SCHEDULE 21 AND ITS IMPACT ON THE LAW OF SENTENCING HOMICIDE

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ABSTRACT

This thesis examines Schedule 21 to the Criminal Justice Act 2003 and its impact on the law for sentencing homicide. It seeks to establish the intention behind the statutory guidelines for murder, and critique the rules therein, using this analysis to inform an evaluation of the Court of Appeal (Criminal Division)'s interpretation and application of the schedule in appellate cases. It also, by virtue of the investigation into the schedule's motivations and the statutory framework accompanying it, considers if Schedule 21 has implications for the sentencing of other homicide offences, and concluding that it does, goes on to explore whether any such influence has been accorded to the schedule in the sentencing of manslaughter.

(91278 WORDS)

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I dedicate this thesis to none of the above however. I knew who I would dedicate this thesis to from the moment I was accepted by Oxford to undertake it. That is, my late Nana.

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CHAPTER 1

Schedule 21 and the Parliamentary Intention behind it

INTRODUCTION

This thesis examines the statutory sentencing guidelines for murder, schedule 21 of the Criminal Justice Act 2003 (CJA03), and its operation by the Court of Appeal for the sentencing of murder. In 2008, 'after almost five years' experience of the operation of Schedule 21, it is time for a review of the working of the Schedule'[1] said David Thomas. This thesis undertakes that, given there remains no thorough and comprehensive analysis.[2]

Thereafter, it widens the exploration to the ramifications Schedule 21 has had on the sentencing of other serious offences against the person. Ashworth and Roberts noted as recently as 2013 that 'despite the steady accretion of offence-specific and generic guidelines over the past decade, the English experience has attracted little attention from scholars, either in terms of normative critiques or empirical enquiries.'[3] This thesis takes a holistic view of Schedule 21 in the context of other Parliamentary reforms to sentencing made around the same time, and through a deep trawl of Hansard, seeks to ascertain whether there is a basis for Schedule 21's influence reaching further than merely the offence of murder it expressly addresses. As the rationale for apportioning custodial punishment enshrined in s.153(2) of the

[1] [2008] Crim LR 904, 905

[2] What contributions there have been take more the format of overviews, eg B Mitchell, 'Sentencing guidelines for murder' in A Ashworth and J Roberts(eds), *Sentencing guidelines* (OUP 2013), or address important related issues raised by the guidelines (eg B Mitchell and J Roberts, Public opinion and sentencing for murder (Nuffield Foundation 2010) rather than legal analyses of Schedule 21's operation and wider influence on sentencing law.

[3] A Ashworth and J Roberts, 'The origins and nature of the sentencing guidelines in England and Wales' in A Ashworth and J Roberts(eds), *Sentencing guidelines* (OUP 2013) 10

CJA03,[4] the implications of Schedule 21 for the sentencing of other crimes are contemplated in the context of desert theory.[5] The stimulus for conducting this investigation is located in the atmosphere and argument driving the policy of Schedule 21 and contemporaneous sister-legislation. That agenda is significant for the prospect that such statutory reforms led by Schedule 21 are intended by Parliament to, or should logically in effect, right a long-established wrong identified in the works of criminologists such as Ashworth. That is, that some offences against the person are not sentenced proportionate to the seriousness of the offence, an injustice particularly apparent when compared to the punishment of some offences against property.[6] It applies core principles of desert theory as laid down primarily by von Hirsch and Ashworth as the governing rules of proportionality and asks if the seriousness of murder has been altered, and if so, what are the ramifications (if any) for the gravity of crimes related to murder.

This introductory chapter provides a background and context for the advent of Schedule 21, investigating whether a greater valuation on the harm of death can be said to form part of the intention behind Schedule 21. It does so through a deep and searching analysis of Hansard regarding sentencing for all forms of homicide contemporary to Schedule 21's passage through Parliament. Finding it can, it proceeds to question whether those statutory guidelines specifically for murder thus have a broader remit, viz. dictating increases in the sentencing for other offences resulting in death not dealt with by legislation in recent years.

[4] Specifically, the shortest term commensurate with the seriousness of the offence

[5] It is highly unlikely any of the crimes dealt with in this thesis would not meet the custody threshold (itself a test based upon proportionality) and thus the quantum of punishment falls to be dictated according to Criminal Justice Act 2003 (CJA03) s.153(2)

[6] A Ashworth, *Sentencing and Criminal Justice* (4th edn, CUP 2005) 149; A Ashworth, *Sentencing and Criminal Justice* (5th edn, CUP 2010) 153

Satisfied such is the case, the thesis moves to its next logical phase by establishing with reference to sentencing practice by the courts, what the impact of Schedule 21 has been in decisions of the Court of Appeal (Criminal Division). Chapter 2 commences this empirical exploration by undertaking the task outlined in the first paragraph of this chapter. The following chapter shifts the focus onto the repercussions of Schedule 21, by first of all looking into whether the statutory sentencing guidelines have had the influence Chapter 1 argues they should have, on the closest relation of murder: the offence of manslaughter. Hence Chapter 3 establishes a picture of sentencing levels for manslaughter prior to any declared influence of Schedule 21. Comparison is thus enabled with scrutiny of post-Schedule 21 manslaughter sentencing in Chapter 4 to discern what, if anything, has changed in the courts' approach, and equally important, the length of custodial terms. Chapter 5 concludes the exploration with a summary of findings.

Background

In 1969 the death penalty was finally and completely abolished for murder in the UK.[7] It brought to an end[8] the purview of the ultimate sanction for murder that had lasted a millennium and a half, its use first being recorded in Britain in the 5th Century.[9] Despite the Act mandating that all murderers now be sentenced to imprisonment for life,[10] it would be mistaken to think an entirely new system was being ushered in. This is primarily because life imprisonment is not actually what it purports: as Lord Mustill said, 'the words which the

[7] Making permanent the Murder (Abolition of Death Penalty) Act 1965, s.1(1)

[8] De facto. Capital punishment was abolished de jure (for treason and piracy) in 1998.

[9] M Gosling, 'Dealing with those who murder' (2004) 139 (Feb) Criminal Lawyer 5, 5

[10] (n 7)

judge is required to pronounce do not mean what they say'.[11] In the same way that every murderer was sentenced to death prior to 1957, but was not actually executed (a near majority (45.7%) of such people being reprieved under the Royal Prerogative of Mercy between 1900 and 1949),[12] it transpired that not every person sentenced to life imprisonment would spend the rest of their days behind bars. The release provisions of s.27 of the Prison Act 1952 empowering the Home Secretary to order the release on licence of any prisoner serving a sentence of life imprisonment were extant, and renewed by s.61(1) of the Criminal Justice Act 1967.

Those reprieved before abolition were released from prison at the behest of the Home Office, when it was determined chiefly that they had spent sufficient time in jail to 'be accepted by public opinion as an adequate vindication of the law.'[13] Other considerations included the danger the prisoner posed to the public and general deterrence. This system, which the Home Secretary was ultimately responsible for,[14] continued virtually unchanged following abolition,[15] except for a statutory obligation[16] upon the Home Secretary to consult the judiciary on when it would be appropriate to sanction release. This procedure persisted, albeit with minor alterations, so that come 2002, it was still the Home Secretary that ultimately had to give permission for a murderer to be released from jail.

[11] *Doody* [1994] 1 AC 531, 549

[12] S Shute, 'Punishing murderers: release procedures and the "tariff", 1953-2004' [2004] Crim LR 873, 873 citing *Royal Commission on Capital Punishment 1949-1953, Report*, Cmnd 8932, September 1953, 3

[13] ibid 226

[14] (n 12) 874

[15] (n 12) 876

[16] (n 7) s.1(2)

Some light was shed on the approach to release taken by the Home Secretary in 1983. Leon Brittain told the House of Commons by way of a written answer that murderers of police officers and prison staff, terrorists, sexually or sadistically motivated killers of children and those murdering using a firearm in the course of a robbery would serve at least 20 years in prison.[17] He sought for the first time, officially at least, to separate the penal term, viz. as he described it, the length of time served in jail necessary to satisfy 'the requirements of retribution and deterrence'[18] from the assessment of risk conducted by the Parole Board. This dichotomy prevails to this day, a mandatory life sentence being formally divided into two parts. The first is the length of time that must be served as punishment for the crime, now known as the "minimum term". It is imperative to appreciate this minimum term set for life sentences is the actual length of time that *must* be served in prison. On expiration of the minimum term release on life licence shall be at the discretion of the Parole Board based on criteria connected to risk, the purpose being to protect the public from dangerous reoffenders. It is therefore possible that D will remain imprisoned after they have served the duration of the minimum term, or later be recalled to prison if they breach the terms of their licence. This minimum term format for a life sentence can be contrasted to the usual 'determinate' sentence where only half the stipulated period of incarceration must actually be served in custody.[19] However, when people are released at the halfway point of their determinate sentence, they are released on licence, meaning they too may be recalled to jail if they break the conditions of their licence. These often include an undertaking that they not be convicted of any offences during their licence period. Thus, it is possible that some Ds will serve only their minimum term and no more, and some Ds will serve half their determinate sentence, be

[17] HC Deb 30 November 1983, vol 49, cols 505-507W

[18] (n 12) 882

[19] CJA03, s.244

released, but shortly thereafter be recalled to serve the remainder of their custodial term for breaching their licence conditions. In this instance, both Ds would serve 10 years in prison. In other instances, the opposite extreme may be true. A life sentence prisoner may serve well in excess of their minimum term in jail, whereas an offender released at the halfway point of their determinate sentence no more, where they are not recalled for breaching their licence conditions. It is fairer and more practical to work on the basis of what time offenders *must* serve in prison for what they are convicted of, as any recall for breach of licence conditions or detainment on the basis of public protection is ultimately within the control of D in that they remain sentient and criminally responsible for their behaviour giving rise to such findings.

Though little extra light has been shed on the rationale and reasons used to reach decisions on penal terms in the Home Office, the judiciary did formulate published guidance to introduce some clarity and consistency to their recommendations on the length of penal terms to the Home Secretary. For example, in 1997, Lord Bingham CJ wrote to all judges laying down loose guidelines on the normal tariff for murder, and relevant aggravating and mitigating factors. He said the normal starting point from which deviation should be made according to the circumstances of the specific case was 14 years, which he recognised was an increase from that used by Lord Lane CJ of 12 years. The 14 year starting point for adults was confirmed by the new Lord Chief Justice, Lord Woolf, in 2000, though revisions were made to the guidance for those under 18. The latter occurred because the Home Secretary was effectively stripped of any involvement with fixing the penal term for young offenders by the European Court of Human Rights (ECtHR).[20] The upshot was that the trial judge would set the penal term in open court henceforth.

[20] *T v UK* (2000) 30 EHRR 121

In 2002, at the request of Lord Woolf CJ, the recently created Sentencing Advisory Panel (SAP) produced a detailed document recommending a more structured approach to be adopted in reaching a judicial recommendation. It suggested the starting point be returned to 12 years, a higher starting point of 16 years be taken for particularly serious cases, and a lower one of around 8 years where culpability was 'significantly reduced'.[21] At this stage, the SAP advised the Court of Appeal which was still responsible for issuing guidelines by way of judgments. It was hoped the SAP's academic lilt would provide an overarching coherence to guidelines, rather than continuing with them developing piecemeal in isolation. Consequently, the Lord Chief Justice issued a new Practice Direction a few months later implementing most of the SAP's advice.[22] The key extracts can be seen in Appendix 2.

Despite the increasing formality and detail of these guidelines, it is worth remembering that the Home Secretary was in no way bound by the resultant recommendations from the judiciary as to the penal term for adults. However, in 2002, his role of determining the penal term, or what became commonly known as 'the tariff', was to be successfully challenged in the courts too. Instead of the task being handed straight to the bench in its entirety as was done with juveniles,[23] it gave rise to the statutory guidelines signposting determinations by judges that have stimulated this research. We now turn to exploring the purpose behind them, and their theoretical implications.

