressing the lack of court transcripts would also improve the accountability of the court and so boost public confidence in the justice system. The continued absence of court transcripts is difficult to understand or justify when transcripts are available for many quasi-judicial hearings which do not make decisions of such moment as those reached by the District Court. The absence of court transcripts mean that appeals of District Court verdicts result in a full rehearing in the Circuit Court while appeals against sentences result in a partial rehearing of the case (Rottman & Tormey 1985). The court therefore produces decisions which, when challenged, are routinely put aside. This system inherently devalues the decisions of the court.

In common with many other large organisations, and perhaps in particular with other public agencies, 'means and ends seem to become intertwined, and evaluation criteria typically become identified as things done (that is, activities) rather than as ends accomplished (that is, impact on society)'

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2 On occasions convictions were waived in respect of minor public order offences and RTOs on foot of a contribution to the court Poor Box. Convictions for driving without insurance were also waived on occasion by certain judges, with defendants in such incidences normally being convicted on the lesser charge of failing to produce documents.

(Lyden 1975). The requirement to complete the normally lengthy court list results in speed and conciseness in court proceedings being highly valued. This orientation may contribute to the ease with which adjournments are granted and at times may also result in an impatience and intolerance with matters which require lengthy amounts of court time.

District Court judges frequently decide that it is appropriate to impose a custodial sentence. In 2008 the outcome for approximately one in eight of all cases not dismissed by the court was a period of incarceration (DJELR 2010). Incarceration has been described as a punishment of last resort (Whitaker 1984), yet in the Irish District Court the use of imprisonment is an everyday and commonplace occurrence. This seems to inure many regular court actors to its imposition. The pace at which court proceedings are conducted does not lend itself to reflection on, or the analysis of, decisions in specific cases. The role played by the probation services in the District Court is very peripheral. The proportion of referrals to the probation services is very low, and when probation reports are presented to the court they are read hurriedly by judges in the courtroom. No significant amount of time is spent in assessing or considering the contents.

It is argued that this system leads to judges largely relying on a limited range of criminal sanctions. Current arrangements do not promote or encourage the use of suitable community-based non-custodial sentencing options, and do not ensure that all sentencing options are considered prior to the imposition of a period of incarceration. It is suggested that if a probation report was required prior to the imposition of a custodial sentence the wider use of non-custodial sanctions might be promoted. As additional capacity has been identified in existing community service schemes (DJELR 2009), and the probation service is seeking to increase the number of CSOs (DJELR 2010), a change in judicial practices seems particularly appropriate at this time.

This thesis presents a picture of a court in which the presumption of innocence can often seem somewhat tenuous. Most prosecutions in the

District Court are conducted by a Garda officer and in many instances the chief prosecution witness is a member of An Garda Síochána whose evidence is often afforded a great deal more credibility by the court than evidence given by a defendant. The weight routinely given to the evidence of Gardaí means that when the chief, and indeed often only, prosecution witness is a member of An Garda Síochána, it can seem that defendants who plead 'not guilty' may effectively have to prove their innocence; this is especially difficult for those who have a previous criminal record and who are presented to the court as being 'known' to the Gardaí. This situation places a great deal, and perhaps an inordinate, amount of power in the hands of the Gardaí. This power is perhaps especially inappropriate when one considers that many of the offences prosecuted in the District Court are 'regulatory' offences (see Whitman 2003; Lacey 2008) which are offences because the underlying behaviour is forbidden, rather than because the behaviour is inherently wrong. Regulatory offences could, as in many other jurisdictions, be dealt with as administrative breaches rather than as criminal offences.

### 10.4.2 The Role of Lower Tier Courts

This thesis provides a valuable insight into the role of lower tier courts. In many ways lower tier courts play a greater role in defining moral boundaries than do higher criminal courts which deal with more serious offences whose moral character is rarely in question. The offences and offenders that appear before lower tier courts tell us a great deal about how 'crime' is defined in a society and who is designated as 'criminal'.

In the Irish context it is clear that a great deal of priority is given to policing behaviour in public spheres. Those who tend to be unruly in public spheres are young men, and in particular young men from lower economic backgrounds. Policing efforts are also concentrated on those who engage in unsophisticated thefts of tangible property. Such crimes are readily detectable, and situational anti-theft devices such as alarms and cameras may even identify the perpetrator. These crimes are also likely to be largely committed by those in the lower socio-economic classes. Directing police resources largely to 'street crime' results in the definition of a limited group

in our society, that is, young men from lower socio-economic classes, as disorderly, dangerous and criminal. Policing practices shape how we categorise behaviour and who we categorise as criminal. Over time these policing practices become 'natural' and largely unquestioned (Harcourt 2002). There may also be organisational reasons for directing police resources to offences such as RTOs and public order offences as such offences produce high detection rates which can be used to evaluate police performance.

Contrast 'street crimes' with more sophisticated cyber-crime and fraud which may not be detected for some time after they are committed and which are likely to require significant levels of education both to carry out and to solve. The resources needed to tackle crimes of this nature are considerable and it seems likely that many perpetrators never appear before our courts. This research suggests that minor crimes committed by those in lower socio-economic classes are more likely to be detected and prosecuted than the crimes committed by those in higher socio-economic classes.

### 10.4.3 Immigration Legislation

The provisions of section 12 of the Immigration Act, 2004 and the potential discriminatory use of this legislation have been discussed in this thesis (see chapter eight). The provisions of this legislation are contrary to the recommendations of the European Commissioner on Human Rights who has strongly argued that irregular migrants should not be criminalised (COECHR 2010). To date this legislation has excited little in the way of controversy or debate although it sanctions the differential policing of non-Irish persons in Ireland, regardless of their residency status. The legislation does not address how non-Irish nationals are to be identified by Gardaí, but this thesis has shown that people of non-European appearance and people with limited English are most likely to be stopped by Gardaí under the provisions of this legislation. This is consistent with previous research which has highlighted that sub-Saharan Africans, and to a lesser extent Eastern Europeans, are subject to a high rate of Garda stops (European Union

Agency for Fundamental Rights 2009; Amnesty International 2001, cited in Ionann 2004). The evidence presented by this thesis suggests that inappropriate police racial and ethnic profiling may be sanctioned and driven by immigration legislation.

Only limited public debate preceded the introduction of the Immigration Act, 2004 and there is little public awareness, or ongoing discussion, about this legislation. In contrast, as noted in chapter eight, widespread controversy has been excited in the US following the enactment of legislation in Arizona which requires non-citizens to carry immigration documents and gives the state police the power to detain illegal immigrants (Archibold 2010). The Arizona legislation has provoked demonstrations and discussions across the US. The US justice department has filed a suit to challenge the Arizona law (Preston 2010) and a decision by a federal judge has blocked the introduction of some of the most controversial components of the law (Kapur 2010), while the battle between supporters and opponents of the law continues unabated.

It is only very recently that Ireland's minority ethnic population has constituted more than a very tiny component of the total population. Recent inward migration has greatly increased the size of the resident minority ethnic population. The majority of people in the minority ethnic communities in Ireland are recent arrivals in our communities. Perhaps Irish people still think of these people primarily as immigrants rather than as neighbours, friends, co-workers and sometimes even fellow citizens. Although some members of the minority ethnic population are Irish citizens the expensive and lengthy naturalisation process, and the high refusal rate of applications, are likely to dissuade many from applying (ICI 2009). The relatively small numbers of Irish citizens in the Irish ethnic minority community may weaken the voice, and the power, of these communities and their ability to draw on the support of the wider Irish community. This may mean that laws which excite controversy in countries with more sizeable and established ethnic minority communities do not generate the public debate in Ireland, and in similar countries, that they warrant. This thesis therefore contends that the political process of introducing

immigration legislation that criminalises irregular migrants will be less contentious in new immigrant destination countries than in countries with long-standing and sizable ethnic minority communities.

## 10.5 Immigration and the Political Economy of Punishment

The critical materialist theoretical perspective, known as the political economy of punishment, stems from the work of Rusche and Kirchheimer (1939) and contends that the penal apparatus of capitalist societies are used to ensure a flexible, compliant supply of labour. The penal arm of the state is therefore understood as being integral to the working of capitalist economies because of the role it plays in controlling the labour force. Workers are induced to provide their labour and avoid criminal sanctions by ensuring that the conditions of penal confinement are more unattractive than the living conditions of even the lowest paid worker (De Giorgi 2010).

However, penal confinement is not used at the same rate in all capitalist societies, and the conditions of confinement also vary greatly. Analysts who put forward a 'soft' version of the political economy of punishment recognise that the high levels of penal punitiveness that are associated with the relatively unfettered capitalism found in liberal regimes are not found in all capitalist societies (Cavadino & Dignan 2006; Lacey 2008).

Proponents of the political economy of punishment have explained recent penal expansionism by pointing to economic restructuring in developed capitalist societies (see Wacquant 2001, 2009). Economic restructuring has resulted in the loss of many manufacturing jobs as low cost manufacturing bases in less developed countries have replaced many higher cost manufacturing facilities in developed countries. Competition from manufacturers in cheaper, less developed countries has also eroded the pay and reduced the security attaching to the jobs that remain. Technological advances have also resulted in lower labour inputs in many manufacturing and agricultural processes. This means that in developed capitalist

economies many of those with low levels of education, and especially young men, are surplus to the requirements of the labour market, or are limited to work which yields minimum wage rates. Economic restructuring has therefore resulted in a bigger proportion of the work force facing a higher risk of economic and social marginalisation.

It is contended that the economically marginalised are increasingly controlled by the state through a combination of workfare and prisonfare (Wacquant 2009). In America penal expansionism has disproportionately affected the African American community, and in particular young African American men who face rates of incarceration eight times those of white men (Western & Pettit 2006:16). In Europe analysts have claimed that penal expansionism is largely fuelled by foreigners and immigrants who as a group are especially at risk of economic marginalisation (Wacquant 1999; De Giorgi 2006, 2010). The higher risk of economic marginalisation of migrants stems from lower job security and their limited access to, or exclusion from, the formal labour market and the income supports offered to the native population. The economic marginalisation of migrants is also linked to regulations which seek to privilege native workers by restricting access to labour markets. Migrants who are excluded from the formal economy are especially vulnerable. When breaches of immigration legislation are criminalised immigrants also have more opportunity to breach the criminal code and may be subject to greater surveillance by law enforcement officers.

Drawing on evidence of the experience of Irish migrants, this thesis presents a more nuanced view of the link between immigration and penal expansionism than that which has been suggested previously by proponents of the political economy of punishment (see Wacquant 1999; De Giorgi 2006, 2010). Whilst acknowledging the structural disadvantages faced by immigrants, and their higher risk of criminalisation, this thesis argues that claims of hyper-incarceration and hyper-criminalisation of immigrants are not convincing, and are not adequately supported by empirical evidence. This thesis argues that we should expect local and national economic, legislative, and procedural differences, along with variations in migration

patterns, to produce a disparate rather than a consistent pattern of immigrant criminalisation and incarceration.

This thesis also contends that immigrants' contribution to penal expansionism will be greatly dependent on key characteristics of the immigrant population, and in particular their level of education and socio-economic status. EU citizenship was not found to be a crucial determinant of criminalisation in Ireland and consequently this thesis does not support claims regarding the hyper-criminalisation of non-EU immigrants (De Giorgi 2010). Socio-economic class rather than nationality is the most crucial factor which increases the risk of criminalisation. Higher socio-economic class protects citizens and non-citizens alike from the structural bias within law enforcement processes, discussed above, which results in resources being targeted at particular types of offences and offenders.

Blanket claims of hyper-criminalisation of immigrants ignore national and local variations in policies and practices and indeed in patterns of migration. Macro-level analysis of criminal justice statistics may also cloak important variations in patterns of offending. Much of the detail that is essential to formulate appropriate policies can only be obtained by local, micro-level research.