[21] SAP, *Minimum terms in murder cases* (SAP 2002) 5

[22] [2003] 1 Cr App R (S) 46

[23] Criminal Justice and Courts Services Act 2000, s.60

THE CONCEPTION OF SCHEDULE 21

Introduction

This chapter will examine the origins of Schedule 21:[24] what was the intention of Parliament in legislating new sentencing arrangements for murder, and partly based on the answer to that research question, go on to ask what its logical consequences should be- both for murder and for other offences. The present chapter will sift through the primary and secondary sources surrounding the proposals that eventually became Schedule 21 in order to draw out the Parliamentary intention behind them. The objective is to discern what, if any, broader implications the legislation has, then explore whether those implications have indeed been realised- in every sense- in sentencing practice in subsequent chapters. Initially this is confined to researching the interpretation and impact of Schedule 21: its operation by the courts for sentencing murder itself. Later, the exploration is expanded to see whether, and if so how, Schedule 21 has influenced the sentencing of other homicides.

Methodology

What precisely is meant by Parliamentary intention? 'The phrase is a shorthand reference to the intention which the court reasonably imputes to Parliament in respect of the language used'[25] in a statutory provision. Such interpretation must be consistent

[24] CJA03. See Appendix 1

[25] *R v Secretary of State for the Environment, Transport and the Regions, Ex parte Spath Holme Ltd* [2001] 2 AC 349, 396 (Lord Nicholls)

with the 'policy and objects of the Act',[26] which is the only proper application of a statute, as the great Lord Reid held. The purpose, 'and hence its ambit', may be express or implied.[27] Legitimate techniques to achieve this include reverting to both 'internal aids (found in the rest of the Act) or external aids (for example, material outside the Act) to identify the mischief that the statute is intended to cure and the purpose of the legislation.'[28]

In this instance, the words of the Act are perfectly clear, but the purpose behind them is not so apparent. If it can be established that Schedule 21 was motivated by a particular policy, then the meaning of the Act is potentially much wider than initially meets the eye by virtue of other statutory provisions.[29]

Extensive reference is made to ministerial statements, not least because the government produced the guidelines as their solution to a specific stimulus. As the architects of Schedule 21, government spokespeople are best placed to explain its original aims. However, this will be balanced by coverage of extra-governmental supporters who also voted to pass the legislation. Furthermore, debates concerning other related laws being promoted around the same time will be studied to provide a contextual background. Doing so provides a broad purview of what is likely to have

[26] *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997, 1030

[27] (n 25) 396 (Lord Nicholls)

[28] A Bradley and K Ewing, *Constitutional and Administrative Law* (15th edn, Pearson 2011) 17

[29] In particular, s.153(2) of the CJA03, which requires sentences to be for the shortest period commensurate with the seriousness of the crime. If the seriousness of a crime has been altered by Schedule 21 by virtue of certain features, then sentences for other crimes with those features will be affected too.

been Parliamentary intention in agreeing the final, amended schedule, something that needs to be distinguished from governmental or ministerial intention.[30]

What Parliament passes as law is law and to be applied by the courts whether they agree with the justifications, merits, nature, definition or extent of the mischief it is attempting to remedy or not.[31]

Origins of Schedule 21

Murderers were unique in that they were the only offenders who, for all intents and purposes, were sentenced not by a judge but by a politician. In *Anderson,*[32] the Appellate Committee of the House of Lords held that the Home Secretary was in reality performing an act of sentencing[33] but was not an 'independent and impartial tribunal' because he was a member of the executive.[34] Previously, a mandatory life sentence would be awarded to the convicted murderer and the trial judge and Lord Chief Justice would make recommendations to the Home Secretary as to the length of the penal element, viz. the amount of time D would have to serve in jail before becoming eligible for parole. In recent times this figure should have taken into

[30] (n 25) 396 (Lord Nicholls); J Baker, 'Statutory Interpretation and Parliamentary Intention' (1993) 52(3) CLJ 353, 354-357

[31] A Dicey, *Introduction to the Law of the Constitution* (first published 1885, 8th edn, Macmillan 1915) 3-4, 18-20, 24-25, 39; A Ashworth, Sentencing and Criminal Justice (5th edn, CUP 2010) 52

[32] [2003] 1 AC 837

[33] (n 32) [17]-[18], [24]

[34] (n 32) [26]

account the judicial guidelines for the sentencing of murder as covered in the preceding chapter. The Home Secretary however was at absolute discretion whether to follow these recommendations, or set a minimum term of his own choosing. The genesis of Schedule 21 can thus be found in *Anderson*, which ruled the hitherto practice and power of the Home Secretary to ultimately fix the penal element of a murderer's life sentence a breach of Art.6 of the ECHR, and that consequently 'the Home Secretary should play no part in fixing the tariff of a convicted murderer'.[35]

Issuing a declaration of incompatibility between the statutory provisions affording the Home Secretary such a power and the ECHR, the government could do two things: either ignore it or take action to remedy the problem. Only the latter was realistic. The government's immediate stance, espoused by the then Home Secretary David Blunkett in a written answer on 25th November 2002, was correct to note that the 'judgment will affect only the issue of *who* sets the tariff in each case'.[36] He proclaimed

> As is proper in a democracy, Parliament will continue to retain the paramount role of setting a clear framework within which the minimum period to be served will be established. I am determined that there should continue to be accountability to Parliament for these most critical decisions. This is fundamental to our democracy and to the maintenance of confidence in the criminal justice system.[37]

He went on

> These principles will set a framework within which judicial discretion, which is an essential feature of sentencing, will operate…The principles will set out that for the most serious crimes— such as the sexual, sadistic murder of children— life should mean life. The principles will incorporate the same aggravating factors upon which previous Home Secretaries and I have based

[35] (n 32) [28]

[36] HC Deb 25 November 2002, vol 395, col 100W [emphasis added]

[37] ibid

> our decisions. These factors will include murder committed in the course of armed robbery or the murder of prison or police officers in the course of their duty as set out to Parliament by my predecessor Leon Brittan in 1983.[38]

From these initial indications, it is clear that Blunkett wished to retain executive or at least legislative influence over sentence levels for murder, and would enact a framework of principles to do so. Crucially, those 'will incorporate the same aggravating factors upon which previous Home Secretaries and I have based our decisions.'[39] Blunkett's emphasis that the only change mandated by the judgment was who fixes the tariff makes it clear that who decides the policy would not. As it stood however in practice, the means for the influence exercised by the Home Secretary would evaporate leaving purely the judicial guidelines to advise sentencers.

Not just a new procedure, but a new policy

Without the ability to henceforth set minimum terms himself, it is not immediately apparent how a Home Secretary's policy would continue to be enforced by others. Blunkett hints at such concerns in his first public enunciation on the issue. Advocating that for certain murders 'life *should* mean life'[40] and that the most heinous crimes must be 'dealt with properly'[41] betrays an anxiety. His implication is either that presently that is not the case, or that those goals would not be guaranteed if the Lord Chief Justice's Practice Direction were allowed to stand alone as the sole authority for

[38] (n 36) col 101W

[39] ibid

[40] ibid (emphasis added)

[41] HC Deb 4 December 2002, vol 395, col 928

judges determining minimum terms.[42] His tone suggests he for one still stands by the doctrine that only the executive can ensure justice is done when it comes to punishing murderers[43] and hence his disenfranchisement means positive steps need to be taken to uphold what the government see as "appropriate" sentencing of murderers.

The proposed guidelines were first put before Parliament on 20th May 2003, as an amendment to the Criminal Justice Bill then still under discussion in the Commons. Ashworth claims that this amendment was 'quickly put forward...in an attempt to reassert political control over minimum terms by requiring judges to have regards to statutory guidelines.'[44] Whilst the latter aspect is self-evident from Blunkett's own admissions, dealt with in a moment, Ashworth is not the only scholar to impugn the preparation of the guidelines as unduly hasty. Thomas lambasts Schedule 21 as being 'cobbled together at high speed'.[45] Yet what eventually became Schedule 21 was first presented to Parliament six months after the Home Secretary first responded to the *Anderson* ruling in November 2002. The guidelines then underwent another six months of Parliamentary debate, scrutiny, and consequent alteration, much of it in the Lords, before becoming law. Are these really the hallmarks of sloppiness? By way of analogy, today's Sentencing Council dominated by judges, academics, and criminal justice experts, issued a draft guideline for consultation on assault in October 2010, and published the definitive guideline which sentencers must follow, in March 2011. Again, six months- or less even. Why do scholars describe these guidelines as

[42] This had always been insinuated. Douglas Hurd, whose remarks that judicial recommendations as to minimum terms was just one factor in fixing the tariff, also included 'the need to maintain public confidence in the system of justice' implying that judicial recommendations alone couldn't be relied upon to do so: HC Deb 23 July 1987, vol 120, col 349W

[43] See the case advanced for the Home Secretary in *Anderson* defending his powers

[44] A Ashworth, 'The struggle for supremacy in sentencing' in (n 3) 20, 21

[45] D Thomas, 'Sentencing: murder- minimum term' [2008] Crim LR 904, 905

'cobbled together at high speed'? Is their wrath reserved for Schedule 21 because on murder they lost 'the struggle for supremacy in sentencing', as Ashworth's chapter is titled? The reality is that primary legislation is likely to be subject to much greater scrutiny than SAP/SGC/SC proposals, not merely because of debates and votes that it must successfully clear in Parliament, but the degree of exposure more widely owing to the media highlighting contentious Bills and other measures. Alluding, therefore, that Schedule 21 is unfit for purpose by intimating that it was ungainly rushed into law is hard to sustain by current standards. Looking back at the standards of the day, when the SAP advised the Court of Appeal, as they did on murder minimum terms on March 15th 2002, the extent of broader scrutiny and public and political input was much less. That guidelines on the sentencing of murder were issued without the agreement of the ultimate arbiter of murder sentences at the time aptly evinces this.

On the other hand, does analysis of the Schedule's motivations or contents provide a more defensible basis on which to criticise it? Explicit about Parliament re-asserting its leading role vis-à-vis the penalty for murder, Blunkett claimed 'we are trying to achieve the same result'[46] as when the Home Secretary fixed the tariff. He gives a number of examples of how Home Secretaries down the years have set substantially higher tariffs for the more heinous murders to justify this.[47] It also serves to explain why Schedule 21 is so much more punitive than the SAP guidance and resultant Practice Direction, which he tries to distance himself from by claiming he neither ratified nor agreed with those judicial guidelines.[48] In effect, he is incorporating the Home Secretary's modifier on minimum terms into the new guidelines, since that

[46] HC Deb 20 May 2003, vol 405, col 870

[47] ibid

[48] HC Deb 20 May 2003, vol 405, cols 870, 871

minister will not be able to do so on an individual basis anymore. As he says, it is codifying the principles the Home Secretary uses.[49] Whilst this initially may look like a circumvention of the ruling in *Anderson*, it is in fact merely giving effect to the separation of powers demanded by the judgment, and no more. It found that sentencing, for a discrete individual, could not be performed by someone who 'as a member of the executive, is undoubtedly not independent'.[50] Ergo, *Anderson* found the procedure for setting tariffs unlawful, not the policy the Home Secretary was applying in doing so.

This notion is at odds however with Blunkett's subsequent admission that 'there will be an increase in those serving life sentences'.[51] Why would this be the case if the new statutory guidelines are merely replicating extant practice? Contrary to warnings 'we must be careful that, in seeking properly to address public disquiet about the most serious murderers, we do not simply introduce a ratcheting up of tariffs for every murderer',[52] Schedule 21 raises the starting point for the 16 *and* 12 year gradations, albeit by different proportions. Thus, most importantly it appears to be more punitive than prior practice of Home Secretaries for a category (unaggravated murders) that has never been subject to a Home Secretary's modifier, unlike the upper category.[53] The former Home Office Minister Douglas Hogg MP who had fixed numerous tariffs in that capacity laid bare that 'the plain truth is that what we are being asked to approve is substantially in excess of what the Lord Chief Justice and the Court of

[49] (n 46)

[50] (n 32) [48] (Lord Steyn)

[51] HC Deb 20 May 2003, vol 405, col 869

[52] HC Deb 20 May 2003, vol 405, col 884

[53] HL Deb 14 October 2003, vol 653, col 872

Appeal recommended.'[54] David Blunkett, the Home Secretary confirms the intention is to raise sentencing levels from those established by the courts, replying 'yes, I accept that entirely. I disagreed with the Lord Chief Justice's practice guidance.'[55] It is evident thus that despite only having to alter who assesses the appropriate length of the minimum term, the opportunity is being taken to change the *policy* itself as well. Indeed, if anything the *Anderson* ruling has provided the Home Secretary with an opportunity to bind courts to higher sentencing levels. It is at this stage that closer scrutiny of the Schedule would help illuminate developments.

THE CONTENT OF SCHEDULE 21

Schedule 21, as it eventually became, is a narrative guideline for the sentencing of those convicted of murder. It provided different 'starting points' for adults based upon originally 3 categories of the seriousness of the murder, and a fourth, separate one for juveniles. Subject to aggravating and mitigating factors, murders of 'exceptionally high' gravity merit a whole life order, those of 'particularly high' gravity a starting point of 30 years, and all others, one of 15 years. Offenders under the age of 18 should have their minimum terms fixed from a starting point of 12 years. The recent amendments made to Schedule 21[56] will not be dealt with here as they were not on the table and thus cannot be part of the Parliamentary intention when the CJA03 was passed.

[54] HC Deb 20 May 2003, vol 405, col 871

[55] ibid

[56] Para.5A of Schedule 21 introduces a fourth, new starting point for adults of 25 years for murders committed with a weapon (which is not a firearm) that D had taken to the scene of the killing. Firearms are dealt with under para.5

Whole life order

The top category of 'exceptionally high seriousness' can be found in para.4 of the Schedule and has no sibling in any of the judicial guidelines. The affirmation of a whole life order as the statutory maximum for the penal element in a mandatory life sentence for murder did not change the status quo; in *Hindley,*[57] the House of Lords had already held that it was possible for a minimum term to be fixed as the entirety of D's natural life if the gravity of the offending conduct merited it. Thus Parliament affirmed that "LWOP" (Life WithOut Parole) was the ultimate sanction of the UK. It is the anchor of our penalty scale thereby. [58]

However, the range of cases that were deemed to merit such a punishment was broadened by Schedule 21. Many were in the same group declared by the then Home Secretary in 1983 as worthy of at least 20 years in prison. In the language of s.153(2), the shortest term commensurate with the seriousness of the offence for murders of this nature has increased greatly to a whole life sentence. Even accepting that Leon Brittan was indicating a lower limit rather than upper or actual appropriate tariff, the policy in practice was that a whole life order was rare and exceptional:

> In 1985, for instance, the trial judge gave a sentence of 20 years for an offence of rape and murder and rape and attempted murder by one individual. The Lord Chief Justice ratified that, but the Home Secretary increased it to 30 years. In 1996, the trial judge recommended 25 years for an offence of three sexual assaults and murders. The Lord Chief Justice affirmed. The tariff was 35 years. In 2000, three murders

[57] [2001] 1 AC 410

[58] C Appleton and B Grover, 'The pros and cons of life without parole' (2007) 47(4) Brit J Criminol 597, 612.

> resulted in a sentence of 25 years. The Lord Chief Justice agreed with that. The tariff was set at 35 years.[59]

Schedule 21 makes it clear that in the second example, according to para.4, the starting point now would be a whole life order. Hence, the statutory guidelines are legislating a higher tariff than even the former practice of Home Secretaries. The modifier applied by that officeholder to impart democratic sensibilities on the tariff has itself been increased by Schedule 21.

Murders of 'particularly high' seriousness

The same is true of the other gradations for which starting points were given as Shute observes:

> The types of murder included in these lists [paras.4 and 5 of Schedule 21] are broader than those for which a sentence of death could have been imposed between 1957 and 1965 and those which had been identified by Mr Brittan in 1983 as requiring especially long terms of imprisonment.[60]

Not only are the categories broader but the respective starting point is higher too than previous practice of Home Secretaries. As Lady Scotland remarked in the Upper House in the context of murdered police officers, one of the instances marked out by both the Lord Chief Justice's Practice Direction and Schedule 21 of being in the 'particularly high seriousness' bracket:

> Leon Brittan, in his 1983 statement on murder tariffs, said that murderers of police officers should serve at least 20 years. In practice… that has tended to receive a tariff of between 20 and 25 years. Therefore, setting the starting point at 30 years enables the court

[59] HC Deb 20 May 2003, vol 405, col 870

[60] (n 12) 178

> to increase that tariff, if it deems that the nature of the offence is so grave… We have provided a very significant increase.[61]

This statement recognises not just the fact that the politically determined sentence was higher than that of the judicial recommendation which would have been in the region of 16 years given the bench's guidelines for this class of murder, but that the political sentence is now higher than what it would have been previously. Again, here there has been an increase in the 'modifier' applied by the political dimension of the process.

Murders not covered above

The same can be observed with relation to the 15 year starting point encompassing all other murders, which represents a 3 year increase from the judicial guidelines. Given that the Home Secretary affirmed the overwhelming majority of judicially recommended tariffs (87% in the five year spell 1997-2002 shortly before he lost the power to do so),[62] which can safely be assumed to be the bulk of these "standard" cases,[63] it is apparent there has been an inflation in the political modifier for these murders too. Indeed, this increase, in the wake of the SAP opining that the 14 year starting point Lord Bingham CJ moved to in 2000 be reversed back to 12 years, is a distinct abjuration of that policy endorsed by Lord Woolf CJ's 2002 guidance.[64] The fact that this increase in sentencing levels will affect far more cases than any of the other provisions means that it is potentially just as important if not more so, despite

[61] HL Deb 14 October 2003, vol 653, col 872

[62] HL Deb 16 June 2003, vol 649, col 589

[63] Since they constitute 70% of murders: HL Deb 11 November 2003, vol 654 col 1264

[64] As Blunkett explicitly said in the course of Commons debates: HC Deb 20 May 2003, vol 405, col 871

not being headline-grabbing in the same way whole life minimum terms are. Ascertaining what this represents, and the intention behind it, is the focus of this chapter.

Under 18s

One aspect which received much attention in the Upper House was the starting point for youths. The government agreed to amend the Schedule to insert a new starting point for youths, rather than grouping them with adults. Baroness Scotland told the House there were 'clear similarities' between the sentencing levels for adults and juveniles,[65] of whom those released in 2000 had served on average a minimum term of 10.8 years.[66] If so, the introduction of a 12 year starting point for under 18s will reduce the starting point by 3 years for applicable young offenders compared to the Lord Chief Justice's Practice Direction.

WHY THE RISE IN TARIFF?

The government's case

Having established that increases in sentencing levels for all gradations of murder have been ordained by Schedule 21, although intriguingly of varying degrees, it is

[65] (n 63) col 1243

[66] HC Deb 20 May 2003, vol 405, col 893

pertinent to ask *why*? What has caused the Home Secretary's modifier itself to be revised upwards? Blunkett, moving the freshly published draft guidelines in the House for the first time propounded:

> we should lay down a framework that will give the people of this country confidence in the system, for two reasons—first, that those who commit the most horrendous murders will get what used to be called, in old-fashioned language, their just deserts. Secondly, when people have confidence in the system and there is consistency in the treatment of the most difficult and dangerous crimes, they might be prepared to listen to a broader debate about sentencing policy, the sentencing framework and the work of the Sentencing Guidelines Council.[67]

These two aims, one a question of proportionate punishment, and the other about a communicative aspect of sentencing for criminal justice, are united by a common thread of democratisation in a sense; of delivering a sentencing system that better reflects shared public values.[68]

With regards to the first justification, Blunkett exclaims, 'there is no question but that the public are bewildered by how sentences can be reached when they know that the crime that has been committed was so heinous that there could be only one sentence: life should mean life.'[69]

In speaking of 'heinous' crimes, Blunkett appears to be referring to the gravity of the crime committed. His language describing the public's bewilderment also intimates the extent of the alleged disparity between public conceptions of a just sentence and those actually handed down. This may go some way to explaining his insinuation of

[67] HC Deb 20 May 2003, vol 405, col 871

[68] Values I emphasize, not as to whether sentences for crimes are too lenient or not, but values in the sense of principles and tenets shared by all citizens in our nation. A shift in these may have implications for the quantum of punishment however.

[69] HC Deb 20 May 2003, vol 405, col 867

under-sentencing *by* the judiciary in that it was the Home Secretary at the time who essentially sentenced murderers by fixing their tariff, but overwhelmingly the Secretary of State followed the judicial recommendation in the case. He is making a case for change and asking for the Parliament's endorsement.

To reinforce his contentions in this respect, Blunkett identifies the problem of disparity between murder sentences and those of lesser offences, outlining the wider intention behind the revised structure enacted by Schedule 21:

> People cannot understand that when someone has been found guilty of murder…the sentence that is served for taking a life does not always equate to other forms of criminality for which people at a lower level of the sentencing framework are serving longer sentences. People think, honestly, that we have all lost our marbles. They do not understand how, if murder is the most horrendous crime, others do not see that the perpetrators must be put in jail for as long as possible so that society demonstrates its common sense through its actions.[70]

The theme of the government's contention is the gravity of the crime of murder is not reflected by sentences for it, not least when compared to the punishments for other offences. This dimension of ordinal proportionality in relation to lesser offences is most pertinent to the lower sentences for murder, those imposed for unaggravated murders, and can most closely be associated with the shift from twelve to fifteen years for those murders. Blunkett's concerns are not dissimilar to a contemporary critique emanating from the academy relating to the proximity of sentences for armed robbery and serious drug crimes to grave domestic offences against the person,[71] which tend to fall in the lowest category for murder sentencing.[72] That concern about the brevity of sentences for domestic killings was the catalyst for the sentencing guidelines on

[70] HC Deb 20 May 2003, vol 405, col 871

[71] A Ashworth, *Sentencing and criminal justice* (3rd edn, Butterworths 2000) 131

[72] Few domestic homicides entail any of the characteristics listed as indicative of 'exceptionally high' or 'particularly high' seriousness murders in Schedule 21.

provocation too.[73] Ashworth has convincingly propounded that penalties need to be rebalanced in favour of breaches of bodily integrity compared to offences infringing property rights.[74] It would explain why a substantial increase has been made to the unaggravated tier of murder as well as the others by Schedule 21.

There is another option to solve this issue though, assuming it exists, namely to decrease the sentence levels for those lesser crimes felt to illustrate murder as under-sentenced. The government's assessment was resoundingly that murders were under-sentenced and that the new starting points would deliver sentences that actually 'recognises the seriousness of the offence'.[75] Seriousness is determined by reference to two factors: harm and culpability. This suggests that elements of the crime of murder are now treated more seriously than before by society, or that there has been historic under-valuing of the tenets breached by murder and consequently inadequate minimum terms. We can identify this component as the harm element, simply because, the culpability ingredient of intention is common to most crimes (except ones of strict liability, for instance). If there was an increased valuation on an intention to do wrong, irrespective of the wrong, we would expect to see all crimes' penalties increased where intention was a feature, which is the vast majority. This didn't occur. Other crimes where the same harm element, death, was the actus reus however did have their sentences increased contemporaneously,[76] or even new offences created to censure and sanction other killings.[77] This would suggest it was

[73] (n 21) 2

[74] A Ashworth, *Sentencing and Criminal Justice* (4th edn, CUP 2005) 149; A Ashworth, *Sentencing and Criminal Justice* (5th edn, CUP 2010) 153

[75] HC Deb 20 May 2003, vol 405, col 901

[76] Causing death by dangerous driving: CJA03, s.285(3)

[77] RSA06, ss.20 and 21

the harm element that was having a higher valuation placed upon it as a policy of the time. The common feature between those crimes is distinctly not their culpability elements, for murder being intention, for dangerous driving being a form of gross negligence. Again, the common denominator with the RSA06 offences is the harm of death- certainly not intention (controversially).

Scrutiny by the House of Commons

There was regrettably only one debate of decent length on the guidelines that became Schedule 21 in the House of Commons. This may surprise readers as it did opposition MPs. A Conservative MP was incensed that:

> the Government are allowing the House of Commons two and a half hours to consider 16 new clauses and more than 30 amendments, an hour and a half to consider three new clauses and more than 100 amendments, and a further hour and a half to consider four new clauses, one schedule and one amendment.'
>
> How on earth do the Government expect the House to discharge its responsibility for proper scrutiny of legislation when they are imposing such a timetable on our deliberations?[78]

Similarly, a Liberal Democrat MP was 'dumbfounded' by the dismissive attitude of the government minister given 'nearly 500 amendments and 28 new clauses have been tabled to the Criminal Justice Bill, dealing with the most crucial issues of life and liberty.'[79]

Of what discussion there was, the guidelines received a mixed reaction- some welcoming and some sceptical. The Tory front bench declared them 'perfectly cogent

[78] HC Deb 20 May 2003, vol 405, col 842

[79] HC Deb 20 May 2003, vol 405, col 843

and sensible proposals'.[80] Disappointingly there was confusion as to the purpose of the penal term.[81] Doubt though was expressed about increasing minimum terms for all gradations of murder 'in seeking properly to address public disquiet about the most serious murderers'.[82] This intimates the Shadow Attorney General, Dominic Grieve, at least, was conceiving of Schedule 21 in a narrower sense than Parliament who passed the provision. Nonetheless, he was clear that he did not think the Home Secretary was starting a bidding war into how high tariffs could go[83] which militates against the hypothesis that the increases in sentencing levels was a matter of penal populism.