## 10.6 Conclusion

This thesis set out to present a detailed ethnographic account of the work of the Irish District Court and to record and explain the presence of foreign nationals amongst District Court defendants. The thesis includes numerous field note extracts which not only allow us to hear the voice of the court but also probe and scrutinise court decisions and outcomes. Collectively the extracts presented, and the related analysis, provide an in-depth understanding of what the court does and the roles played by various courtroom actors. The account presented in this thesis ensures that the work of the District Court can now be more readily understood than before.

The picture that emerges from this thesis is of a court in which the vast majority of defendants, regardless of their nationality or ethnicity, are from the lower socio-economic classes. Although nationality is of direct relevance in determining who appears before the court in respect of breaches of immigration legislation, for all other offences defendants of all nationalities share a remarkably similar profile; for the most part they are young, male and have low incomes and low levels of education. The thesis also points out that class not only shapes the composition of defendants before the court it also, on occasion, influences courtroom outcomes.

A superficial interpretation of the composition of Irish District Court defendants might suggest that minor criminal offences are disproportionately committed by the less well off in Irish society. However, in the main the Irish District Court is only called upon to deal with a limited range of offences committed largely by a small section of our society. The court is rarely called upon to deal with 'white collar' crimes which are usually committed by those in the higher socio-economic classes. It seems very likely that the vast bulk of 'white collar' crimes are never detected and the perpetrators are never prosecuted (see Whitaker 1984; Kilcommins et al. 2004; Coulter 2010b); this creates an erroneous impression that those who commit crime are predominantly from the ranks of the poor and less educated.

This thesis contends that the socio-economic composition of District Court defendants is a product of how crime is defined and policed in Irish society rather than a reflection of the distribution of crime in Irish society. It argues that all criminal offences are not policed and prosecuted with equal vigour and that the criminalisation of certain behaviour disproportionately impacts the less well off in our society. In practice the tag of 'criminal' in Irish society is largely reserved for those who are economically and socially vulnerable and therefore, for the most part, the Irish District Court punishes and regulates the poor. It is argued that the institution of punishment in Irish society is very largely used to regulate and control those who have no attachment or only a tenuous attachment to the labour market and who

therefore do not contribute to the production of wealth as measured in capitalist economies.

In Ireland migrants face a higher risk of economic marginalisation and of criminalisation than the native population. Some migrants may also be subject to undue police surveillance due to racial/ethnic profiling. However, these risks do not necessarily translate into higher rates of criminalisation for all migrants because, as outlined above, police resources and efforts are primarily targeted at offences committed by the less well off in society. Hence, migrants with high socio-economic status are largely insulated from the risk of criminalisation, whereas migrants of low socio-economic status are especially at risk of criminalisation. Overall therefore, although the origins of Irish District Court defendants are now extraordinarily varied, defendants are still overwhelmingly from the lower social classes in society.

This thesis demonstrates that situated, local, micro-level research can provide insights and knowledge which can inform and guide macro-level theories and analysis. Irish District Court defendants now have global origins but the organisation, practices and decisions of the court are embedded in local cultures and context. This thesis highlights that, despite global influences, local cultures are enduring and must continue to be taken into account.

This thesis concludes with the usual clarion call for further related research. Our knowledge of the work of the Irish District Court could be further expanded by quantitative research on District Court outcomes. To be most useful such research would be based on CS records which were augmented by the inclusion of information such as defendants' nationality, ethnicity, employment status and level of education. Additional qualitative research on courtroom insiders would also add to our knowledge base. Research on police practices and decisions to prosecute would also enable us to better understand the composition of District Court defendants.

## Bibliography


Abbott, E. (1931) 'Crime and the Foreign Born: Public Opinion', Volume 10, *U.S. Wickersham Commission Reports,* U.S. National Commission on Law Observance and Enforcement.

Adler, P. A. (1985) *Wheeling and Dealing: An Ethnography of an Upper-level Drug dealing and Smuggling Community*, New York: Columbia University Press.

Adler, P. A. and P. Adler (1993) 'Ethical Issues in Self-Censorship: Ethical Research on Sensitive Topics', in C. M. Renzetti and R. M. Lee (Eds.), *Researching Sensitive Topics*, Newbury Park: Sage: 249-66.

Agar, M. (1971) *Ripping and Running: A Formal Ethnography of Urban Heroin Addicts,* New York: Seminar Press.

Albrecht, H. J. (1997) 'Ethnic Minorities, Crime and Criminal Justice in Germany', *Crime and Justice: Ethnicity, Crime and Immigration: Comparative and Cross-National Perspectives,* 21:31-99.

Albrecht, H. J. (2002) 'Immigration Crime and Unsafety', in *Crime and Insecurity: Governance and Safety in Europe,* A. Crawford (Ed.), Cullompton: Willan: 159-185.

Alscher, S. (2005) 'Knocking at the Doors of "Fortress Europe": Migration and Border Control in Southern Spain and Eastern Poland', Working Paper 126, November 2005, San Diego: The Centre for Comparative Immigration Studies, University of California, San Diego. Retrieved online on 22/04/2010 from: http://www.ccis-ucsd.org/PUBLICATIONS/wrkg126.pdf

Angel-Ajani, A. (2003) 'A Question of Dangerous Races?' *Punishment & Society,* 5(4):433-448.

Anspach, D. F. and S. H. Monsen (1989) 'Determinant Sentencing, Formal Rationality, and Khadi Justice in Maine: An Application of Weber's Typology', *Journal of Criminal Justice,* 17:471-85.

Archibold, R. C. (2010) 'Arizona Enacts Stringent Law on Immigration', *The New York Times,* 23/04/2010.

Arsovska, J. and P. Verduyn (2008) 'Globalization, Conduct Norms and "Culture Conflict": Perceptions of Violence and Crime in an Ethnic Albanian Context', *British Journal of Criminology*, 48 (2):226-246.

Ashworth, A. (2005) 'Criminal History in England: The Search for the Snark', *Federal Sentencing Reporter,* 17(3):207-208.

Ashworth, A., E. Genders, G. Mansfield, J. Peay, and E. Player (1984) *Sentencing in the Crown Court,* Occasional Paper 10, Oxford: Oxford Centre for Criminological Research.

Austin, W. and T. A. Williams (1977) 'A Survey of Judges' Responses to Simulated Legal Cases: Research Note on Sentencing Disparity', *Journal of Criminal Law & Criminology,* 68(2):306-310.

Bacik, I., A. Kelly, M. O'Connell and H. Sinclair (1998) 'Crime and Poverty in Dublin: An Analysis of the Association Between Community Deprivation, District Court Appearance and Sentence Severity', in *Crime and Poverty in Ireland*, I. Bacik and M. O'Connell (Eds.), Dublin: Round Hall Sweet and Maxwell: 1-30.

Bacik, I. (2002) 'The Practice of Sentencing in the Irish Courts', in *Criminal Justice in Ireland,* P. O' Mahony (Ed.), Dublin: Institute of Public Administration: 349-370.

Bacik, I. (2007) 'Breaking the Language Barrier: Access to Justice in the New Ireland', *Judicial Studies Institute Journal,* 2:109-123.

Bagaric, M. (2000) 'Double Punishment and Punishing Character: The Unfairness of Prior Convictions', *Criminal Justice Ethics,* 19 (1):10-28.

Barnes, A. (2009) 'Displacing Danger: Managing Crime Through Deportation', *Journal of International Migration and Integration,* 10(4):431-445.

Barrett, A. (2009) *EU Enlargement and Ireland's Labour Market*, IZA DP No. 4260, June 2009, Bonn: Institute for the Study of Labour.

Barrett, A. and D. Duffy (2008) 'Are Ireland's Immigrants Integrating Into Its Labour Market?' *International Migration Review*, 42 (3):597-619.

Bauman, Z. (2000) *Liquid Modernity*, Cambridge: Polity Press.

Becker, H. (2008) 'Offences and Penalties in the Immigration Residence and Protection Bill 2008 - Do the Punishments Fit the Crime?' Paper presented at ACJRD Eleventh Annual Conference Dublin 9th October 2008. Retrieved online on 22/04/2010 from http://www.immigrantcouncil.ie/images/8470_091008_ACJRDpaper.pdf

Beckett, K. and B. Western (2001) 'Governing Social Marginality: Welfare, Incarceration and the Transformation of State Policy', *Punishment and Society*, 3:43-59.

Bender, G. J. (1992) *Angola Under the Portuguese: The Myth and the Reality*, Berkley; Los Angeles: University of California Press.

Bennett, J. (2001) ''Snakehead' Gangs whose Trade is Human Suffering', *The Irish Independent*, 26/04/2001. Retrieved online on 20/08/2010 from www.independent.ie

Bennett, W. L. and M. S. Feldman (1981) *Reconstructing Reality in the Courtroom*, London: Tavistock Publications.

Berdal, M. and M. Serrano (2002) *Transnational Organised Crime and International Security: Business as Usual?* Boulder, CO: Lynne Rienner Publishers.

Bernard, T. J. (1989) 'A Theoretical Approach to Integration', in *Theoretical Integration in the Study of Deviance and Crime: Problems and Prospects*, S. F. Messner, M. D. Krohn and A. E. Liska (Eds.), Albany: State University of New York: 137-160.

Blake, G. O. (2009) 'America's Deadly Export: Evidence from Cross-Country Panel Data of Deportation and Homicide Rates'. Paper presented on 24th March 2010 at the 11th Annual Conference of the Sir Aurthur Lewis Institute of Social and Economic Studies 'Turmoil and Turbulence in small Developing States: Going Beyond Survival. Retrieved online from http://www.sta.uwi.edu/conferences/09/salises/documents/G%20Blake.pdf

Blumberg, A. S. (1967) 'The Practice of Law as a Confidence Game: Organisational Cooperation of a Profession', *Law and Society Review,* 1(2):15-39.

Bogira, S. (2005) *Courtroom 302*, New York: Alfred A. Knopf.

Boswell, C. (2003) 'The "External dimension" of EU Immigration and Asylum Policy,' *International Affairs,* 79(3):619-638.

Bourgois, P. (1995) *In Search of Respect: Selling Crack in El Barrio*, Cambridge: Cambridge University Press.

Boyle, K. (1984) 'Appendix II - The Galway District Court Study', in *The Criminal Justice System: Policy and Performance*, Dublin: NESC.

Brady, T. (2009) 'Gang Accused of Trafficking Face 15 Years in Jail if Convicted', *The Evening Herald*, 03/10/2009. Retrieved online on 20/08/2010 from http://www.herald.ie

Bremmer, J. (1983) 'Scapegoat Rituals in Ancient Greece', *Harvard Studies in Classical Philology*, 87: 299-320.

Brewer, J. D., B. Lockhart and P. Rodgers (1997) *Crime in Ireland 1945-1995: Here be Dragons,* Oxford: Clarendon Press.

Brickey, S. L. and D. E. Miller (1975) 'Bureaucratic Due Process: An Ethnography of a Traffic Court', *Social Problems,* 22(5):688-697.

Brown, I. and R. Hullin (1992) 'A Study of Sentencing in the Leeds Magistrates' Courts: The Treatment of Ethnic Minority and White Offenders', *British Journal of Criminology,* 32(1):41-53.

Bryman, A. (2004) *Social Research Methods*, Oxford: Oxford University Press.

Burns, S. L. and M. Peyrot (2008) 'Reclaiming Discretion: Judicial Sanctioning Strategy in Court Supervised Drug Treatment', *Journal of Contemporary Ethnography,* 37 (6):745-777.

Butcher, K. F. and A. Morrison Piehl (2005) 'Why Are Immigrants' Incarceration Rates So Low? Evidence on Selective Immigration, Deterrence, and Deportation' (WP 2005-19), Chicago: Federal Reserve Bank of Chicago, November 2005. Retrieved online on 16/06/2010 from http://ideas.repec.org/p/fip/fedhwp/wp-05-19.html

Cahill, A. (2009) 'Asylum Seekers to Ireland Double the EU Average', *The Irish Examiner*, 9th May, 2009.

Carey, S. (2007) *Social Security in Ireland, 1939-1952: The Limits to Solidarity*, Dublin: Irish Academic Press.