Fellow counsel on the government benches declared the 15 year starting point 'entirely appropriate'.[84] Many of the members in favour were the same people pushing for reforms to the road traffic legislation,[85] suggesting they were inspired by similar values and concerns and found murder sentencing wanting also. Indeed, the atmosphere of the debates is not one of allegations of "draconian" sanctions, harsh justice or excessive punitiveness. No such accusations are made. The Liberal Democrat spokesman informed the government his party wouldn't be voting for Schedule 21 due to the figures chosen for the starting points,[86] but otherwise reservations tended to focus on the consequences of the new starting points, rather than their intrinsic merit. Numerous MPs for instance inquired about the impact on the

[80] HC Deb 20 May 2003, vol 405, col 882

[81] (n 80) col 884

[82] ibid

[83] (n 80)

[84] (n 80) col 900

[85] (n 80) col 875-876

[86] (n 80) col 892

prison population.[87] This rather implies that the central provisions of the schedule, the starting points and their respective factors, were largely uncontroversial; consideration turned to the practicalities of their enforcement.

Grieve's remark that 'the rapidity with which the proposals have been put together shines through them'[88] has been seized upon by sceptics, but the format of them is largely similar to the Practice Direction issued by the Court of Appeal. His remark, sandwiched between doubt over the 30 and 15 year starting points, seems a product of his considering the schedule to go further than he would in raising sentencing levels. That is, after all, the main difference between Schedule 21 and Lord Woolf's guidelines. Moreover, speaking on Schedule 21's then debut as Schedule 2, does not account for the subsequent amendments made as a result of debate in the Lords. It's true the schedule certainly could have been subject to more extensive scrutiny in both Houses, however, it's doubtful how much extra would have changed. The Commons received the statutory guidelines warmly as it was, and the detractors' focus in the Lords was on the temerity of the guidelines to encroach on judges' discretionary prerogative in the first place, rather than the sentencing *levels* the guidelines were bringing. Contemporaneous debate on the topic of deaths caused by driving illuminate similar changes around much the same time.

[87] (n 80) cols 869, 875, 881

[88] (n 80) col 881

DRIVING OFFENCES CENSURING THE CAUSING OF DEATH OR INJURY

Causing death by dangerous driving (CDDD)

In December 2000 the government launched a review of penalties for road traffic crimes. The consultation paper was especially erudite, and observed that penalties for car crimes had to be proportionate to sentences for other non-road-related offences, as well as being consistent within its own species. It noted that both intra and inter offence ordinal proportionality 'may change over time, for example in response to changing social conditions'.[89]

It also acknowledged how attitudes to drink-driving had been 'transformed'[90] come 2000. It seemed to identify no similar revolution in the attitude to causing death by culpable driving though, remarking

> However devastating the consequences of causing death by dangerous driving, it seems unlikely that public opinion generally, or the sentencing practice of the courts, would equate that offence with other serious offences for which 14 years imprisonment is available.[91]

It found no need from the courts to increase the statutory maximum of 10 years as the existing ceiling was not prohibiting appropriate sentences.[92] Since it doubted any deterrent effect, that is any fewer deaths being caused by dangerous driving as a result

[89] Home Office, *Road Traffic Penalties* (HO 2000) 5

[90] (n 89) 6

[91] (n 89) 15

[92] (n 89) 15

of increasing the statutory maximum to a mooted 14 years,[93] it concluded overall against any such increase.[94]

However, given the scale of change to motoring crimes and their penalties over the course of the following decade, one would have to infer significant changes in the social fabric of the country occurred during that period, or perhaps that such changes had taken place already but not been noticed or incorporated into policy.

Indeed, the government report was at odds with the conclusion of the all-party Parliamentary Advisory Council for Transport Safety. Their review published in 1999 complained that 'bad driving offences, especially those involving death, are often not being dealt with in a manner which signals to society that such offences are a serious matter'.[95] It could only have been a surprise to the government then that within a couple of years of the Home Office's 2000 report judges were sentencing at or near the statutory maximum of 10 years for CDDD.

The *Report on the Review of Road Traffic Penalties* published just over 18 months later discovered that there had been a clumping of sentences around 10 years since the last report[96] and consequently that the 10 year ceiling was 'no longer appropriate'.[97] Besides this it gave very little if any explanation for proposing lifting the cap.

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[93] (n 89) 15

[94] (n 89) 17

[95] PACTS, *Road Traffic Law and Enforcement* (PACTS 1999) 2

[96] Home Office, *Report on the Review of Road Traffic Penalties* (HO 2002) 5

[97] (n 96) 6

Causing death by careless driving (CDCD) and the Road Safety Act 2006 (RSA06)

Despite it being announced shortly after the 2002 Report that the maximum penalty for CDDD would be increased to 14 years custody, backbench MPs were demanding more reform of road traffic offences and penalties whilst the CJA03 enacting that rise was still going through Parliament. One proposed new offences of aggravated CDDD with a statutory maximum of life imprisonment,[98] and causing death by 'bad driving'.[99] A multitude of MPs queued up to record 'so many hon. Members and so many of our constituents'[100] bewilderment at 'obscenely lenient'[101] sentences that 'trivialise the life that has been lost'.[102] Especially in cases of Careless Driving (CD) where a fatality had resulted, it was felt to be an affront to justice that any harm caused was treated as immaterial when sentencing because there was no harm component to the offence. Irrespective of the fact that the Court of Appeal had changed its stance on whether the fact a death caused by careless driving could aggravate sentence between 1996 and 1999, and that SAP guidelines given effect by *Cooksley*[103] upheld this policy, the overall picture was that sentences for many motoring crimes resulting in loss of life were woefully inadequate in recognising that fact. As one MP who characterised the consensus commented, 'a key point rightly

[98] HC Deb 30 April 2003, vol 404, col 75 WH

[99] (n 98) col 77 WH

[100] HC Deb 11 Jan 2005, vol 429, col 240

[101] (n 98) col 80 WH

[102] (n 98) col 82 WH

[103] [2004] 1 Cr App R (S) 1

made by many hon. Members is that sentencing policy does not appear to reflect the seriousness of the crimes committed.'[104] Another mirrored the sentiments of all the other speakers in the debate, urging that 'when considering offences, we need to ensure that the fact of death or injury is a key point in criminal proceedings'.[105]

All the same, no new offence of CDCD was incorporated into the CJA03. Demonstrating this wasn't a passing fad, pressure continued in Parliament with attempts by backbenchers to introduce such provisions, or berating the government for not having done so.[106] Jim Knight, who proposed new offences of motor vehicle manslaughter and an aggravated version, was scathing of the existing structure of road traffic offences and their punishment. With respect to the former he criticised the 'gulf' between the conduct required for CD and dangerous driving (DD) as 'huge'.[107] The degree of dissatisfaction with sentencing prompted him to call for 'a change in our attitude towards road traffic accidents where serious injury or death occurs.'[108]

Although momentum was gathering amongst MPs, there was discontent with the government's handling of the issue. A quite unusual anger can be sensed in some members' speeches. One Labour MP, tangibly frustrated by the fact that the government had made sympathetic noises yet done little in the last 4 years implored, '[i]t is about time that it was recognised that virtually every Member of Parliament wants something done about people who break the law in their cars and murder our

[104] (n 98) col 88WH

[105] (n 98) col 81WH

[106] HC Deb 13 July 2004, vol 423, cols 1278-81; HC Deb 7 September 2004, vol 424, cols 181-205WH; HC Deb 11 January 2005, vol 429, cols 213-266

[107] HC Deb 13 July 2004, vol 423, col 1280

[108] HC Deb 13 July 2004, vol 423, col 1280

constituents. It is like allowing them to do what they like with a gun.'[109] No doubt criminal lawyers would recoil at the exaggeration used by this MP to make his point. Nevertheless, it gives a good sense of the increasingly intolerant approach to the harm of death, howsoever caused. In this respect, it is analogous to the transformation of attitude Viscount Thurso referred to vis-à-vis drink driving.[110] Because the car is so easily a potentially lethal machine when poorly used, it is not acceptable to take charge of one in a diminished state of competence. Indeed, many MPs were 'absolutely astonished'[111] that an offence of CDCD didn't exist already. Exclamations such as 'it is absurd that the structure of our law does not consider death to be at the centre of such cases'[112] are representative of unanimous agreement on the matter. The government minister was left convinced at the end of the debate 'that we are going through a gradual cultural change in this matter.'[113] Less than twenty years after the last major review in the late 1980s, attitudes in the House had changed dramatically.

On February 3rd 2005 the government released a consultation paper proposing the creation of the crime of CDCD, and two related offences of essentially an illegal driver causing death. The strength of feeling in the elected House can be observed by the fact that MPs on both sides of the House were scathing of the delay in tabling provisions to enact the proposals.[114] Scheduling the publication of this report for the day after the general election of 2005 is not the action of a government keen to

[109] (n 100) col 216

[110] HC Deb 7 September 2004, vol 424, col 199WH

[111] (n 100) col 235

[112] (n 100) col 249

[113] (n 100) col 266

[114] ibid; (n 100) cols 253-254; HC Debs 8 March 2005, vol 431, cols 1403-1404

profiteer from penal populism.[115] It was nonetheless merely postponing the inevitable given the cross-party support for the planned sections, which were eventually enacted by the Road Safety Act 2006.

The government's sloth compared to MPs' desperation for these measures casts them in a revealing light. Rather than easily being derided as yet more penal populism from a government keen to stay ahead in the 'law and order' stakes,[116] the government's reluctance shifts the impetus for their introduction to ordinary backbench MPs. One who declared themselves a trustee of the Prison Reform Trust found it 'absolutely bewildering'[117] that such a 'yawning gap'[118] existed between CDDD and CD, meaning cases of CD which had caused a death did not reflect the degree of culpability and 'the fact that a death occurred'.[119] This would suggest the cross-party accord on the harm done by bad driving was organic and individually inspired rather than an elite, top-down reform cooked up by a few advisers and being rapidly and forcefully whipped through Parliament, regardless of others.[120] If there was a genuine movement amongst society at large for greater recognition of the harm of death, this is how we would expect it to be expressed.

The harm of death needs more fulsome recognition

[115] Cf. S Cunningham, 'Punishing drivers who kill' (2007) 27(2) LS 288, 297, 301-302; A Ashworth, *Sentencing and criminal justice* (5th edn, CUP 2010) 127; M Hirst, 'Causing death by driving and other offences' [2008] Crim LR 339, 340

[116] Against the Tories: I Loader, 'Fall of the "Platonic Guardians"' (2006) 46(4) Brit J Criminol 561, 578

[117] (n 100) col 247

[118] (n 100) col 247

[119] (n 100) col 248

[120] As could be argued the Iraq war, foundation hospitals, top-up fees etc were.

In sum, this investigation has unearthed much evidence that the central issue the government championed Schedule 21 as remedying was as an organic, cross-party grass-roots concern. Contemporaneous homicide sentencing reforms similarly motivated to Schedule 21, viz. that the value of human life was higher than was being reflected both by the law of criminal liability and in sentencing over a range of different circumstances where it had been criminally terminated.