Castellano, U. (2007) 'Becoming a Nonexpert and Other Strategies for Managing Fieldwork Dilemmas in the Criminal Justice System', *Journal of Contemporary Ethnography*, 36(6):704-730.

Cavadino, M. and J. Dignan (2006) 'Penal Policy and Political Economy', *Criminology and Criminal Justice*, 6(4):435-456.

Central Statistics Office (CSO) (2004) *Census 2002 Volume 8 - Irish Traveller Community,* Dublin: The Stationery Office.

Central Statistics Office (CSO) (2007) *Census 2006 Volume 5 - Ethnic or Cultural Background (including the Irish Traveller Community),* Dublin: The Stationery Office.

Central Statistics Office (CSO) (2008a) *Census 2006: Non-Irish Nationals Living in Ireland*, Dublin: The Stationery Office.

Central Statistics Office (CSO) (2008b) *Construction and Housing in Ireland 2008 Edition*, Dublin: The Stationery Office.

Central Statistics Office (CSO) (2009) 'Population and Migration Estimates-April 2009'. Retrieved online from http://www.cso.ie

Central Statistics Office (CSO) (2010a) *Quarterly National Household Survey: Quarter 2 2010,* 21 September 2010, Dublin: Stationery Office.

Central Statistics Office (CSO) (2010b) *Population and Migration Estimates: April 2010,* 21 September 2010, Dublin: Stationery Office.

Chambliss, W. J. and R. B. Seidman (1971) *Law, Order, and Power*, Reading, MA: Addison-Wesley.

Chiricos, T.G. and C. Crawford (1995) 'Race and Imprisonment: A Contextual Assessment of the Evidence', in *Ethnicity, Race and Crime: Perspectives Across Time and Place,* D. F. Hawkins (Ed.), Albany: State University of New York Press: 281-309.

Chiricos, T. G. and G. P. Waldo (1975) 'Socioeconomic Status and Criminal Sentencing: An Empirical Assessment of a Conflict Proposition', *American Sociological Review,* 40(6):753-772.

Christie, N. (1986) 'Suitable Enemies', in *Abolitionism: Toward a Non-Repressive Approach to Crime*, H. Bianchi and R. von Swaaningen (Eds.), Amsterdam: Free University Press.

Cicourel, A. V. (1968) *The Social Organisation of Juvenile Justice*, New York: Wiley & Sons.

Clarke, S. H. and G. G. Koch (1976) 'The Influence of Income and Other Factors on Whether Criminal Defendants go to Prison', *Law and Society Review,* 11:57-92.

Codd, H. (2008) *In the Shadow of Prison: Families, Imprisonment and Criminal Justice*, Cullompton: Willan Publishing.

Cohen, J. (1931) 'Report on Crime and the Foreign Born - Reports of the National Commission on Law Observance and Enforcement', *Michigan Law Review,* 30:99-104.

Cohen, A. (1966)*Deviance and Control*, Engle- wood Cliffs, New Jersey: Prentice-Hall.

Collins, J. (2003) 'Immigrant Crime in Europe and Australia: Rational or Racialised Responses?' National Europe Centre Paper No. 80:1-35. Paper presented at conference entitled: The Challenges of Immigration and Integration in the European Union and Australia, University of Sydney, 18-20 February 2003.

Comptroller and Auditor General (2002) 'Annual Report 2001 Chapter 6: The Courts Service'. Retrieved online on 20/03/2010 from: http://audgen.irlgov.ie/documents/annualreports/2001/Chap6.pdf

Conley, J. M. and W. M. O'Barr (1990) *Rules Versus Relationships: The Ethnography of Legal Discourse*, Chicago; London: The University of Chicago Press.

Connolly, J. (2006) *Drugs and Crime in Ireland,* Overview 3, Dublin: Health Research Board.

Conroy, B. and P. G. Gunning (2009) 'The Irish Sentencing Information System (ISIS): A Practical Guide to a Practical Tool', *Judicial Studies Institute Journal*, 9 (1):37-53.

Coomber, R. (2002) 'Signing Your Life Away? Why Research Ethics Committees (REC) Shouldn't Always Require Written Confirmation that Participants in Research Have Been Informed of the Aims of a Study and Their Rights - The Case of Criminal Populations', *Sociological Research Online,* 7 (1) http://www.socresonline.org.uk/7/1/coomber.html

Corcoran, M. P. (2002) 'The Process of Migration and the Reinvention of Self: The Experiences of Returning Irish Emigrants', *Journal of Irish Studies* 37:175-191.

Cottino, A. (1998) ''The Big Thieves Hang the Small Ones': Equality Before the Criminal Law in an Unequal Society', in *The New European Criminology: Crime and Social Order in Europe,* V. Ruggiero, N. South and I. Taylor (Eds), London; New York: Routledge: 136-145.

Coulter, C. (2010a) 'The Judiciary Signals Support for Setting Up Judicial Council', *The Irish Times* 10/05/2010.

Coulter, C. (2010b) 'Wall Around Site of Planned Prison "Poor Use of Money"', *The Irish Times*, 24/09/2010.

Council of Europe (1993) *Consistency in Sentencing: Recommendation No. R (92) 17*, Strasbourg: Council of Europe.

Council of Europe (2009) *SPACE 1 Annual Penal Statistics: Survey 2007*, Strasbourg: Council of Europe.

Council of Europe Commissioner for Human Rights (COECHR) (2010) *Criminalisation of Migration in Europe: Human Rights Implications,* Issue Paper, 4 February 2010, Strasbourg: Council of Europe Commissioner for Human Rights.

Courts Service (CS) (2005) *Courts Service Strategic Plan 2005-2008*. Retrieved online on 25/06/2010 from www.courtservice.ie

Courts Service (CS) (2006) *Courts Service Annual Report 2005*. Retrieved online on 20/06/2010 from www.courtservice.ie

Courts Service (CS) (2007) *Courts Service Annual Report 2006*. Retrieved online on 20/06/2010 from http://wwwcourtsservice.ie

Courts Service (CS) (2008a) *Courts Service Annual Report 2007*. Retrieved online on 20/06/2010 from http://wwwcourtsservice.ie

Courts Service (CS) (2008b) *Courts Service Strategic Plan 2008-2011*. Retrieved online on 25/06/2010 from www.courtservice.ie

Courts Service (CS) (2009) *Courts Service Annual Report 2008*. Retrieved online on 20/06/2010 from http://wwwcourtsservice.ie

Courts Service (CS) (2010) *Courts Service Annual Report 2009*. Retrieved online on 20/06/2010 from http://wwwcourtsservice.ie

Crosscare Migrant Project (2008)'Family reunification legislation and migrant integration', Crosscare Migrant Project, January 2008. Retrieved online on 23/09/2010 from http://www.migrantproject.ie/images/Family%20reunification.pdf

Crow, I. and F. Simon (1987) *Unemployment and Magistrates' Courts*, London: National Association for the Care and Resettlement of Offenders.

Cusack, J. and J. Guerin (2003) 'Sex Industry Links with Russian Mafia Prompted Lap Dance Raids', *The Sunday Independent*, 08/06/2003. Retrieved online on 20/08/2010 from www.independent.ie

Davies, C.A. (1999) *Reflexive Ethnography: A guide to researching selves and others*, London: Routledge.

Decker, S. H., F. van Gemert and D. C. Pyrooz (2009) 'Gangs, Migration and Crime: The Changing Landscape in Europe and the USA', *Journal of International Migration and Integration,* 10(4):393-408.

De Giorgi, A. (2006) *Re-thinking the Political Economy of Punishment: Perspectives on Post-Fordism and Penal Politics*, Aldershot: Ashgate.

De Giorgi, A. (2010) 'Immigration Control, Post-Fordism, and Less Eligibility: A Materialist Critique of the Criminalization of Immigration Across Europe', *Punishment and Society,* 12 (2):147-167.

De Koster, W., J. van der Waal, P. Achterberg and D. Houtman (2008) 'The Rise of the Penal State: Neo Liberalism or New Political Culture?' *British Journal of Criminology*, 48(6):720-734.

Delsol, R. and M. Shiner (2006) 'Regulating Stop and Search: A Challenge for Police and Community Relations in England and Wales,' *Critical Criminology*, 14(3):241-263.

Department of Justice Equality and Law Reform (DJELR) (2009) 'Value for Money and Policy Review of the Community Service Scheme'. Retrieved online on 22/07/2010 from http://www.probation.ie

Department of Justice, Equality and Law Reform (DJELR) (2010) *White Paper on Crime: No. 2 February 2010, Criminal Sanctions Discussion Document*, Dublin: DJELR.

Department of Justice, Equality and Law Reform (DJELR) (Undated) 'Green Paper on Procedural Safeguards for Suspects and Defendants in Criminal Proceedings Throughout the European Union. Response of the Minister for Justice Equality and Law Reform, Ireland'. Retrieved online on 20/06/2010 from:
http://ec.europa.eu/justice_home/fsj/criminal/procedural/responses/28.pdf

Department of Social Protection (DSP) (2010) 'Habitual Residence Condition - Guidelines for Deciding Officers on the Determination of Habitual Residence', Retrieved online on 15/08/2010 from www.welfare.ie/EN/OperationalGuidelines/Pages/habres.aspx

Devins, M. C. (2009) 'Selectivity in Prosecution in the District Court', *Judicial Studies Institute Journal,* 9 (2):26-41.

Dickey, W. J. (1993) 'Sentencing, Parole and Community Supervision', in *Discretion in Criminal Justice: The Tension Between Individualization and Uniformity,* L. E. Ohlin and F.R. Remington (Eds.), Albany: State University of New York Press: 135-174.

DKM Economic Consultants (2010) *Annual Construction Industry Review 2009 and Outlook 2010-2012.* Report commissioned and funded by the Department of the Environment Heritage and Local Government. Dublin:DEHLG.

Dorgan, S. (2006) 'How Ireland Became the Celtic Tiger' *Backgrounder* #1945 23/06/2006, The Heritage Foundation. Retrieved online on 25/08/2010 from
www.heritage.org/research/worldwidefreedom/bg1945.cfm

Dowds, L. and C. Hedderman (1997) 'The Sentencing of Men and Women', in *Understanding the Sentencing of Women*, C. Hedderman and L. Gelsthorpe (Eds.), London: Home Office: 1-60.

Downes, D. (2001) 'The *Macho* Penal Economy: Mass Incarceration in the United States - A European Perspective', *Punishment and Society*, 3 (1):61-80.

Drummond, A. (2006) 'Cultural Denigration: Media representation of Irish Travellers as Criminal', in *Counter-Hegemony and the Postcolonial "Other"*, M. Hayes and T. Acton (Eds.), Cambridge: Cambridge Scholars Press: 75–85.

Drummond, A. (2007) *Irish Travellers and the Criminal Justice Systems Across the Island of Ireland*. University of Ulster (unpublished PhD thesis).

Durkheim, E. (1964) *The Division of Labor in Society*, New York: The Free Press; London: Collier–Macmillan.

Durkheim, E. (1973) *Moral Education: A Study in the Theory and Application of the Sociology of Education*, New York: Free Press; London: Collier–Macmillan.

Edwards, A. B. (1995) *The Practice of Court Interpreting*, Amsterdam; Philadephia: John Benjamins.

Eisenstein, J. and H. Jacob (1977) *Felony Justice: An Organisational Analysis of Criminal Courts*, Boston; Toronto: Little, Brown and Company.

Elias, N. (2008) *Essays. 2, On Civilising Processes, State Formation and National Identity,* Dublin: University College Dublin Press.

Emerson, R. M. (1969) *Judging Delinquents: Context and Process in Juvenile Court*, Chicago: Aldine Publishing.

Equality and Human Rights Commission (EHRC) (2010) 'Stop and Think'. Retrieved online on 19/04/2010 from http://www.equalityhumanrights.com/fairer-britain/race-in-britain/stop-and-think/

Esping-Andersen, G. (1990) *The Three Worlds of Welfare Capitalism*, Cambridge: Polity Press.

European Commission (2006) 'The European Union Policy Towards a Common European Asylum System'. Retrieved online on 20/04/2010 from http://www.ec.europa.eu/justice_home/fsj/asylum/fsj_aslum_intro_en.htm

European Migration Network (EMN) (2009) 'Ad-Hoc Query on Criminal penalties against illegally entering or staying third-country nationals', Compilation produced 21/09/09. Retrieved online from http://www.emn.fi/files/96/COMM_145_EMN_Ad-Hoc_Query_Criminal_penalties_against_illegally_entering_or_staying_third_country_nationals

European Parliament Committee on Civil Liberties, Justice and Home Affairs (LIBE) (2010) 'Draft report on the Directive of the European Parliament and of the Council on the Right to Interpretation and Translation in Criminal Proceedings' (00001/2010-C7-005-/2010/0801(COD)). Retrieved online on 24/06/2010 from http://www.europal.europa.eu/meetdocs/2009-2014/documents/libe/pr/807/807292/8

European Union (EU) (2010) 'Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings' Brussels. Retrieved online on 23/01/2011 from http://europa.eu/legislation_summaries/justice_freedom_security/judicial_cooperation_in_criminal_matters/jl0047_en.htm

European Union Agency for Fundamental Rights (FRA)(2009) *European Union minorities and Discrimination Survey Main Results Report.* Retrieved online on 23/06/2010 from http://fra.europa.eu/fraWebsite/attachments/eumidis_mainreport_conference-edition_en_.pdf

Eurostat (2009) 'Asylum in the EU in 2008', Eurostat News release 66/2009-8 May 2009. Retrieved online from http://epp.eurostat.ec.europa.eu

Eurostat (Undated) 'Population and Social Conditions - Asylum applications' [tps00021]. Retrieved online from http://epp.eurostat.ec.europa.eu

Fallon, J. (2008) 'Two jailed men refuse to reveal identities' *The Irish Times*, 11/02/2008.

Fanning, B. (2001) 'Reluctant Hosts: Refugee Policy in Twentieth Century Ireland', *Administration,* 48:4.

Farrington, D. P. and A. M. Morris (1983) 'Sex, Sentencing and Reconviction', *British Journal of Criminology,* 23(3):229-248.

Farrington, D. P. and K. A. Painter (2004) *Gender Differences in Offending: Implications for Risk-Focused Prevention*. Home Office Online Report 09/04 (Home Office Research Findings No. 196). Retrieved online on 16/06/2010 from www.homeoffice.gov.uk/rds/pdfs06/r196.pdf

Feeley, M. M. (1979) *The Process is the Punishment: Handling Cases in a Lower Criminal Court,* New York: Russell Sage Foundation.

Ferreira, M. L. and P. Vanhoudt (2004) 'Catching the Celtic Tiger by its Tail' *European Journal of Education*, 39(2):209-236.

Fitzgerald J. and M. Hamilton (1996) 'The Consequences of Knowing: Ethical and Legal Liabilities in Illegal Drug Research', *Social Science and Medicine,* 43(11):1591-1600.

Flood, J. (2005) 'Socio-Legal Ethnography', in *Theory and Method in Socio-Legal Research*, R. Banakar and M. Travers (Eds.), Oxford and Portland Oregon: Hart Publishing.

Forfás (2006) 'Overview of Ireland's Productivity Performance, 1980-2005', Forfás /National Competitiveness Council. Retrieved online on 27/08/2010 from http://www.forfas.ie

Foucault, M. (1977) *Discipline and Punish: The Birth of the Prison,* London: Allen Lane.

Francis, R. D. (1981) *Migrant Crime in Australia*, St Lucia: University of Queensland Press.

Franko-Aas, K. (2005) *Sentencing in the Age of Information: From Faust to Mackintosh*, London: GlassHouse Press.

Franko-Aas, K. (2007) 'Analysing a world in motion: Global flows meet "criminology of the other"', *Theoretical Criminology*, 11(2):283-303.

Fraser, N. (2003) 'From Discipline to Flexibilization? Rereading Foucault in the Shadow of Globalization', *Constellations*, 10 (2): 160-171.

Free Legal Aid Centre (FLAC) (2010) *One Size Doesn't Fit All: A Legal Analysis of Direct Provision 10 Years On,* Dublin: Free Legal Aid Centre. Retrieved online on 05/07/2010 from http://www.flac.ie/publications/one-size-doesn't-fit-all/

Garland, D. (1990) *Punishment and Modern Society: A Study in Social Theory*, Oxford: Clarendon.

Garland, D. (1991) 'Sociological Perspectives on Punishment', *Crime & Justice*, 14: 115-165.

Garland, D. (1996) 'The Limits of the Sovereign State: Strategies of Crime Control in Contemporary Society', *British Journal of Criminology,* 36(4):445-71.

Garland, D. (2001) *The Culture of Control: Crime and Social Order in Contemporary Society*, Oxford: Oxford University Press.

Garland, S. (2008) 'Ahern Will Ask Congress to Act on Irish Immigrants in America', *The New York Sun,* 30th April 2008.

Garner, S. (2007) 'Babies, Bodies and Entitlement: Gendered Aspects of Access to Citizenship in the Republic of Ireland', *Parliamentary Affairs*, 60:437-451.

Gaudet, F. J., G. S. Harris and C. W. St. John (1933) 'Individual Differences in the Sentencing Tendencies of Judges', *Journal of Criminal Law and Criminology,* 23(5):811-818.

Gerber, M. M., H. Hirtenlehner and J. Jackson (2010) 'Insecurities About Crime in Germany, Austria and Switzerland: A Review of Research Findings', *European Journal of Criminology* 7 (2):141-157.

Glaser, B. G. and A. L. Strauss (1967) *The Discovery of Grounded Theory: strategies for qualitative research*, Chicago: Aldine.

Glaser, B. G. (1992) *Basics of Grounded Theory Analysis: emergence vs forcing*, Mill Valley, California: Sociology Press.

Gould, J. B. (2002) 'Studying Inequality With One Eye: A New Agenda for Evaluating Disparate Treatment in the Courts', *Justice System Journal,* 23(3): 17-344.

Hagan, J. (1974) 'Extra-Legal Attributes and Criminal Sentencing: An Assessment of a Sociological Viewpoint', *Law and Society Review,* 8(3):357-384.

Hagan, J. and K. Bumiller (1983) 'Making Sense of Sentencing: A Review and Critique of Sentencing Research', in *Research on Sentencing: The Search for Reform Volume II,* A. Blumstein, J. Cohen, S. E. Martin and M. Tonry (Eds.), Washington: National Academy Press: 1-54.

Hagan, J., R. Levi and R. Dinovitzer (2008) 'The Symbolic Violence of the Crime-Immigration Nexus: Migrant Mythologies in the Americas', *Criminology AND Public Policy,* 7(1):95-112.

Hagan, J. and A. Palloni (1999) 'Sociological Criminology and the Mythology of Hispanic Immigration and Crime', *Social Problems,* 46(4):617-632.

Hall, P. A. and D. Soskice (2001) 'An Introduction to the Varieties of Capitalism' in P. Hall and D. Soskice (Eds.), *Varieties of Capitalism*, Oxford: Oxford University Press.

Hamilton, C. (2005) 'Sentencing in the District Court: "Here Be Dragons"', *Irish Criminal Law Journal,* 15(3) ICLJ 9.

Hammerberg, T. (2008) 'It Is Wrong to Criminalise Migration,' *New Europe*, issue: 801, 29/09/2008. Retrieved online on 03/03 2010 from http://www.neurope.eu/articles/89923.php

Hammersley, M. (2009) 'Against the Ethicists: On the Evils of Ethical Regulation', *International Journal of Social Research Methodology,* 12 (3):211-225.

Handler, J. F. (2004) *Social Citizenship and Workfare in the United States and Western Europe: The Paradox of Inclusion.* Cambridge: Cambridge University Press.

Harcourt, B.E. (2002) *Illusion of Order: The False Promise of Broken Windows Policing,* Cambridge, MA: Harvard University Press.

Hatton, T. J. (2005) 'European Asylum Policy', Discussion Paper No. 1721 August 2005, Bonn: IZA. Retrieved online on 20/04/2010 from http://www.iza.org

Hawkins, D. F. (1987) 'Beyond Anomalies: Rethinking the Conflict Perspective on Race and Criminal Punishment', *Social Forces,* 65(3):719-745.

Hay, D. (1975) 'Property, Authority and the Criminal Law', in *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England,* D. Hay, P. Linebaugh, and E.P. Thompson (Eds.), London: Allen Lane.

Healy, D. and I. O'Donnell (2010) 'Crime Consequences and Court Reports', *Irish Criminal Law Journal,* 20(1) ICLJ 2.

Henham, R. J. (1990) *Sentencing Principles and Magistrates' Sentencing Behaviour*, Aldershot: Avebury.

Hertz, R.A. (2002) '"Foreigners" in Germany: The Role of Academic Criminologists as an Interest Group Influencing Government Policy', in *Migration Culture Conflict and Crime*, J. D. Freilich, G. Newman, S. G. Shoham and M. Addad (Eds.), Aldershot: Ashgate: 131-144.

Hirschi, T. and M. Gottfredson (1983) 'Age and the Explanation of Crime', *American Journal of Sociology,* 89:552–84.

Hogarth, J. (1971) *Sentencing as a Human Process*, Toronto: University of Toronto Press.

Homan, R. (1991) *The Ethics of Social Research,* London: Longman.

Homan, R. (1992) 'The Ethics of Open Methods', *British Journal of Sociology,* 43:321-332.

Home Office (2005) 'Statistics on Race and the Criminal Justice System-2005: A Home Office Publication under Section 95 of the Criminal Justice Act 1991', London: Home Office. Retrieved online on 29/06/2008 from http://www.homeoffice.gov.uk/rds/pdfs06/s95race05.pdf

Hood, R. (1962) *Sentencing in Magistrates' Courts: A study in Variations in Policy*, London: Stevens & Sons Ltd.

Hood, R. (1972) *Sentencing and the Motoring Offender*, London: Heinemann Educational Books.

Hood, R. and G. Cordovil (1992) *Race and Sentencing: A Study in the Crown Court: a Report for The Commission for Racial Equality*, Oxford: Clarendon Press.

Horgan, B. (2007) 'The Roma Project: A Case Study of Community Service', *Irish Probation Journal,* 4(1):85-92.

Hudson, B. (1989) 'Discrimination and Disparity: The Influence of Race on Sentencing', *New Community,* 16:23-34.

Huntington, S. P. (1996) *The Clash of Civilizations and the Remaking of World Order,* New York: Simon & Schuster.

Huntington, S. P. (1999) 'Cultures in the 21st Century: Conflicts and Convergences'. Paper delivered at Colorado College 125th Anniversary Symposium 04/02/1999. Retrieved online from http://www.coloradocollege.edu/Academics/Anniversary/Transcripts/HuntingtonTXT.htm).

Immigrant Council of Ireland (ICI) (2003) *Labour Migration into Ireland,* Dublin: ICI.

Immigrant Council of Ireland (ICI) (2009) 'Citizenship processes in need of overhaul', Press release 07/05/2009, Immigrant Council of Ireland. Retrieved online on 21/07/2010 from http://www.immigrantcouncil.ie/press_detail.php?id=91

Inciardi, J. A., D. Lockwood and A.E. Pottiger (1993) *Women and Crack Cocaine*, New York: Macmillan.

Ionann (2004) 'An Garda Síochána Human Rights Audit', Report from Ionann Management Consultants, June2004. Report prepared for the Human Rights Working group of An Garda Síochána. Retrieved online on 27/06/2010 from http://www.minelres.lv/reports/ireland/PDF_Ireland)Comhlamh_GardaHreport.pdf

Irish Criminal Law Journal (ICLJ) (2007a) 'Cases and Comment: District Judge Brady & DPP (Respondents) v David Joyce (Applicant) [HC 2006/92 JR] Feeney J., April 24, 2007', 17 (2) ICLJ 29a.