Opposition

Criticism from the then Lord Chief Justice Lord Woolf, amongst others in the House of Lords, accused Schedule 21 of being politically motivated.[121] In the course of Parliamentary debate some of the ministers made remarks that could be construed as disclosing a less noble motive for Schedule 21,[122] arousing the spectre that Schedule 21 was merely another misguided example of "penal populism", where 'the electoral advantage of a policy...take[s] precedence over its penal effectiveness',[123] a regrettable consequence of the democratisation of criminal justice.[124]

Could Schedule 21 constitute merely a calculated exercise to satiate "populist punitiveness" as Bottoms originally phrased it? The absence of any rigorously

[121] Second reading of the Criminal Justice Bill, HL, 16 June 2003- Background notes to speech by Lord Woolf, [58]

[122] HC Deb 20 May 2003, vol 405, cols 901-902

[123] J Roberts et al, *Penal populism and public opinion* (OUP 2003), 5

[124] D Garland, *The culture of control* (OUP 2001); (n 116)

conducted research to substantiate his assertions that there was 'public bewilderment' at murder tariffs does not help Blunkett's cause. Might we say the same of much government legislation which public opinion is prayed in aid of? Does legislation not often lead public opinion as much as public opinion leads legislation? The former, where a political movement espoused by a political party or adopted by it shapes the law and that in turns shapes public opinion, is no less legally binding once enacted. One also has to ask, if Schedule 21 was mere penal populism, why did not the government exploit other opportunities. After all, there had been hostility towards the sentencing of burglars around the same time, largely fermented by intense press scrutiny.[125] Some judges were quoted, explicitly stating that but for Lord Woolf's new guideline on burglary sentencing, a convict they were sanctioning would have been sent to jail.[126] Was the response here statutory guidelines? No. Was the response here a hastily altered set of guidelines from the Court of Appeal after executive pressure? No. Just a clarificatory email to judges. The relative action with respect to murder and inaction as regards burglary, suggests Parliament was convinced there was a justifiable public disillusionment with the former, and not with the latter. In the present context, the fact that the rise came vis-à-vis offences against the person and not property crimes, is consistent with the suggestion that offences against the person were under-sentenced compared to property crimes.

It is worth noting that the burglary guidelines were revised in 2009 of the new Lord Chief Justice's own volition. The new guidelines handed down by Lord Judge CJ

[125] C Baker, 'Press ganged' *Law Gazette* (13 February 2003) <http://www.lawgazette.co.uk/news/press-ganged> accessed 7 October 2011

[126] D Sapsted, 'Seven times burglar spared jail by new ruling' *The Telegraph* (4 January 2003) <http://www.telegraph.co.uk/news/uknews/1417857/Seven-times-burglar-spared-jail-by-new-ruling.html> accessed 7 October 2011

centred upon 'the principle which must be grasped…that when we speak of dwelling house burglary, we are considering not only an offence against property, which it is, but also, and *often more alarmingly and distressingly*, **an offence against the person**.'[127] 'The importance of viewing burglary as an invasion of the privacy and security of the home'[128] is an innately physical notion. It is this emphasis that prompts the revised approach in *Saw*, not any suggestion that protection of property is under-valued. Intriguingly, in the very context of burglary, *Saw* consolidates the contention of this thesis that changes to the recognition of physical safety were a key characteristic of sentencing reform in the 2000s.

Whilst it can be pointed out that via ordinal proportionality these rises in murder sentences should lead to rises elsewhere in the same harm genus according to the Parliamentary intention distilled in this chapter, it is unlikely a reactive government looking for short-term popularity boosts from penal populism would adopt such a policy. It is indirect, nuanced, implicit and performed by the courts without the fanfare of political "initiatives" where the government can attempt to glean maximum credit. Indeed, it is precisely because of this much time and space is devoted to a painstaking exploration in subsequent chapters to ascertain whether any consequent increases in other homicide sentences have actually been implemented by the Court of Appeal.

The government was also accused of penal populism in respect of increasing the statutory maximum for CDDD and the new RSA06 offences already described.[129] Yet

[127] *Saw* [2009] 2 Cr App R (S) 54, [6] bold added

[128] A Ashworth, *Sentencing and criminal justice* (5th edn, CUP 2010) 139

[129] Cunningham (n 115) 297, 301-302; (n 128) 127

the latter were not part of the CJA03, and has already been seen from my Hansard analysis, were actually a backbench crusade, rather than a cabinet ploy to exploit popular punitiveness. The government, having prevaricated and postponed as much as possible, only capitulated after their general election victory made further delay futile. Hence Cunningham is mistaken to cite this field as one where Ashworth's conclusion that '[v]ote winning and populism appear to hold greater sway with the government than respect for rights'[130] applies.[131] One may not doubt this judgment on a raft of other policies from New Labour, but on close scrutiny it doesn't bear up here.

Do the greater tariff increases for the categories in para.4 and 5 betray an agenda rooted in something other than the seriousness of killing? If there is an increased valuation on death, then does this not also impinge on the moral reprehensibility of intending to kill, intending to violate egregiously bodily integrity in other aggravating respects, whether it be sadistically or sexually? The gravity of the higher culpability for 'particularly' and 'exceptionally' high seriousness murders would be increased more than the basic uplift applied for the harm of death exhibited with unaggravated murders. Whether this can be said for all the features listed as indicative of one of the higher starting points is disputable, but it can for most.

If this leaves us with the possibility that some of the tariff increase is not compatible with factors determining the gravity of an offence under desert theory, it does not undermine the aspects that are. The former would be in addition to an increased valuation upon the harm of death. The key lies in the rise of the normal starting point to 15 years for unaggravated murders. These are not the high profile murders arousing

[130] A Ashworth, 'Criminal Justice Reform' [2004] Crim LR 516, 517

[131] Cunningham (n 115) 302

'public disquiet' as the Shadow Attorney-General noted. Hence, no reason exists to increase the sentences for them on account of penal populism. These are the murders for which, from 1998, the *judicial* recommendation had been increased to 14 years to better reflect the seriousness of the crime.[132] The rise in sentencing level for unaggravated murders demonstrates an enhanced importance pertains to something elemental about the offence of murder. Similarly, that it is something elemental to the offence of murder is reflected in the fact sentences for all gradations have increased. This chapter has shown that must be the harm of death. Unlike penal populism, if that has the effect of longer sentences for other homicides, it is a legitimate reason because it addresses one of the criteria for determining offence seriousness under desert theory as enacted by s.143(1) and s.153(2).

CONCLUSION ON PARLIAMENTARY INTENTION

Thus, on close analysis of Parliamentary debate explaining and discussing the reasoning behind Schedule 21 and other contemporary legislation, Parliamentary intention was to increase sentences for murder because it thought the true seriousness of the crime as sensed by society was not being recognised sufficiently. In particular, it sought to redress an under-valuation of the harm of breaches of bodily integrity, and especially in its gravest form, death. It did so most emphatically when the two were combined, as demonstrated by the whole-life starting point for sexual or sadistic

[132] *Sullivan* [2005] 1 Cr App R (S) 308, [28]

murders. In such cases the bodily injuries are inflicted not merely as part of the causing of the ultimate harm, and thus can be seen to represent extra harm beyond death.

SCHEDULE 21 AND ITS LOGICAL CONSEQUENCES

Introduction

This part analyses the Schedule itself from a theoretical perspective, teasing out its implications, and testing them against the requirements of the rationale it uses. Chapter 2 proceeds to investigate the Court of Appeal's interpretation and application of Schedule 21, bearing in mind the principles distilled from the conceptual exploration, and Parliament's intentions from Chapter 1. In so doing it seeks to highlight inconsistencies, problems, and other issues arising from the Schedule's operation. This provides plenty of scope for development of Schedule 21, and equally judges' practices in relation to it. The importance of the Schedule as guidelines for fixing the sentences for the most high profile and grave crime in existence cannot be underestimated as regular controversy, be it domestic[133] or international,[134] highlights.

[133] J Bingham, 'Ben Kinsella's family attack 'complacent' knife crime sentencing rules' Telegraph London 16/6/09 <http://www.telegraph.co.uk/news/newstopics/politics/lawandorder/5541984/Ben-Kinsellas-family-attack-complacent-knife-crime-sentencing-rules.html> accessed 26/6/09, and in the wake of para.5A, L Dearden, 'Ann Maguire murder: Boy, 16, sentenced to minimum 20 years in prison for stabbing' Independent, London, 3rd November 2014 <www.independent.co.uk/news/uk/crime/ann-maguire-murder-boy-16-sentenced-to-20-years-in-prison-for-stabbing-9835782.html> accessed 7/3/16

[134] *Vinter v UK* [2013] ECHR 345

This makes my research all the more valuable in contributing to a debate that has hitherto been largely neglected by scholars, and saturated by popular rhetoric.

Theoretical analysis

As detailed earlier, Schedule 21 was introduced to replace the existing guidelines used by the judiciary, evidencing a strong dissatisfaction with them. The year previous, the Sentencing Advisory Panel(SAP) had laid down a detailed, 'desert-based approach'[135] which remedied the 'somewhat idiosyncratic'[136] rationale for judges recommending minimum terms previously. What the fruits of Schedule 21 have been in practice shall be explored in Chapter 2. But what does this supposed hastily assembled instrument say and mean in the first place?

What is immediately obvious is that Schedule 21 almost doubles the starting points for some gradations of murder. The narrative guidelines broke murder down into originally three levels of seriousness, and stipulate a starting point in years for each. Those of 'exceptionally high' seriousness have a starting point of a whole life order; those of 'particularly high' seriousness a 30 year minimum term, and all other murders work from a 15 year minimum term. A fourth, a 25 year starting point for murders committed with a weapon taken to the scene, was added in 2010. To assist in the evaluation of where a specific murder lies on this scale, examples are provided of the types of case which would usually fall under each. Many of the scenarios listed as

[135] C Valier, 'Minimum terms of imprisonment in murder, just deserts and the sentencing guidelines' [2003] Crim LR 326, 327

[136] (n 135) 327

indicative of a 30 year or whole life tariff used a 15-16 year starting point under the former guidelines. A list of aggravating and mitigating factors is also provided through which the precise seriousness of the murder can be refined down, in order to reach a final minimum term from the starting point.

'For most of the twentieth century, courts in England and Wales enjoyed wide discretion when determining sentence, restricted only by broad statutory limits'.[137] Ironically, murder was an exception in two respects. Firstly, there has been a mandatory sentence for it for well over a century, and secondly, whilst there was discretion among trial judges and the Lord Chief Justice to make a recommendation to the Home Secretary as to what the tariff should be, the recommendation was just that. It carried no binding legal force. Shute asserted that the guidelines to accompany the power now falling to the bench were 'designed to place very substantial constraints on sentencing judges'[138]. Thus, rather than *enabling* the handing down of 50 year minimum terms in appropriate cases which David Blunkett embarked upon, the result would be that such sentences *must* be given. However, Shute's assessment of the Schedule's intention vis-à-vis judicial discretion is perhaps alarmist. As Thomas is at pains to point out, the 'most important paragraphs'[139] of Schedule 21 are 8 and 9 which explicitly preserve a sentencer's discretion to order 'a minimum term of any length (whatever the starting point)'[140] upon appropriate consideration of all the circumstances. Only the most incompetent legislator could have included such a clause if their intention was to limit judicial discretion so greatly as Shute claims.

[137] (n 3) 1

[138] S Shute, 'Punishing Murderers' [2004] Crim LR Supp 160, 178

[139] D Thomas, 'Sentencing Murderers' (2004) Arch News, 7, 8

[140] Schedule 21, para.9

While the purpose of the Schedule seems to be to introduce a new tariff, in a guidelines sense, it is by no means constraining in the way that many other examples of guidelines are, for instance by using grids and figures, requiring 'substantial and compelling'[141]circumstances for relatively minor[142] deviations. Ashworth points to the language of the Schedule, which utilises caveats like 'normally' when referring to examples of cases that would usually fall under one of the elevated seriousness headings as another reason why it 'is not constraining'[143] from a discretion perspective. Surmising as much, must we assume that the government failed in its objectives given he also asserts that Schedule 21 was 'hastily put together by politicians for the purpose of curtailing judicial discretion'?[144] Surely the language he flags up were terms included purposefully, as were explicit clauses such as paras 8 and 9. Thomas also notes the enabling section of the Act, s.269, uses the 'have regard to' phrase, as was used for other guidelines issued by the Sentencing Guidelines Council(SGC), in relation to 'the general principles' of Schedule 21. This, he submits, makes it 'clear' that the court need not 'slavishly follow' the Schedule, where it would be inappropriate in the interests of justice to do so.[145] He abjures Shute's conclusion by arguing 'a legitimate reading of this legislation allows substantial scope for the exercise of judicial discretion so as to arrive at a minimum term which the court "considers appropriate"'.[146] Ergo, it would appear the government did intend to

[141] eg Minnesota, A Von Hirsch, 'Structure and Rationale' in A Von Hirsch et al(eds), *The sentencing commission and its guidelines* (Northeastern University Press 1987) 106

[142] Beyond 5-8%, (n 141) 105

[143] A Ashworth, *Sentencing and Criminal Justice* (4th edn, CUP 2005) 117

[144] (n 44) 21

[145] (n 139) 8 both quotes

[146] (n 139) 9

preserve a significant degree of judicial discretion in reflecting the exact gravity of a case, and was more concerned with increasing the penalty scale as a whole, the framework within which that discretion is exercised. Judges had been operating under guidelines in various guises vis-à-vis murder since Lord Bingham CJ's letter of 1997, and by adopting starting points for murders of differing grades of seriousness is fundamentally alike rather than unlike the previous guidelines issued by Lord Woolf CJ under the aegis of the SAP. As such, this is an example of using guidelines to set sentencing policy, as Tonry suggests,[147] as opposed to codifying existing precedents. Only if sentencing discretion is meant to embrace differing opinions between judges on the seriousness of particular harms, only if different judges reaching different conclusions on the seriousness of the same crime is considered an integral and valued dimension of judicial discretion, could Schedule 21 be construed as a restriction on it. If so, it would require many of those who have championed sentencing guidelines for the consistency they facilitate, bringing courts' practice closer to the cornerstone of the common law- treating like cases alike- to now disown a set of sentencing guidelines which further those very aims.

Having addressed the increased tariff, 'the focus of concern here is on the relativities and their justifications- on ordinal rather than cardinal proportionality'[148] both within the schema, and illuminating implications for inter-offence ordinal proportionality as the upper penalty anchor.

[147] M Tonry, 'Setting sentencing policy with guidelines' in S Rex and M Tonry(eds), *Reform and Punishment* (Willan, Cullompton, 2002)- albeit via quite a difference process, somewhat crucial to his model

[148] (n 74) 116

Rationale of Schedule 21

Schedule 21 is a tool for assessing the seriousness of a murder by virtue of s.269(5) of the CJA03. Section 269(3) makes the seriousness of the offence, minus any remand credit, the two criteria to be considered by the court in determining an 'appropriate' minimum term. Schedule 21 dictates starting points for different murders based upon 'the seriousness of the offence'.[149] The use of the seriousness of the offence as the rationale for the quantum of punishment to be imposed is based on desert theory:[150]

> The primary basis for deciding quanta of punishments, under this theory, is the principle of proportionality, or 'commensurate deserts', requiring the severity of the penalty to be proportionate to the gravity of the defendant's criminal conduct.[151]

Desert theory makes a number of related demands which flow from its central premise. These requirements will be used as the yardstick to measure Schedule 21 against to see how far it conforms to a proportionality theory of sentencing.

'The gravity of a crime depends upon the degree of harmfulness of the conduct, and the extent of the actor's culpability'[152] state Von Hirsch and Ashworth, and this is

[149] Para.4(1)(a); para.5(1)(a)

[150] A Von Hirsch, 'The "Desert" model for sentencing' (2007) 74(2) Social Research 413, 415

[151] A Von Hirsch, 'Proportionate Sentences' in A Von Hirsch et al(eds), *Principled Sentencing* (3rd edn, Hart 2009) 118

[152] See also A Von Hirsch, *Censure and Sanctions* (Clarendon Press 1993) citing A Von Hirsch, *Past or future crimes* (Manchester University Press 1986) 64-5

indeed applied as the statutory test also in the CJA03.[153] Examining the given examples of some 'cases that would normally' be deemed within a certain gradation we can test whether they represent crimes of increased harm or culpability, thence justifying their higher seriousness ranking.

Paragraph 4(2)(d) provides possession of a previous conviction for murder normally renders a subsequent murder of exceptionally high seriousness, without any inquiry into the circumstances of the latter killing. It may, for example, fall into para.6 but for the previous conviction, which suggests the prior murder conviction heightens the gravity of the present case. Because this is the case 'normally' rather than always, it should still necessitate an evaluation of the seriousness of the latter murder. Considerable academic debate still rages over whether previous convictions should increase the seriousness of the contemporary offence.[154] The whole life order for murderers already convicted before of murder evokes the 3-strikes logic of long incapacitatory sentences for identified recidivists. It appears to depart from the otherwise settled position that public protection in this context is properly the responsibility of the Parole Board, post-minimum term. If it is possible that an offender who receives a 15 year minimum term be detained once that sentence has been served on the grounds they are too likely to re-offend, why is that insufficient to deal with the recidivist murderer?

[153] s.143

[154] M Bagaric, *Punishment and Sentencing* (Cavendish 2001) Ch 10; (n 74) Ch 6; cf. J Roberts, 'Revisiting the recidivist sentencing premium' in A Von Hirsch et al(eds), *Principled Sentencing* (3rd edn, Hart 2009)

Similarly it is hard to claim more harm was caused merely due to the motivation of the offender in committing an ideologically inspired murder, which is what para.4(2)(c) suggests by placing such assassinations in the uppermost gradation. Could political instability, possibly resulting in nationwide strife, following a statesman's murder be deemed increased harm? A convincing justification may be provided by remembering the only crime ever mooted to be graver than murder in modern times is treason, a crime concerning damage to national interests. Notwithstanding this, para.4(2)(c) requires merely *motivation*, not the purpose be realised. The question is asked as, although from the perspective of culpability the inherent vulnerability of such a public role is testified to by Kennedy through to Mohandas and Indira Ghandi or numerous Conservative MPs who have been the victim of IRA terrorist atrocities, some may object to the apparent higher valuation of these group's lives, than more "ordinary" people who also place themselves in danger[155] but whose murders are placed in the lower category of seriousness, 'particularly high'. This includes police(wo)men in the course of duty,[156] and conceivably witnesses as victims of murders 'intended to obstruct or interfere with the course of justice'.[157] It could however be seen as an expression of the abhorrence that one might vitiate such fundamental shared societal values in order to advance their political goals, which goes to culpability. There is widespread agreement amongst the public that similar motivations that undermine shared societal values, such as the victim being attacked for their race or religion, increases the seriousness of the

[155] (n 21) [16]

[156] para.5(2)(a)

[157] para.5(2)(d)

offence.[158] Fellow common law countries like New Zealand also enshrine such principles as equality and democracy by codifying hate crimes and terrorist acts as aggravating factors.[159] Terrorism usually involves an attempt to subvert the state, overbear the will of the established constitutional settlement. Such a theoretical basis would chime, albeit on a lower level, with the disapprobation of D's motives in murdering 'for gain' which normally renders the offence to be of 'particularly high seriousness'[160], or indeed with the compassionate treatment of those who kill in the belief that the murder was an act of mercy- which is listed as a mitigating factor in para.11.

For all other murders, 'the appropriate starting point, in determining the minimum term, is 15 years.'[161] The majority of the scenarios identified in para.4(2) and para.5(2) as signifying a higher degree of seriousness are similar to those the SAP suggested.[162] In reviewing the SAP's advice to the Court of Appeal, Valier signed off the guidelines as 'particularly embody[ing] a desert-based approach'.[163] Yet besides politically motivated murders, those where 'the victim was providing a public service'[164] were also included. It is difficult to see how the murder of a nurse or librarian can be deemed more serious than anyone else who deals with the general public on a daily basis, like a supermarket cashier. A better test would be one of

[158] J Roberts and M Hough, 'Exploring public attitudes to sentencing factors in England and Wales' in J Roberts (ed), *Mitigation and aggravation at sentencing* (CUP 2011) 174

[159] W Young and A King, 'Addressing problematic sentencing factors in the development of guidelines' in Roberts (n 158) 211

[160] para.5(2)(c)

[161] para.6

[162] (n 21)

[163] (n 135) 327

[164] (n 21) 6

vulnerability where a sensible distinction can be drawn between teachers and say probation workers, who like police officers or prison officers are required to deal with potentially dangerous criminals on a daily basis. The status of this now as an aggravating factor[165] under Schedule 21 provides the greater degree of flexibility in application that this group needs.

Aggravating and mitigating factors

Schedule 21 lists 'aggravating factors that may be relevant to the offence of murder' in para.10, and respective mitigating factors in para.11. 'Making aggravation/mitigation explicit and examining their rationale can have a...function: helping to decide whether a given factor is worth introducing or retaining at all'[166] von Hirsch points out.

According to Roberts, 'one response is to define relevance in terms of the statutory purposes of sentencing or the principal components of a proportionate sentence, namely harm and culpability. If factor X enhances culpability or signifies greater harm, then it should be considered at sentencing.'[167] That 'response' is not merely one of a range of options but the only coherent response when the sentencing guidelines in question adopt a desert rationale for determining minimum terms as already highlighted, and reinforced by s.269(3) of the same Act that Schedule 21 is party to, stating the minimum term is to be determined according to the seriousness of the

[165] para.10(f)

[166] A von Hirsch, 'Foreword' in Roberts (ed) (n 158) xv

[167] J Roberts, 'Punishing, more or less' in Roberts (ed) (n 158) 8

offence (for which Schedule 21 is to be used according to s.269(5)) minus any remand credit. This rationale regarding murder is partnered by the rationale for any custodial sentence for any other offence besides murder. Section s.153(2) specifies that to be determined as the shortest term commensurate with the seriousness of the offence; desert theory again. Patently desert is the sole criterion for determining the length of any custodial punishment, whatever the offence. Ergo, any factors not pertaining to harm or culpability cannot affect the seriousness of the offence and ergo cannot affect the quantum of punishment. However, Roberts claims 'this approach may be too restrictive; it is easy to conceive of factors which are unrelated to harm or culpability.'[168] Indeed he is right that discounts given for a guilty plea or assistance rendered to the Crown cannot straightforwardly be related to what harm has been caused or D's culpability. Roberts summates that 'on occasion the principles of sentencing, then, give way to broader goals.[169] However, that is Parliament's prerogative, or problem, depending on how you see it. These two mitigating factors, if even correctly described as that,[170] must be taken into account because Parliament has decreed so.[171] Even if disagreed with in principle, their legal applicability cannot be doubted. This is an apposite juncture to contemplate s.142(1), which states that 5 'purposes of sentencing' must be taken into account when sentencing an offender. These include deterrence and rehabilitation, so should these rationales for punishment not also be taken account of when determining the minimum term, either directly or via aggravating and mitigating factors? In short, no. Firstly, s.142(2) excludes the

[168] ibid

[169] ibid

[170] It might be more accurate that they are openly described as discounts or some such other term of concession to the norm, rather than factors that mitigate the seriousness of the offence

[171] With regards to guilty pleas: CJA03, ss.144 and 174(2). Regarding assistance rendered to the Crown, Serious Organised Crime and Police Act 2005, s.73.

section from applying to murder because it is an offence for which the sentence is fixed by law. Even if it did not, to allow these other rationales for sentencing to influence the determination of the minimum term would clearly be incompatible with other provisions dealing with murder specifically. Underlining the veracity of this interpretation is the refinement of the menu of 5 factors down to just one for all other custodial sentences. To the extent that factors of general application to be taken into account, such as a guilty plea, are not necessarily directly relevant to the rationale of desert, we must accept that these are isolated, if express, departures from the desert rationale. They are limited exceptions to the general rationale, rather than a basis for more generally taking a range of other factors connected to other rationales for punishment into account. The combined effect of s.269(3) vis-a-vis murder, and s.153(2) for all other custodial sentences where a special sentencing regime has not been laid down by Parliament, is coherent and consistent. Subject to aggravating or mitigating factors expressly stated by Parliament to be of relevance, the sole arbiter of the length of a penal custodial term is the seriousness of the offence.

What about other factors that Parliament has *not* expressly required the courts to take into consideration, and which are immaterial to the criteria Parliament *has* stated as the rationale for fixing minimum terms?