Irish Criminal Law Journal (ICLJ) (2007b) 'Cases and Comment: District Judge Brady & ANOR (Respondent) v Martin Moore (applicant), [HC 2005 1336/JR] [2006] I.E.H.C. 434, Feeney J., November 16, 2006, 17 (2) ICLJ 29.

Irish Penal Reform Trust (IPRT) (2008) 'IPRT Position Paper 2: Spent Convictions Bill 2007'. Retrieved online on 10/03/2010 from http://www.iprt.ie

Irish Prison Service (IPS) (2003a) *Irish Prison Service Annual Report 2001*, Dublin: The Stationery Office.

Irish Prison Service (IPS) (2003b) *Irish Prison Service Annual Report 2002*, Dublin: The Stationery Office.

Irish Prison Service (IPS) (2004) *Irish Prison Service Annual Report 2003*, Dublin: The Stationery Office.

Irish Prison Service (IPS) (2005) *Irish Prison Service Annual Report 2004*, Dublin: The Stationery Office.

Irish Prison Service (IPS) (2006) *Irish Prison Service Annual Report 2005*, Dublin: The Stationery Office.

Irish Prison Service (IPS) (2007) *Irish Prison Service Annual Report 2006*, Dublin: The Stationery Office.

Irish Prison Service (IPS) (2008) *Irish Prison Service Annual Report 2007*, Dublin: The Stationery Office.

Irish Prison Service (IPS) (2009) *Irish Prison Service Annual Report 2008*, Dublin: The Stationery Office.

Irish Prison Service (IPS) (2010) *Irish Prison Service Annual Report 2009*, Dublin: The Stationery Office.

Irish Translators' and Interpreters' Association (2008) 'Submission of the Irish Translators' and Interpreters' Association on the Courts Service Statement of Strategy 2008-2011'. Retrieved online on 24/03/2010 from http://www.translatorsassociation.ie/

Irish Translators' and Interpreters' Association (ITIA) (2010) 'Submission of the Irish Translators' and Interpreters' Association to the Joint Committee on Justice, Equality, Defence and Women's Rights concerning the proposed EU Directive on the right to interpretation and to translation in criminal proceedings'. Retrieved online on 24/06 from http://www.translatorsassociation.ie/

Johnson, L. M. (2007) 'Steve Bogira, Courtroom 302', *Critical Criminology,* 15(4):365-368.

Joint Committee on European Affairs (2009) 'Eleventh Report: The Position of Minority Groups in Europe - an Examination of Roma Policies in the European Union' (Rapporteur: Senator Terry Leyden). Houses of the Oireachtas, December 2009.

Jones, M. J. (2002) 'Policy Paradox: Implications of US Drug Control Policy for Jamaica', *Annals of the Academy of Political and Social Science,* 582:117-33.

Joyce, C. (2009a) *European Migration Network Annual Policy Report on Migration and Asylum 2008: Ireland*, ESRI Survey and Statistical Report Series 015, Dublin: ESRI.

Joyce, C. (2009b) *European Migration Network Annual Report on Asylum and Migration Statistics 2007: Ireland*, ESRI Survey and Statistical Report Series 018, Dublin: ESRI.

Joyce, C. and E. Quinn (2009) *Policies on Unaccompanied Minors in Ireland*, Report by European Migration Network, Dublin: ESRI.

Juchno, P. (2007) 'Asylum applications in the EU', Eurostat, Statistics in Focus, Population and Social Conditions 110/2007. Retrieved online from http://www.epp.eurostat.ec.europa.eu

Junger-Tas, J. (1997) 'Ethnic Minorities and Criminal Justice in the Netherlands'. In *Ethnicity, Crime and Immigration: Comparative and Cross-National Perspectives*, M. Tonry (Ed.), Chicago; London: University of Chicago Press: 257-310.

Justice Initiative (2008) 'Justice Initiative Finds Racial Discrimination in Dutch Database', Open Society Justice Initiative 21/03/2008. Retrieved online on 28/06/2008 from http://www.justiceinitiative.org/db/resource2?res_id=104056

Kapur, S. (2010) 'Blocked Arizona immigration law may reduce chances of real reform', *The Guardian* 29/07/2010. Retrieved online on 29/07/2010 from http://wwwguardian.co.uk/commentisfree/cifamerica/2010/july29/arizona-immigration-law

Kapardis, A. and D. P. Farrington (1981) 'An Experimental Study of Sentencing by Magistrates', *Law and Human Behavior*, 5, No. 2/3, British Research: 107-121.

Karydis, V. (1998) 'Criminality or Criminalization of Migrants in Greece?' in *The New European Criminiology: Crime and Social Order in Europe*, V. Ruggiero, N. South and I. Taylor (Eds.), London and New York: Routledge: 350-367.

Kaufmann, E. (2001) 'Nativist Cosmopolitans: Institutional Reflexivity and the Decline of "Double-Consciousness" in American Nationalist Thought', *Journal of Historical Sociology*, 14(1):47-78.

Kelleher, P. and C. Kelleher (2004) *Voices of Immigrants: The Challenges of Inclusion*, Dublin: Immigrant Council of Ireland.

Kennedy, P. and J. Murphy-Lawless (2003) 'The Maternity Care Needs of Refugee and Asylum Seeking Women in Ireland', *Feminist Review*, 73: 39-53.

Kilcommins, S., I. O'Donnell, E. O'Sullivan and B. Vaughan (2004) *Crime, Punishment and the Search for Order in Ireland*, Dublin: Institute of Public Administration.

Kildal, N. (2001) 'Workfare Tendencies in Scandinavian Welfare Policies' Geneva: International Labour Office, February 2001. Retrieved online on 27/08/2010 from http://www2.ilo.org/public/English/protection/ses/download/docs/workfare.pdf

Killias, M. (1989) 'Criminality amongst Second Generation Immigrants in Europe: A Review of the Evidence', *Criminal Justice Review,* 14(1):13-42.
Killias, M. (1997) 'Immigrants, Crime, and Criminal Justice in Switzerland' *Crime and Justice, Ethnicity, Crime and Immigration: Comparative and Cross-National Perspectives,* 21:375-406.

Killias, M. (2009) 'Paradise Lost? New Trends in Crime and Migration in Switzerland', in *Immigration Crime and Justice*, W.F. McDonald (Ed.), Bingley: Emerald Group Publishing: 33-45.

Kinnvall, C. (2004) 'Globalization and Religious Nationalism: Self, Identity, and the Search for Ontological Security', *Political Psychology,* 25(5):741-767.

Kleck, G. (1981) 'Racial Discrimination in Criminal Sentencing: A Critical Evaluation of the Evidence with Additional Evidence on the Death Penalty', *American Sociological Review,* 46(6):783-805.

Kopp, I. (2008) 'Review of Resource Needs in the Forensic Science Laboratory and the Wider Scientific Context in Ireland', Dublin: Department of Justice Equality and Law Reform. Retrieved online on 25/06/2010 from http://www.justice.ie/en/JELR/Pages/Kopp_Review

Koser, K. (2005) 'Irregular Migration, State Security and Human Security'. A paper prepared for the Policy Analysis and Research Programme of the Global Commission on International Migration. Retrieved online on 25/05/2010 from: www.gcim.org/attachments/TPF.pdf

Kuhn, A. (1997) 'Prison Populations in Western Europe', in *Sentencing Reform in Overcrowded Times: A Comparative Perspective,* M. Tonry and K. Hatlestad (Eds.), Oxford: Oxford University Press: 124-133.

Kupchik , A. (2006) *Judging Juveniles: Prosecuting Adolescents in Adult and Juvenile Courts*, New York: NYU Press.

Lacey, N. (2008) *The Prisoners' Dilemma: Political Economy and Punishment in Contemporary Democracies,* Cambridge: Cambridge University Press.

La Free, G. D. (1980) 'Variables Affecting Guilty Pleas and Convictions in Rape Cases: Toward a Social Theory of Rape Processing', *Social Forces,* 58(3):833-850.

Lally, C. (2003) 'Greens Seek Anti-Racism Training for Judiciary', *The Irish Times,* 21 February 2003. Retrieved online from http:// www.irishtimes.ie

Lally, C. (2010) 'Gardaí Seek New Fingerprint Laws,' *The Irish Times*, 14/04/2010.

Lavenex, S. (1999) *Safe Third Countries: Extending the EU Asylum and Immigration Policies to Central and Eastern Europe*, Budapest: Central European University Press.

Law Reform Commission (LRC) (1993) *Consultation Paper on Sentencing*, Dublin: Law Reform Commission.

Law Reform Commission (LRC) (1996) *Report on Sentencing*, Dublin: Law Reform Commission.

Law Reform Commission (LRC) (2002) *Consultation Paper on Penalties for Minor Offences*, Dublin: Law Reform Commission.

Law Reform Commission (LRC) (2003) *Report on Penalties for Minor Offences* (LRC 69-2003), Dublin: Law Reform Commission.

Law Reform Commission (LRC) (2004) *Consultation Paper on Prosecution Appeals from Unduly Lenient Sentences in the District Court* (LRC CP-33 2004), Dublin: Law Reform Commission.

Law Reform Commission (LRC) (2005) *Report on Court Poor Box: Probation of Offenders* (LRC-75-2005), Dublin: Law Reform Commission.

Law Society of Ireland (Undated) 'Solicitors' Advertising Regulations - Summary '. Retrieved online on 10/04/2010 from http://www.lawsociety.ie/Documents/members/adv_regs_summary.pdf

Lee, M. T. and R. Martinez (2009) 'Immigration Reduces Crime: An Emerging Scholarly Consensus', in *Immigration Crime and Justice*, W. F. McDonald (Ed.), Bingley: Emerald Group Publishing: 3-16.

Lee, M. T., R. Martinez and R. Rosenfeld (2001) 'Does Immigration Increase Homicide? Negative Evidence from Three Border Cities', *Sociological Quarterly*, 42(4): 559-580.

Leonard, C. (2002) 'Racism and Xenophobia: Difficulties Facing the Courts in Ireland and Sweden in Dealing with Ethnic Minorities', *Judicial Studies Institute Journal,* 2(1):110-124.

Levin, M. A. (1977) *Urban Politics and the Criminal Courts*, Chicago: University of Chicago Press.

Lewandoski, K. (1993) 'A New Transportation for the Penitentiary Era: Some "Household Words" on Free Emigration', *Victorian Periodicals Review*, Vol.26 (1):8-18.

Linehan, S., D. Duffy, H. O'Neill, C. O'Neill, and H. G. Kennedy (2002) 'Irish Travellers and forensic mental health', Irish Journal of Psychological

Medicine, 19 (3): 76-79. Retrieved online on 01/10/2010 from http://www.ijpm.org/content/pdf/116/travellers.pdf

Liska, A. E., M. D. Krohn and S. F. Messner (1989) 'Strategies and Requisites for Theoretical Integration in the Study of Crime and Deviance', in *Theoretical Integration in the Study of Deviance and Crime: Problems and Prospects*, S. F. Messner, M. D. Krohn and A. E. Liska (Eds.), Albany: State University of New York: 1-20.

Lobo, A. P. and J. J. Salvo (1998) 'Resurgent Irish Immigration to the US in the 1980s and Early 1990s: A Socio-Demographic Profile', *International Migration,* 36(2):257-280.

Lowell B. L. (2009) 'Immigration "Pull" Factors in OECD Countries over the Long Term', in *The Future of International Migration to OECD Countries*, Paris: OECD:51-137.

Luibhéid, E. (2004) 'Childbearing against the state? Asylum seeker women in the Irish Republic', *Women's Studies International Forum*, 27(4):335-349.

Lund, J. M. (1994) 'Boundaries of Restriction: The Dillingham Commission', *University of Vermont History Review,* 6, December 1994. Retrieved online on 18/09/2008 from: http://www.uvm.edu/~hag/histreview/vol6/lund.html

Lyden, F.J. (1975) 'Using Parsons' Functional Analysis in the Study of Public Organizations', *Administrative Science Quarterly*, 20(1):59-70.

Lynch, J. P. and R. J. Simon (1999) 'A Comparative Assessment of Criminal Involvement Among Immigrants and Natives Across Seven Nations', *International Criminal Justice Review,* 9(1):1-17.

Lynch, M. J. (2007) *Big Prisons, Big Dreams: Crime and the Failure of America's Penal System*, New Jersey: Rutgers University Press.

Lyons, A. and P. Hunt (1988) 'The Effects of Gender on Sentencing: A Case Study of the Dublin Metropolitan Area District Court', in *Whose Law and Order: Aspects of Crime and Social Control in Irish Society*. M. Tomlinson, T. Varley and C. McCullagh (Eds.), Belfast: Sociological Association of Ireland: 129-142.

MacCormaic, R. (2008) 'Ireland of the unwelcomes'? *The Irish Times*, 26/09/2010.

MacCoun, R. J. and T. R. Tyler (1988) 'The Basis of Citizens' Perceptions of the Criminal Jury: Procedural Fairness, Accuracy and Efficiency', *Law and Human Behavior*, 12:333-352.

MacÉinrí, P. (2001a) *Immigration and the Irish Media. One Year of Coverage in the Irish Times,* Cork: Irish Centre for Migration Studies, UCC.

MacÉinrí, P. (2001b) *Immigration into Ireland: Trends, Policy Responses, Outlook*, Cork: Irish Centre for Migration Studies, UCC.

MacPherson, W. (1999) *The Stephen Lawrence Inquiry*. Presented to Parliament by the Secretary of State for the Home Department by Command of Her Majesty, February 1999. London: Stationery Office.

Maguire, N. (2008) 'Sentencing in Ireland: An Exploration of the Views, Rationales, and Sentencing Practices of District and Circuit Court Judges', Unpublished PhD thesis, Trinity College Dublin.

Mannheim, H., J. Spencer and G. Lynch (1957) 'Magisterial Policy in the London Juvenile Courts, Part II', *British Journal of Delinquency,* 8:119-138.

Marks, M. (2004) 'Researching Police Transformation: The Ethnographic Imperative', *British Journal of Criminology,* 44:866–888.

Martens, P. L. (1997) 'Immigrants, Crime, and Criminal Justice in Sweden' *Crime and Justice, Ethnicity, Crime and Immigration: Comparative and Cross-National Perspectives,* 21:183-256.

Martens, P. L. (2007) 'Immigrants as Victims of Crime', in *Crime and Immigration*, J. D. Freilich and G. R. Newman (Eds.), Aldershot: Ashgate: 397-414.

Martinez, R. and M. T. Lee, (2000) 'On Immigration and Crime', *Criminal Justice 2000: The National Institute of Justice* 1:485-523.

McBarnet, D. J. (1984) *Conviction: Law, the State and the Construction of Justice*, London: Macmillan.

McCarthy, C. (2010) 'Minister is Complacent on the Realities of Racism', *The Irish Examiner*, 18/01/2010.

McConville, M. and J. Baldwin (1982) 'The Influence of Race on Sentencing in England', *Criminal Law Review*: 652-658.

McCullagh, C. (1992) 'Unemployment and Imprisonment: Examining and Interpreting the Relationship in the Republic of Ireland', *Irish Journal of Sociology,* 2:1-19.

McCullagh, C. (1996) *Crime in Ireland: A Sociological Introduction*, Cork: Cork University Press.

McEvoy, P. (2005) 'Research for the Department of Justice on the criteria applied by the Courts in sentencing under s. 15A of the Misuse of Drugs Act 1977 (as amended)'. Retrieved online on 12/04/2010 from http://www.jjustice.ie/en/JELR/Research.pdf/files/Research.pdf

McGinnity, F., J. Nelson, P. Lunn, and E. Quinn (2009) *Discrimination in Recruitment: Evidence from a Field Experiment*, Dublin: Equality Authority/ESRI.

Melossi, D. (1985) 'Punishment and Social Action: Changing Vocabularies of Punitive Motive within a Political Business Cycle', *Current Perspectives in Social Theory,* 6:169-197.

Melossi, D. (2003a) 'A New Edition of "Punishment and Social Structure'" Thirty-Five Years Later: A Timely Event', *Social Justice* 30 (1):248-263.

Melossi, D. (2003b) '"In a Peaceful Life": Migration and the Crime of Modernity in Europe/Italy', *Punishment and Society* 5(4):371-397.

Melossi, D. and M. Pavarini (1981) *The Prison and the Factory: Origins of the Penitentiary System*, London: Macmillan.

Menz, G. (2009) *The Political Economy of Managed Migration: Nonstate Actors, Europeanization, and the Politics of Designing Migration Policies*, Oxford: Oxford University Press.

Merry, S. Engle (1990) *Getting Justice and Getting Even: Legal Consciousness Among Working-Class Americans*, Chicago: University of Chicago Press.

Merton, R. K. (1968) *Social Theory and Social Structure* (enlarged edition), New York: Free Press; London: Collier-Macmillan.

Migrant Rights Centre Ireland (MRCI) (2007) *An Exploration of Irregular Migration in Ireland*, Dublin: MRCI.

Mileski, M. (1971) 'Courtroom Encounters: An Observation Study of a Lower Criminal Court', *Law and Society Review,* 5(4):473-538.

Moehling, C. and A. Morrison Piehl (2007) 'Immigration and Crime in Early 20th Century America', *National Bureau of Economic Research*, Working Paper 13576: 1-50.

Morenoff, J. D. and A. Astor (2006) 'Immigrant Assimilation and Crime: Generational Differences in Youth Violence in Chicago', in Immigration *and Crime: Race Ethnicity and Violence*, R. Martinez and A. Valenzuela (Eds.), New York; London: New York Press: 36-63.

Morgenstern, C. (2009) 'Pre-Trial/Remand Detention in Europe: Facts and Figures and the Need for Common Minimum Standards', *ERA Forum* (2009) 9(4):527–542.

Moxon, D. (1988) *Sentencing Practices in the Crown Court*, Home Office Research Study No. 102, London: Home Office.

Murphy, G. (2007) 'An Analysis of Sentencing Provisions in the Criminal Justice Act, 2006', *Judicial Studies Institute Journal,* 1:60-100.

Murray, J. (2006) 'The Effects of Imprisonment on Families and Children of Prisoners', in *The Effects of Imprisonment,* A. Liebling and S. Maruna (Eds.), Cullompton: Willan Publishing: 442-464.

National Consultative Committee on Racism and Interculturalism (NCCRI)/Equality Authority (2003a) *Media Coverage of Refugee and Asylum Seekers in Ireland*, Raxen3, study compiled for the European Monitoring Centre on Racism and Xenophobia, April 2003, Dublin: NCCRI.

National Consultative Committee on Racism and Interculturalism (NCCRI)/Equality Authority (2003b) *Case Study: The Task Force on the Travelling Community*, study compiled for the European Monitoring Centre on Racism and Xenophobia, April 2003, Dublin: NCCRI.

National Consultative Committee on Racism and Interculturalism (NCCRI) (2004) 'The Traveller Education Strategy – as Part of an Intercultural Education Strategy in Ireland'. Retrieved online on 12/05/2010 from: http://www.nccri.ie

National Economic and Social Council (NESC) (2005) *The Developmental Welfare State*, No. 113 May 2005, Dublin: NESC.

National Economic and Social Council (NESC) (2006) *Managing Migration in Ireland: A Social and Economic Analysis,* a Report by the International Organisation of Migration for the National Economic and Social Council of Ireland, No.116 September 2006, Dublin: NESC.

Needham, M. (1983) 'The District Court, An Empirical Study of Criminal Jurisdiction', Thesis submitted for LLM degree, University College Galway.

Newman, G. R., J. D. Freilich and G. J. Howard (2007) 'Exporting and Importing Criminality: Incarceration of the Foreign Born', in *Crime and Immigration*, J. D. Freilich and G. R. Newman (Eds.), Aldershot: Ashgate: 31-52.

Norris, C. (1993) 'Some Ethical Considerations on Field-Work with the Police', in *Interpreting the field: Accounts of ethnography*, D. Hobbs and T. May (Eds.), Oxford: Clarendon Press: 122-143.

O'Barr, W. M. (1982) *Linguistic Evidence: Language, Power, and Strategy in the Courtroom,* San Diego: Academic Press.

O'Donnell, I. (2000) 'A Comment on Sentencing', *Irish Criminal Law Journal,* 10(4) ICLJ2.

O'Donnell, I. (2001) 'Prison Matters', *Irish Jurist (NS)*, 36: 153-173.

O'Donnell, I., E. P. Baumer and N. Hughes (2008) 'Recidivism in the Republic of Ireland', *Criminology and Criminal justice,* 8(2):123-146.

O'Donnell, I., C. Teljeur, H. Hughes, E. Baumer and A. Kelly (2007) 'Punishment, Social Deprivation and the Geography of Reintegration,' *Irish Criminal Law Journal,* 17(4):3-9.

Office of the Director of Public Prosecutions (ODPP) (2009) *Office of the Director of Public Prosecutions Annual Report 2008*. Retrieved online on 24/06/2010 from http://www.dppireland.ie/filestore/documents/Annual_Report_2008_ENG.pdf

O'Halloran, M. (2010) 'Amended Immigration Bill Expected Before Autumn' *The Irish Times,* 01/06/2010.

O'Keefe, C. (2009) 'Heavy Trafficking', *The Irish Examiner*, 14/03/2009. Retrieved online on 20/08/2010 from www.examiner.ie

O'Mahony, P. (1996) 'An Investigation of the Operation of the Bail System'. Unpublished Report for the Minister for Justice.

O'Malley, T. (2000) *Sentencing Law and Practice*, Dublin: Round Hall Sweet & Maxwell.

O'Malley, T. (2006) *Sentencing Law and Practice, 2nd Edition*, Dublin: Thompson Round Hall.

O'Malley, T. (2009) 'Sentencing Recidivist Sex Offenders: A Challenge for Proportionality', in *Criminal Law and Procedure: Current Issues and Emerging Trends*, I. Bacik and L. Heffernan (Eds.), Dublin: FirstLaw: 106-133.

O'Malley, T. (2010) 'Time Served: The Impact of Sentencing and Parole Decisions on the Prison Population', Paper delivered to Irish Penal Reform Trust, Morrison Hotel Dublin, 28th June, 2010. Retrieved online from www.iprt.ie

Organisation for Economic Co-operation and Development (OECD) (2004) *Trends in International Migration Annual Report* (SOPEMI), Paris: OECD.

Organisation for Economic Co-operation and Development (OECD) (2008), *International Migration Outlook: SOPEMI 2008*, Paris: OECD.

Organisation for Economic Co-operation and Development (OECD) (2009) 'International Migration and the Economic Crisis: Understanding the Links and Shaping Policy Responses', *International Migration Outlook*, Paris: OECD.

Organisation for Economic Co-operation and Development (OECD) (2010), *International Migration Outlook: SOPEMI 2010*, Paris: OECD.

O'Sullivan, E. (1998) *Homelessness, Housing Need and Asylum Seekers in Ireland,* Dublin*:* Homeless Initiative.

Ousey, G. C. and C. E. Kubrin (2009) 'Exploring the Connection between Immigration and Violent Crime Rates in U.S. Cities, 1980–2000', *Social Problems,* 56( 3):447–473.

Overby, L. M., R. D. Brown, J. M. Bruce, C. E. Smith and J. W. Winkle (2005) 'Race, Political Empowerment, and Minority Perceptions of Judicial Fairness', *Social Science Quarterly,* 86(2):444-462.

Owen, B. A. (1998) *In the Mix: Struggle and Survival in a Women's Prison*, New York: State University of New York Press.

Pager, D. (2007) *Marked: Race Crime and Finding Work in an Era of Mass Incarceration*. Chicago: University of Chicago Press.