It is, for example, questionable why an offence is mitigated merely by virtue of D's age.[172] While juveniles are accepted as being less culpable (and indeed Schedule 21 sets a lower starting point for minors[173]), why old age might mitigate is unclear.[174]

[172] para.11(g)

[173] para.7

Substituting the term 'age' for 'youth' would solve this. More likely, it is a shorthand means of accounting for the greater penal bite incarceration is likely to have on elderly prisoners,[175] thus meaning they will have endured the same quantum of punishment in quicker time than younger inmates. Nonetheless, it doesn't affect the seriousness of the offence, it affects the severity of the sentence, and would be better approached on that basis firstly for conceptual clarity, and secondly, as a consequence of that, preclude the risk of double counting that might occur if a sentencer first mitigated the seriousness of the offence because of D's old age, then shortened the sentence length on the grounds an elderly D would suffer the pains of imprisonment more than the average adult.[176]

Arguably there is another anomaly too. Paragraph 11(f) which provides for 'a belief by the offender that the murder was an act of mercy' to constitute mitigation manifests no connection to reduced harm or culpability. Normally, if D happens to be misguided in their motivations- for example they believe that killing V will avenge some wrong, or bring about a more enlightened way of life, that is no mitigation at all. Indeed, in certain circumstances it may elevate the gravity of the crime immensely, as with para.4(2)(c) and para.5(2)(g).

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[174] A Ashworth and A von Hirsch, *Proportionate Sentencing* (OUP 2005) 165. Intuition alone, isn't satisfactory.

[175] Ibid 172-3

[176] (n 174) 176

ORDINAL PROPORTIONALITY

Within murder: different gradations

Having scrutinized the gradations of seriousness Schedule 21 uses, we must now consider how the starting points conform to other requirements of proportionality. Ordinal proportionality requires, inter alia, that the difference in gravity of criminal offences is reflected in the differences in the sentences.[177] That is, 'persons convicted of crimes of differing gravity should receive punishments correspondingly graded in their degree of severity.'[178] This includes the sub-principle that more serious offences' punishments are spaced proportionate by how much more serious they are.[179] Whether Schedule 21 conforms to this obligation will be the focus of the next section. Ashworth surmises it may be difficult to translate the theory into practice as

> the criteria for gauging seriousness…should be able to suggest approximate differences in the reprehensibleness of various crimes involved. However, these criteria are unlikely to be sufficiently precise to provide exact estimates of the degree of difference in seriousness- which is why there might be a variety of possible spacing conventions.[180]

Yet there is no point to the theory if it *can't* be. The criminal law in particular, does not exist to provide interesting debates, but to dispense justice when ordinary subjects

[177] (n 174) 140

[178] (n 152) 18

[179] ibid 18

[180] (n 174) 140 in footnote

are wronged. Ultimately, a determination must be made as to what length of minimum term is proportionate to the seriousness of the offence in order to hand down a sentence, and those determinations must be consistent in order to treat like cases alike.

Schedule 21 lays down starting points ranging from 15years for commonplace murders, through 30 years for particularly serious murders, to whole life terms (potentially 60 years or so) for murders of exceptional gravity. Gaps between murder sentences could thus be in the region of 45 years in extraordinary cases, and will commonly be of 15 years- despite no second murder (ie the equivalent of two consecutive sentences). It must be asked then whether the starting points provided by Schedule 21 maintain ordinal proportionality between different gradations of murder with such large differences.

Writing before the radical overhaul of the murder tariff-fixing system, Ashworth identified an 'internal logic' between the 10-12 year determinate sentences for attempted murder, and similar length murder minimum terms, though stops short of offering any endorsement to this proportionate relationship.[181] However, taking into account the 3 rough bands of seriousness emerging from the case law at that point (which significantly replicate those of Schedule 21), he notes 'it can be argued that the differentials between the three groups are too large, if it be true that (crudely put) the periods of detention are around 30, 20 and 10 years'.[182] Given the new starting points are whole life, 30, and 15, a relationship between the figures appears to have been maintained, though at an increased rate, which would render these

[181] (n 71) 105. Indeed, M Wasik, 'Sentencing guidelines in England and Wales- state of the art?' [2008] Crim LR 253 mocks US sentencing grids for simply halving sentences for the inchoate offence.

[182] (n 37) 105

differentiations too large further, if his conclusion as to the previous structure was justified. Ashworth gives tacit support to the length of the terrorist and assassination cases noting that death was only narrowly averted in both attempted murder cases and 'in principle…right'[183] to give little credit for the actual lack of killing, while querying whether the gap thus created with domestic instances 'should be so great'.[184] If so, translating this ratio to murder, the appropriate way to reduce that disparity would be to increase the lower starting points which are commonly used for domestic murder sentences from 15 years so they are not so undervalued when compared to the most serious murders.

The gaps are certainly of a much greater magnitude than those recommended by the SAP for the upper seriousness band. Is the 15 or so extra years which Schedule 21 presumes for this upper group so great as to convey more censure than the conduct deserves, and thus departs from ordinal proportionality? Mitchell has expressed concern that 'this leads to unwarranted differences in minimum terms unless judges try to bridge the gap'.[185] It should be stressed that the conduct falling within the 'particularly high' category will encompass the most disturbing and atrocious behaviour, where, in the case of sadistic conduct[186], extreme brutality may have been engaged in, causing unthinkable pain and suffering to the victim, and representing a level of evil intent which obliterates treasured societal values- the sanctity of life, bodily integrity, freedom from pain and suffering, coupled with unmitigated callousness, displaying sustained wickedness of mind. When contrasted to murders

[183] (n 74) 119

[184] ibid

[185] Mitchell (n 2) 58

[186] para.5(2)(e)

that are envisaged as falling under the 15 year group, the harm and culpability levels are likely to be significantly higher. Thus, substantial variation in seriousness is likely between cases 'normally' falling within the two categories, which will require a large difference in sentence. There is a risk that a mere four years or so may communicate that this was just an aggravated example of the 15 year category, described by the SAP as often losses of temper between acquaintances, rather than reflecting calculated inhumanity which annihilates many of the most sacred of society's shared values.

As Schedule 21 also provides for whole life terms- which in practice could translate into minimum terms of c.60 years- where numerous instances of the above mentioned savagery is evidenced, this effectively anchors the scale. If disparity could be established, a strong argument could be made that ordinal proportionality would require the sentences at the lower ends of the seriousness scale to increase, in order to relate appropriately to the anchoring point,[187] which is potentially incarceration for over half a century, and the increased tariff for 'particularly high' seriousness murders. This may lead to minimum terms for ordinary murders starting around the 20 year mark, 32 for particularly high seriousness murders, with the whole life term remaining for multiple occurrences of the particularly high category. If the anchor was lower, the reverse would apply.

Either way, it seems hard to maintain ordinal proportionality where whole life minimum terms can be justified for the sheer monstrosity of the crime,[188] yet others convicted in less serious circumstances of the same offence spend merely 12 years in

[187] (n 152) 19

[188] *Hindley* [2001] 1 AC 410

jail, and those guilty of barbaric murders start from 15-16. In this respect, Schedule 21 reflects better the differences in seriousness that the SAP acknowledge,[189] but blur recognition of with only mildly extended minimum terms for cases of 'sadism, gratuitous violence' or 'extensive and/or multiple injuries'.[190]

For the sentencing of other offences

Most salient is perhaps the fact that Baroness Scotland like the Home Secretary referred to an overhaul in sentencing policy, proclaiming the CJA03 an effort 'to bring together a holistic response to sentencing'.[191] The fact that changes to murder, CDDD and firearms sentencing 'should be seen in the light of the overall changes that we are making to provide a sensible framework'[192] does provide us with a distinct agenda. The emerging theme is the importance of the harm of death. That is reinforced by the mandatory 5 year minimum for possession of a firearm. Undeniably it smacks of a deterrent measure but is motivated by a more principled concern for life. Firearms, when used criminally, often result in death; their availability in many scenarios dramatically increases the chance of their use and their bloody consequences. One only needs to glance at the American experience to see how concern for the loss of life arises from 'the right to bear arms'. Indeed, Schedule 21 and its related provisions, the clauses increasing the maximum sentence for CDDD, and the mandatory minimum sentence proposed for possession of a firearm were all

[189] (n 21) 4

[190] (n 21) 6

[191] HL Deb 11 November 2003, vol 654, col 1263

[192] HC Deb 20 May 2003, vol 405, col 866

introduced on the same day and debated together.[193] The Home Secretary talks of murder and violence in the same breath, underscored by an emphasis on 'consequences', in other words harm.[194] The RSA06 offences corroborate the analysis that crimes causing death are more serious and therefore deserving of (greater) sanction than hitherto. To read this congruous with the future Attorney General's other statement that Schedule 21 does not necessitate a ratcheting up of sentencing for *all* offences, and indeed the expectation was rejected,[195] we must assume it was meant other offences outside the agenda. So, for example, theft, or drug possession. Thus, it seems unlikely mere punitiveness is the motivation behind the identified rises in starting points. The broader Parliamentary intention was focused on ensuring sentences for offences resulting in death were actually commensurate with the gravity of that harm. This was all going on alongside attempts to reduce the number of deaths from domestic violence,[196] and the contemporary introduction of corporate manslaughter.[197]

The government's intention in this respect should not be ignored, not least in the context of this thesis. Time and again, ministers asserted the primacy of Parliament to set sentencing policy for the gravest crime, and their impetus behind setting the new tariff is fundamental to the holistic effects of Schedule 21. With sentencing guidelines for other crimes henceforth to be formulated by the SAP/SGC, this is the one starting

[193] HC Deb 20 May 2003, vol 405, col 865-866

[194] HC Deb 20 May 2003, vol 405, col 874

[195] HL Deb 15 October 2003, vol 653, col 1047

[196] The number of deaths from domestic violence fell from 49 to 5 in London between 2003 and 2010: Baroness Scotland, 'Faith as an arbiter of peace' (Ebor Lecture, York St John University, 21 November 2012)

[197] Corporate Manslaughter and Corporate Homicide Act 2007

point they have to gauge where brackets fall on the scale for crimes between an unconditional discharge and the statutory maximum.[198]

Having explored 'the comparative seriousness of crimes, the system of penalties as a whole still needs to be anchored.'[199] The House of Lords decision in *Hindley*[200] effectively anchored the penalty scale by permitting in appropriate cases, whole life minimum terms (ie desert-justified). Since then, through Schedule 21 Parliament has put the whole life order on a statutory footing.[201]

As Von Hirsch decrees, 'once the anchoring points and [thus] magnitude of the penalty scale have been fixed, ordinal proportionality will require penalties to be graded and spaced according to their relative seriousness'.[202] 'Then the penalty can be fixed for (say) a robbery by comparing its seriousness with those other crimes.'[203] Ergo, an increase in the upper anchor will lead to a proportionate increase in the punishment levels for all offences, in order to uphold ordinal proportionality.[204] This logic automatically places the punishment for murder as the 'solar core'[205] of the criminal justice system, and dictates ordinal proportionality for the whole offence

[198] (n 152) 18-19

[199] (n 174) 141

[200] [2001] 1 AC 410

[201] Many may see this as a perfect example of how '"what is 'deserved' rises with the tide of public resentment and anxiety"': A Ristroph, 'Desert, democracy, and sentencing reform' (2006) 96(4) J of Crim L and Criminol 1293, 1309, and citation within

[202] (n 152) 19

[203] A Von Hirsch, 'Proportionality in the Philosophy of Punishment' in M Tonry(ed), *Crime and Justice*, Vol 16 (University of Chicago Press 1992) 77

[204] P Robinson, 'Competing conceptions of modern desert' (2008) 67(1) CLJ 145, 151; (n 152) 19

[205] J Simon, 'No rationale for the law of homicide' (Roger Hood Lecture 21/5/09, Oxford University)

scale, as Lawton LJ envisaged in *Turner*.[206] This pivotal role for the punishment for murder in calculating the overall sentencing tariff is 'undoubtedly right',[207] Ashworth affirms. This is the reverse of the principal technique used by the SAP to draw up their 2002 guidelines.

Furthermore, given the nature of murder as the gravest offence against the person and the increased starting point of the "ordinary" murder, not to mention the more serious murders, it would be reasonable to infer an increased valuation upon the sanctity of life has been adopted. This includes a wider range of cases now considered serious enough to merit a whole life minimum term than before Schedule 21's advent. All these movements provide evidence of a re-weighting of offence seriousness beyond the anchor, which has not changed. They symbolise an increased valuation upon the values infringed by murder specifically, at the least. This should be warmly welcomed by those who feel previous penalty scales have not reflected physical integrity breaches fully, especially when compared with sentences for serious non-physical crimes.[208] On this analysis, 'if the tariff were to reflect commensurability alone, either attempted murder and rape would have to rise in the ranking, or drug smuggling and robbery would have to decline.'[209] Since the starting points for different gradations of murder have increased under Schedule 21, representing an increase in the weight of the values infringed by the offence, so too must the same for other offences where death is caused or intended, hence manslaughter and attempted murder. If this is not done, then the 'enormous gap between murder and attempted murder, particularly in

[206] (1975) 61 Cr App R 67

[207] (n 74) 116

[208] (n 71) 130-1

[209] ibid 131

the so-called domestic cases'[210] that exists as a result of Schedule 21 in Ashworth's estimation will remain as will the 'deep problem of principle'.[211] In subsequent chapters the thesis will explore whether repercussions of Schedule 21's increased tariff have been felt for the other main homicide offence, manslaughter.