Papastergiadis, N. (2000) *The Turbulence of Migration: Globalization, Deterritorialization and Hybridity*, Cambridge: Polity Press.

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

Pavee Point (2005) 'A Review of Travellers' Health using Primary Care as a Model of Good Practice'. Retrieved online on 12/05/2010 from: http://.paveepoint.ie

Pavee Point (2006) *Assimilation Policies and Outcomes: Travellers' Experience*, Report on a Research Project Commissioned by Pavee Point Travellers' Centre, Dublin: Pavee Point.

Pécoud, A. and P. de Guchteneire (2006) 'International Migration, Border Controls and Human Rights: Assessing the Relevance of a Right to Mobility', *Journal of Borderlands Studies,* 21(1):69-86.

Pettit, B. and B. Western (2004) 'Mass Imprisonment and the Life Course: Race and Class Inequality in US Incarceration', *American Sociological Review*, 69:151-169.

Phelan, M. (2007) 'Interpreting, Translation and Public Bodies in Ireland: The Need for Policy and Training', National Consultative Committee on Racism and Interculturalism: Advocacy Paper Number 5.

Pope, C. (2003) 'Judge Issues Apology for Improper Comments' *The Irish Times*, 20/02/2003. Retrieved on 20/06/2010 from http://www.irishtimes.ie

Pratt, J. (2008a) 'Scandinavian Exceptionalism in an Era of Penal Excess: Part I: The Nature and Roots of Scandinavian Exceptionalism' *British Journal of Criminology*, 48(2):119-137.

Pratt, J. (2008b) 'Scandinavian Exceptionalism in an Era of Penal Excess, Part II: Does Scandinavian Exceptionalism Have a Future?' *British Journal of Criminology*, 48(3):275-292.

Preston, J. (2010) 'Justice Department sues Arizona over its Immigration Law', *The New York Times* 06/07/2010. Retrieved online on 21/07/2010 from http://www.nytimes.com/2010/07/07/us/07immig.html

Punch, M. (1979) *Policing the Inner City,* London: Macmillan.

Quinney, R. (1970) *The Social Reality of Crime*, Boston: Little, Brown.

Rainwater, L. and D. J. Pittman (1967) 'Ethical Problems in Studying a Politically Sensitive and Deviant Community', *Social Problems,* 14(4):357-365.

Redmond, D. (2002) *Imprisonment for Fine Default and Civil Debt*, Dublin: Nexus Research.

Reid, L. W., H. E. Weiss, R. M. Adelman and C. Jaret (2005) 'The Immigration-Crime Relationship: Evidence Across US Metropolitan Areas', *Social Science Research,* 34(4):757-780.

Reilly,M. (2010) The Irish Prison Population - an examination of duties and obligations owed to prisoners. Report presented to the Minister for Justice and Law Reform pursuant to Part 5 of the Prisons Act 2007, 29th July 2010. Nenagh: Office of the Inspector of Prisons.

Remington, F. J. (1993) 'The Decision to Charge, the Decision to Convict on a Plea of Guilty and the Impact of Sentence Structure on Prosecution Practices', in *Discretion in Criminal Justice: The Tension Between Individualization and Uniformity,* L. E. Ohlin and F. R. Remington (Eds.), Albany: State University of New York Press: 73-134.

Riley, J., D. Cassidy and J. Becker (2009) 'Statistics on Race and the Criminal Justice System 2007/8: A Ministry of Justice Publication under Section 95 of the Criminal Justice Act 1991', London: Ministry of Justice. Retrieved online on 18/06/2010 from http://www.justice.gov.uk/publications/statistics.htm

Ring, E. (2008) 'Asylum Seekers Discouraged by Changes to System' *The Irish Examiner*, 12/11/2008.

Riordan, D. (2007) 'Immigrants in the Criminal Courts', *Judicial Studies Institute Journal,* 2:95-108.

Roberts, J. V. (2005) 'Impact of Previous Convictions on Sentencing: Recent Developments in England and Wales', *Federal Sentencing Reporter,* 17(3):171-174.

Roberts, J. V. (2008) *Punishing Persistent Offenders: Exploring Community and Offender Perspectives,* Oxford: Oxford University Press.

Rock, P. (1993) *The Social World of an English Crown Court: Witness and Professionals in the Crown Court Centre at Wood Green*, Oxford: Clarendon Press.

Rock, P. (1998) 'Rules, Boundaries and the Courts: Some Problems in the Neo-Durkheimian Sociology of Deviance', *British Journal of Sociology*, 49(4):586-601.

Rose, M. R., C. Ellison and S. S. Diamond (2008) 'Preferences for Juries Over Judges Across Racial and Ethnic Groups', *Social Science Quarterly,* 89(2):372-391.

Rosen, L. (1989) *Anthropology of Justice: Law as Culture in Islamic Society,* Cambridge: Cambridge University Press.

Rottman, D. B. (1984) *The Criminal Justice System: Policy and Performance,* Dublin: National Economic and Social Council.

Rottman, D. B. and P. F. Tormey (1985) 'Criminal Justice System: An Overview', in *Report of the Committee of Inquiry into the Penal System* (Chairman T. K. Whitaker) Dublin: Stationery Office.

Rowe, M. (2007) 'Tripping Over Molehills: Ethics and the Ethnography of Police Work', *International Journal of Social Research Methodology,* 10(1):37-48.

Ruhs, M. and E. Quinn (2009) 'Ireland: From Rapid Immigration to Recession', Migration Policy Institute. Retrieved online on 20/07/2010 from http://www.migrationpolicy.org

Rumbaut, R. G. (2008) 'Undocumented Immigration and Rates of Crime and Imprisonment: Popular Myths and Empirical Realities', Paper presented to the Police Foundation National Conference on "The Role of Local Police: Striking a Balance between Immigration Enforcement and Civil Liberties," Washington, DC, August 21-22, 2008. Retrieved online on 10/05/2010 from http://www.policefoundation.org/pdf/strikingabalance/Appendix%20D.pdf

Rumbaut, R. G. and W. A. Ewing, (2007) *'The Myth of Immigrant Criminality and the Paradox of Assimilation: Incarceration Rates among Native and Foreign-Born Men',* Immigration Policy Center Special Report Retrieved online on 17/06/2010 from http://www.immigrationpolicy.org/special-reports/myth-immigrant-criminality-and-paradox-assimilation

Rusche, G. and O. Kirchheimer (1939) *Punishment and Social Structure*, New York: Columbia University Press.

Russell, M. (1964) 'The Irish Delinquent in England', *Studies* 53 (Spring 1964).

Said, E.W. (1993) *Culture and Imperialism*, London: Chatto & Windus.

Said, E.W. (2003) *Orientalism*, London: Penguin.

Sampson, R. J. and W. J. Wilson. (1995) 'Toward a Theory of Race, Crime, and Urban Inequality', in *Crime and Inequality*, J. Hagan and R. Peterson (Eds.), Stanford, CA: Stanford University Press: 37-54.

Sampson, R. J. (2006) 'Open Doors Don't Invite Criminals: Is Increased Immigration Behind the Drop in Crime?' *New York Times*, March 11 2006, p.27.

Sampson, R. J. (2008) 'Rethinking Crime and Immigration', *Contexts,* 7(1):28-33. Retrieved online on 03/04/2008 from http://contexts.org/articles/winter-2008/sampson/

Sarat, A. and W. L. Felstiner (1988) 'Law and Social Relations: Vocabularies of Motive in Lawyer/Client Interaction', *Law and Society Review*, 22(4):771-800.

Schündeln, M. (2007) 'Are Immigrants More Mobile Than Natives? Evidence from Germany', IZA Discussion Paper 3226, December 2007, Bonn:Institute for the Study of Labour.

Schweppe, J. (2005) 'Definition of a "Sentence" in the Law Reform Commission's Consultation Paper on Prosecution Appeals from Unduly Lenient Sentences in the District Court', *Irish Criminal Law Journal,* 15(3) ICLJ 24.

Sellin, T. (1938) *Culture Conflicts and Crime*, New York: Social Science Research Council.

Seymour, M. (2006) *Alternatives to Custody*, Dublin: Business in the Community in Ireland and Irish Penal Reform Trust.

Shaw, C. R. and H. D. McKay (1942/2006) 'Juvenile Delinquency and Urban Areas: A Study of Rates of Delinquents in Relation to Differential Characteristics of Local Communities in American Cities' in, *The Chicago School of Criminology 1914-1945, Volume VI*, P. Beirne (Ed.), London & New York: Routledge.

Shaw, C. R., H. D. McKay and J. F. McDonald (1938/2006) 'Brothers in Crime', in *The Chicago School of Criminology 1914-1945, Volume V*, P. Beirne (Ed.), London; New York: Routledge.

Siggins, L. (2009) 'Use of Irish Very Low in Courts' *The Irish Times*, 28/10/2009. Retrieved online on 24/06/2010 from http://www.irishtimes.com

Simon, R. J. and J. P. Lynch (1999) 'A Comparative Assessment of Public Opinion Toward Immigrants and Immigration Policies', *International Migration Review,* 33(2):455-467.

Simon, R. J. and K. W. Sikich (2007) 'Public Attitudes Toward Immigrants and Immigration Policies across Seven Nations', *International Migration Review* 4, 1(4):956-962.

Smith, D. J. (1997) 'Ethnic Origins, Crime, and Criminal Justice in England and Wales', in *Ethnicity, Crime and Immigration: Comparative and Cross-National Perspectives*, M. Tonry (Ed.), Chicago; London: University of Chicago Press: 101-182.

Smith, M. D., J. A. Devine and J. F. Sheley (1992) 'Crime and Unemployment: Effects across Age and Race' *Sociological Perspectives*, 35(4):551-572.

Social Research Association (SRA) (2002) 'Ethical Guidelines 2002', Retrieved on 17/12/2009 from http://www.the-sra.org.uk/index2.htm

Social Research Association (SRA) (2003) 'Ethical Guidelines', Retrieved on 17/12/2009 from http://www.the-sra.org.uk/Ethicals.htm

Socio-Legal Studies Association (2009) 'Statement of Principles of Ethical Research Practice', Retrieved online on 07/01/2010 from http://www.kent.ac.uk/nslsa/images/slsadownloads/ethicalstatements/slsa20%ehtics20%statement20%_final_%5B1%5D.pdf

Solivetti, L. M. (2005) 'Who is Afraid of Migration and Crime?' *The Howard Journal*, 44: 322–325.

Solivetti, L. M. (2007) 'Societies Poor in Civic Virtues: A Cross-National Analysis Model on Immigrants' Integration and Host Country Characteristics. In Società Italiana di Statistica (Ed.) *Proceedings of the 2007 Intermediate Conference Risk and Prediction*, 107–18. Retrieved online on 23/03/2010 from http://www.sis-statistica.it/files/pdf/atti/SIS%202007%20Venezia%20intermedio_107-118.pdf

Spent Convictions Group (2009) *The Disclosure of Criminal Convictions: Proposals on a Rehabilitation of Offenders Bill,* May 2009, Dublin: Law Society of Ireland. Retrieved online on 10/03/2010 from http://www.lawsociety.ie

Spierenburg, P. (1984) *The Spectacle of Suffering: Executions and the Evolution of Repression: From a Preindustrial Metropolis to the European Experience*, Cambridge: Cambridge University Press.

Spohn, C. and D. Holleran (2000) 'The Imprisonment Penalty Paid By Young, Unemployed Black and Hispanic Male Offenders', *Criminology,* 38(1):281-306.

Stern, J. (1991) 'Scapegoat Narratives in Herodotus', *Hermes*, 119 (3):304-311.

Sudnow, D. (1965) 'Normal Crimes: Sociological Features of the Penal Code in a Public Defender Office', *Social Problems*, 12(3):255-68.

Sun, H.-E. and J. Reed (2007) 'Migration and Crime in Europe', in *Crime and Immigration,* J. D. Freilich and G. R. Newman (Eds.), Aldershot: Ashgate: 95-120.

Sutherland, E. H. & D. R. Cressey, (1978) *Criminology*, 10th edition, Chicago: Lippincott.

Sutton, J. R. (2004) 'The Political Economy of Imprisonment in Affluent Western Democracies, 1960-1990', *American Sociological Review*, 69:170-89.

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

Tarling, R. (2006) 'Sentencing Practice in Magistrates' Courts Revisited',_*The Howard Journal of Criminal Justice,* 45(1):29-41.
Task Force on the Travelling Community (1995) Report of the Task Force on the Travelling Community, Dublin: Stationery Office.

Tighe, M. (2009) 'Interpreters in Court Pay Row' *The Sunday Times*, 29/03/2009. Retrieved online on 24/06/2010 from http://www.timesonline.co.uk/tol/news/world/ireland/article5993267.ece

Tonry, M. (1981) 'Real Offense Sentencing: The Model Sentencing and Corrections Act', *Journal of Criminal Law & Criminology,* 72(4):1550-96.

Tonry, M. (1982) 'More Sentencing Reform in America', *Criminal Law Review,* [1982]:157-67.

Tonry, M. (1996) *Sentencing Matters*, New York; Oxford: Oxford University Press.

Toth, S. A. (2006) *Beyond Papillon: The French Overseas Penal Colonies, 1854-1952*, Lincoln, Neb.; London: University of Nebraska Press.

Tournier, P. (1997) 'Nationality, Crime, and Criminal Justice in France', in *Ethnicity, Crime and Immigration: Comparative and Cross-national Perspectives*, M. Tonry (ed.), Chicago; London: University of Chicago Press.

Travers, M. (1992) 'Persuading the Client to Plead Guilty: An Ethnographic Examination of a Routine Morning's Work in the Magistrates' Court', *Manchester Sociology Occasional Papers,* 33:1-43.

Travers, M. (1997) *The Reality of Law: Work and Talk in a Firm of Criminal Lawyers*, Aldershot: Ashgate.

Travers, M. (2007) 'Sentencing in the Children's Court: An Ethnographic Perspective', *Youth Justice,* 7(1):21-35.

Turk, A. T. (1972) *Criminality and Legal Order*, Chicago (Ill.): Rand McNally.

Ugba, A. (2007) 'Ireland', in A. Triandafyllidou and R. Gropas (Eds.), *European Immigration: A Sourcebook*, Aldershot: Ashgate.

Uhlman, T., and D. Walker (1980) '"He Takes Some of my Time: I Take Some of His:" An Analysis of Judicial Sentencing Patterns in Jury Cases', *Law and Society Review,* 14:323-342.

United States Sentencing Commission (USSC) (2009) 'Federal Sentencing Guidelines Manual and Appendices (2009)'. Retreived online on 12/04/2010 from http://www.ussc.gov/guidelin.htm

Valier, C. (2003) 'Foreigners, Crime and Changing Mobilities', *British Journal of Criminology,* 43(1):1-21.

Van Kalmthout, A., F. B. van der Meulen, and F. Dunkel (Eds.) (2007) *Foreigners in European Prisons*, Nijmegen: Wolf Legal Publishers.

Vasileva, K. (2009) 'Citizens of European Countries Account for the Majority of the Foreign Population in EU-27 in 2008', Eurostat statistics in focus, 16/12/2009. Retrieved online on 09/01/2010 from http://epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-SF-09-094-EN-PDF.

Vaughan, B. (2001) *Toward a Model Penal System*, Dublin: Irish Penal Reform Trust.

Vazsonyi, A. T. and M. Killias (2001) 'Immigration and Crime among Youth in Switzerland', *Criminal Justice and Behavior* 28(3):329-366.

Vis, B. (2007) 'States of Welfare or States of Workfare? Welfare State Restructuring in 16 Capitalist Democracies, 1985-2002', *Policy and Politics* 35(1):105-122.

Von Hirsch, A. (1976) *Doing Justice: The Choice of Punishments: Report of the Committee for the Study of Incarceration*, New York: Hill & Wang.
Von Hirsch, A. (1993) *Censure and Sanctions*, Oxford: Clarendon Press.

Von Hirsch, A. (2009) 'Proportionate Sentencing: a Desert Perspective', in *Principled Sentencing Readings on Theory and Policy,* (3rd edition) A. Von Hirsch, A. Ashworth and J. Roberts (Eds.), Oxford: Hart Publishing: 115-125.

Von Hirsch, A. and A. Ashworth (2005) *Proportionate Sentencing: Exploring the Principles*, Oxford: Oxford University Press.

Wacquant, L. (1999) '"Suitable Enemies": Foreigners and Immigrants in the Prisons of Europe', *Punishment and Society,* 1(2):215-222.

Wacquant, L. (2001) 'Deadly Symbiosis: When Ghetto and Prison Meet and Mesh', *Punishment and Society*, 3:95-133.

Wacquant, L. (2005) '"Enemies of the Wholesome Part of the Nation": Post-Colonial Migrants in the Prisons of Europe', *Sociologie*, 1:31-51.

Wacquant, L. (2009) *Punishing the Poor: The Neoliberal Government of Social Insecurity*, Durham (NC): Duke University Press.

Walmsley, R. (2009) *World Prison Population* 8th Edition, London: International Centre for Prison Studies. Retrieved online on 20/08/2010 from: http://www.kcl.ac.uk

Walsh, D. and P. Sexton (1999) *An Empirical Study of Community Service Orders in Ireland,* Dublin: The Stationery Office.

Wandall, R. H. (2008) *Decisions to Imprison: Court Decision-Making Inside and Outside the Law*, Aldershot; Burlington: Ashgate.

Ward, T. (2007) *Justice Matters: Independence, Accountability and the Irish Judiciary,* Dublin: Irish Council for Civil Liberties.

Waterhouse, K. (2009) 'Interpreting Criminal Justice: A Preliminary Look at Language Law and Crime in Ireland', *Judicial Studies Institute Journal*, 9 (2):42-75.

Watson, I., M. Nic Ghiolla, P. F. Kennedy and B. Rock-Huspatel (2007) 'National Identity and Anti-Immigrant Attitudes', in *Changing Ireland in International Comparison*, B. Hilliard and M. Nic Ghiolla Phadraig (Eds.), Dublin: Liffey Press: 217-242.

Weber, M. (1969) *Max Weber On Law in Economy and Society,* edited with introduction and annotations by M. Rheinstein, Cambridge Mass: Harvard University Press.

Weitzer, R. (1996) 'Racial Discrimination in the Criminal Justice System: Findings and Problems in the Literature', *Journal of Criminal Justice,* 24(4):309-322.

Western, B. (2006) *Punishment and Inequality in America*, New York: Russell Sage Foundation.

Western, B. and K. Beckett (1999) 'The US Penal System as a Labour Market Institution', *American Journal of Sociology*, 104(4):1030-1060.

Western, B. and B. Pettit (2006) 'Mass Imprisonment' in *Punishment and Inequality in America*, B. Western (Ed.):11-33.

Weyrauch, W. O. and M. A. Bell (2001) 'Autonomous Lawmaking: The Case of the 'Gypsies'', In *Gypsy Law: Romani Legal Traditions and Culture*, W. O. Weyrauch (Ed.), Berkeley: University of California Press.

Whitaker, K. (Chairman) (1984) *Report of the Committee of Inquiry into the Penal* System, Dublin: Stationery Office.

Whitman, J. Q. (2003) *Harsh Justice: Criminal Punishment and the Widening Divide between America and Europe*, New York: Oxford University Press.

Whyte, W. F. (1993) *Street Corner Society: The Social Structure of an Italian Slum* (4th edition), Chicago: University of Chicago Press.

Wiles, R., S. Heath, G. Crow and V. Charles (2005) 'Informed Consent in Social Research: A Literature Review'. ESRC National Centre for Research Methods, NCRM Methods Review Papers, NCRM/001. Retrieved online on 11/01/2010 from http://eprints.ncrm.ac.uk/85/1/MethodsReviewPaperNCRM-001.pdf

Wilson, W. J. (1996) *When Work Disappears: The World of the New Urban Poor*, New York: Alfred A. Knopf.

Wolfgang, M. E. (1958) *Patterns in Criminal Homicide*, Philidelphia: University of Pennsylvania Press.

Working Group on a Courts Commission (1996) *First Report: Management and Finance*, Dublin: The Stationery Office.

Working Group on the Jurisdiction of the Courts (2003) *The Criminal Jurisdiction of the Courts*, Dublin: The Stationery Office.

Wortley, S. (2009) 'Introduction. The Immigration Crime Connection: Competing Theoretical Perspectives', *Journal of International Migration and Integration,* 10(4):349-358.

Yeager, M.G. (1996) 'Immigrants and Criminality: A Meta Survey'. Research Paper written for the Strategic Research and Analysis Branch, Policy Sector, Ministry of Citizenship and Immigration Canada, retrieved online on 15/03/2007 from: http://www.cyberus.ca/~myeager/art-1.html

Young, J. (1998) 'From Inclusive to Exclusive Society: Nightmares in the European Dream', in *The New European Criminology: Crime and Social Order in Europe,* V. Ruggiero, N. South and I. Taylor (Eds.), London; New York: Routledge: 64-91.

Zatz, M. S. (1987) 'The Changing Forms of Racial/Ethnic Biases in Sentencing', *Journal of Research in Crime and Delinquency,* 24:69-92.

Zimring, F. E. and G. Hawkins (1986) *Capital Punishment and the American Agenda*, Cambridge: Cambridge University Press.

Zippelius, R. (1986) 'Exclusion and Shunning as Legal and Social Sanctions', *Ethology and Sociobiology*, 7(3):159-166.

## Legislation

*Aliens Act, 1935* (No.1/1935). Dublin: The Stationery Office.

*Aliens Order, 1946 (as amended)* (S.I. No. 395/1946). Dublin: The Stationery Office.

*Bail Act, 1997* (No.16/1997). Dublin: The Stationery Office.

*Courts Act, 1971* (No.36/1971). Dublin: The Stationery Office.

*Courts of Justice (District Court) Act, 1946* (No.21/1946). Dublin: Stationery Office.

*Courts Service Act, 1998* (No.8/1998). Dublin: Stationery Office.

*Criminal Justice Legal Aid Act, 1962* (No.12/1962). Dublin: The Stationery Office.

*Criminal Justice (Theft and Fraud Offences) Act, 2001* (No.50/2001). Dublin: The Stationery Office.

*Criminal Justice (Public Order) Act, 1994* (No.2/1994). Dublin: The Stationery Office.

*Criminal Justice (Public Order) Bill, 2010* (No.7/2010). Dublin: The Stationery Office.

*Employment Permits Act, 2003 (*No.7/2003). Dublin: The Stationery Office.

*Employment Permits Act, 2006* (No.16/2006). Dublin: The Stationery Office.

*Fines Act, 2010* (No.8/2010). Dublin: The Stationery Office.

*Illegal Immigrants (Trafficking) Act, 2000* (No.29/2000). Dublin: The Stationery Office.

*Immigration Act, 1999* (No.22/1999). Dublin: The Stationery Office.

*Immigration Act, 2003* (No. 26/2003). Dublin: The Stationery Office.

*Immigration Act, 2004* (No. 1/2004). Dublin: The Stationery Office.

*Immigration Residence and Protection Bill, 2008* (No.2/2008). Dublin: The Stationery Office.

*Immigration Residence and Protection Bill, 2010* (No.38/2010). Dublin: The Stationery Office.

*Misuse of Drugs Act, 1977* (No. 12/1977). Dublin: The Stationery Office.

*Non-Fatal Offences Against the Person Act, 1997* (No.26/1997). Dublin: The Stationery Office.

*Probation of Offenders Act, 1907.* (7 Edw.7) c.17. Dublin: The Stationery Office.

*Refugee Act, 1996* (No.17/1996). Dublin: The Stationery Office.

*Solicitors' (Amendment) Act, 2002* (No.19/2002). Dublin: The Stationery Office.