Even if doubt lingers from contemporaneous statements, remarks made later seem to wash away any ambiguity. In 2009 speaking of increasing sentences for manslaughter Baroness Scotland, by then Attorney-General, said 'changes in the law...mean that crimes which result in death are now dealt with more seriously before.'[212] This implies it was Parliament's, broad, holistic, general policy when it enacted Schedule 21, increased the CDDD maximum, introduced new offences for death caused by driving, and so on, and that manslaughter was not excluded from this, even though no specific statutory action was taken in relation to it. One might question this account on the basis that Parliament was capable of taking remedial action for a raft of other crimes, so why not manslaughter? The answer could be that the legislation introduced created new crimes, or increased statutory maxima, but otherwise left the courts to handle the implementation of the policy. With manslaughter however, the policy would have probably required statutory guidelines like Schedule 21, and there was neither the catalyst for this as there was for murder owing to *Anderson*, nor pre-existing guidelines that could be easily reshaped. It may well have been decided that the Courts would recognise the general policy adopted by Parliament of the time, and implement it themselves wherever Parliament had not changed the statutory

[210] (n 74) 119

[211] (n 74) 121

[212] Baroness Scotland, Interview with BBC < http://news.bbc.co.uk/1/hi/wales/8421526.stm>

framework. The option of increasing the statutory maximum of manslaughter was not open, as with CDDD, because it was already life imprisonment.

Parliament's policy in Schedule 21 had the effect of opening up 'a disproportionate disparity between the sentencing ranges for murder and single punch manslaughter'[213] Lady Scotland argued. This demands remedial adjustments in sentencing levels for manslaughter, because ordinal proportionality hinges on the seriousness of the offence, which is the sole criteria for determining all custodial sentences save those determined by Schedule 21, under the oft-forgotten s.153(2). Ergo, even if Parliament didn't conceive at the time of its sentencing increases for murder being directly pertinent to the sentencing of other homicide offences, then provisions they did pass in the CJA03 make them. In other words, the new regime they implemented would have logical, necessary consequences, which mean Parliament needn't spell out in great detail each specific ramification, because application of the general framework will naturally deliver those changes. By way of analogy, if Parliament changed the rate at which tax was charged in one band (Y) from X to X+10, and the tax in another band (Z) was always charged at Y-30, then the changes to band Z do not need their own legislation; they follow from the rules laid down. The same principle applies when the seriousness of a certain element of an offence is changed, and that element appears in other offences too, because of the proportionality model enshrined in s.143(1) and s.153(2). The offence this thesis shall consider is manslaughter, in all its guises, as the next most serious homicide offence after murder. Investigations as to other offences involving death is desirable, but sadly beyond the ambit of this project, for practical reasons as much as anything.

[213] Interview with BBC < http://news.bbc.co.uk/1/hi/wales/8421526.stm>

Thus, we now turn to examine firstly Schedule 21's impact on murder sentencing, and in subsequent chapters to its impact on sentencing of manslaughter which did not receive specific Parliamentary intention.

CHAPTER 2

The Court of Appeal (Criminal Division)'s interpretation and application of Schedule 21

The theoretical analysis of Schedule 21 enables a more fulsome and thoughtful scrutiny of how far Schedule 21 has been followed in its spirit and intention, while also performing a more conventional exploration of the decisions purporting to be taken within Schedule 21, and their relative consistency. How the case law deals with each of the main elements will be taken and studied in turn. This exercise has, to the best of my knowledge never been performed before in relation to Schedule 21, and is rarely engaged in more generally. Indeed, Padfield has said of empirical evidence of sentencing practice that 'the starting point...is the absence of analysis. There is very little empirical research into the reality of sentence decision-making',[214] she laments. This thesis therefore, within its own limits, seeks to redress that dearth, accepting the challenge she poses, imploring 'we need a lot more empirical research into the realities of sentencing.'[215] Recognising '[t]here are of course a number of academics who analyse and comment on individual appellate decisions,...this is rarely done systematically.'[216] By systematically scrutinising many of these such cases that happen to deal with murder, we will be in a position to observe trends, settled interpretations, and indeed inconsistencies and disparity between different cases. Since this is rarely done, and has not comprehensively been done in relation to murder since 2003 at least, the project shall make an original and significant contribution to

[214] N Padfield, 'Intoxication as a sentencing factor' in Roberts (n 158) 91

[215] ibid 93

[216] N Padfield, 'Exploring the success of sentencing guidelines' in Ashworth and Roberts (n 3) 41

the literature that exists. The scrutiny of the operation and application of Schedule 21 itself in this chapter, as well as its impact on the sentencing for other serious offences against the person in subsequent chapters, is replete with reference to decided cases and the judgments therein.

In her article 'Exploring the success of sentencing guidelines', Padfield discusses 'what we may want guidelines to achieve, the goals of guidelines, before exploring ways in which we may seek to measure their success (or otherwise) in achieving these goals.'[217] She says 'we need a lot more knowledge and understanding of both the purposes of sentencing and the impact of sentencing, before we can reach any agreement on how to measure the success of any individual guideline.'[218]

Whilst Padfield couches her exploration in the terms of 'success' of sentencing guidelines, I find this term inapposite as it is not necessarily the quality of the guidelines that will result in their objects being realised. The guidelines have to be applied and operated by a different body to that which created them. Since the guidelines are relatively fresh, as is, rather uniquely, the system they are being enforced by, we need to ascertain how the guidelines are being interpreted, operated and applied in the first place. Then we can begin to evaluate whether the influence is what would be expected given the terms of the Schedule, and if not, in what ways. Nonetheless, taking into account our moderated understanding of success, Padfield is

[217] (n 216) 31

[218] ibid

surely right in 'the simple proposition that we are unlikely to be able to measure the success of guidelines without a clearer idea what they are meant to achieve.'[219]

We know from Chapter 1 that Parliament wanted to set a new sentencing policy for those convicted of murder, and expect the courts to follow it. It is predicated upon murderers getting their just deserts for the gravity of the crime they have committed. Another well known objective of any sentencing guideline is to help ensure consistency in sentencing so like cases are treated alike.

Methodology

Padfield, speaking generally, declares 'the next challenge is the extraordinary paucity of data on actual sentencing decisions in this country, which makes the assessment of the impact of guidelines hugely problematic.'[220] This is, in a nutshell, vis-a-vis Schedule 21, what this thesis aims to remedy. In so doing, it will make an original and significant contribution to our knowledge and understanding of sentencing for murder under the current regime governed by the statutory guidelines.

Gauging the influence of Schedule 21 on sentencing for murder, and indeed other serious offences against the person as subsequent chapters attempt, could be done in various ways. A statistical analysis of the lengths of murder sentences handed down in the Crown Court would provide the most complete picture from one perspective, free

[219] (n 216) 34

[220] (n 216) 39

from the drawbacks of limited samples. However, there would be pitfalls too; there is no dataset in the public domain of these figures. Even if they could be obtained, they would exclude variations made by the Court of Appeal, and therefore include ultimately false records in the data used. More available datasets, for example the time served in prison by those receiving mandatory life sentences for murder as used by Roberts and Mitchell,[221] do not enable a clean inquiry into the law because it reflects both the penal term and any time spent in jail thereafter until parole had been granted. It is thus impossible to isolate the amount of time that reflects the seriousness of the offence, the minimum term determined by the court which is the subject of this project.

Moreover, even if annual figures could be obtained specifically for all minimum terms confirmed for murder, alone the statistics would be difficult to causally link to anything specific, let alone particular provisions of Schedule 21, without looking more deeply into the facts of the particular case, and the legal reasons given for the minimum term fixed by the judge. That is essentially a legal exercise rather than a criminological one. Recourse to the judgment would be needed to know whether, in a case of murder, it was classified as a para.4, 5, 5A, 6, or 7 murder- and why. Given these categories are divided according to offence seriousness in linguistic terms (that is, particularly high seriousness, etc) or other factual descriptions, closer reading of the facts and the judgment would be necessary to understand why the court had decided each particular case fell into the different possible paragraphs. In other words, it would be difficult to make much sense of the minimum term fixed without

[221] Mitchell and Roberts (n 2) 20

understanding the legal reasons why the figure in each particular case had been arrived at by the judge. As Padfield points out,

> recording outcome alone is not very helpful: we need to know, first, the facts of individual cases, the manner in which the crime was committed, as well as the background of the offender, before useful comparisons can be made. And the factual bases for sentences are endlessly variable. Second, we need to know sentencers' reasons for their decisions.[222]

This problem would be exacerbated when it came to looking at sentencing for other serious offences against the person, as we wouldn't be able to ascertain when and how Schedule 21 was influencing sentencing levels. It would require a legal analysis of case law to ascertain if the law in relation to sentencing other serious offences against the person has changed as a result of Schedule 21- rather than something else- and if so, in what way exactly, to make any sense of the numerical trends. It is information on 'actual sentencing decisions' as Padfield stresses that we need in order to form an idea of the impact of sentencing laws or guidelines. Decisions are made within rules normally, with regard to certain factors, and a judgment ultimately reached. Hence, it is the law of sentencing for murder and other serious offences against the person, how it is approached and applied in practice by the courts, that this thesis is chiefly concerned with. We can learn more about Schedule 21's impact on the law through such a legal analysis, and the legal reasoning for the sentencing outcomes in those particular cases.

Shortcomings nonetheless accompany this line of inquiry as well, and tend to resemble the converse of the advantages to a quantitative analysis. Far from all the sentencing remarks for offenders convicted in the Crown Court are published.[223] The

[222] (n 216) 40

[223] (n 216) 40

sample size would therefore be much smaller, posing doubts over reliability. By focusing on 'the rich treasure trove of Court of Appeal judgments'[224] though, that limitation is acknowledged, but redressed by the disproportionate legal force such decisions have because England is a common law jurisdiction predicated upon the doctrine of precedent. Appellate judgments are therefore more likely to be accurate and authoritative statements of the law than those in the Crown Court anyhow.

A more qualitative criminological methodology might have entailed elite interviews with sentencing judges and perhaps counsel who make representations at the sentencing hearing following conviction. Obtaining the experiences of those who work with the guidelines first hand may shed light on the reality of sentencing with Schedule 21 that would never be revealed by the formal published judgments. Then again, it is unlikely judges would disclose anything particularly remarkable as it would be contrary to their interests. Advocates may well advocate a particular view more so, but that of course introduces the downsides of bias, prejudice, and personal or political agendas to their anecdotal contributions. Ultimately, when seeking to ascertain what the law is, recourse to primary legal sources such as statutes and cases is preferable to the limited experiences of individual sentencers and idiosyncratic, potentially opinionated accounts from lawyers and judges. If the objective of the thesis was to decide whether Schedule 21 was "user-friendly", or "liked" by legal practitioners, interviewing would have shone much better light on the research question. Ideally, two or more methodologies would be used, for example alloying a statistical analysis of minimum term lengths to the legal critique based on decided cases, providing another dataset on which to draw findings and cross-check

[224] (n 216) 41

hypotheses against. However, the project needs to remain manageable and achievable within the inherent practical limitations of a doctoral thesis, including time, length, and money.

To set out the selected methodology in further detail, every appeal against murder sentence reported in volumes of the Criminal Appeal Reports (Sentencing) from the enforcement of the CJA03 in 2003 until 2013 has been read, analysed, and contributed to the findings of this thesis. The Criminal Appeal Reports (Sentencing) has been chosen because it is the leading set of law reports devoted purely to sentencing decisions. It provides both the highest number of cases dealing with appeals against murder sentences on an annual basis, and the greatest detail by reporting the whole of the judgment (pertinent to sentencing), not merely providing a summary of the ratio as with the case reports in the Criminal Law Review.

The SAP has employed a similar technique in recent times to establish an accurate picture of sentencing law and practice.[225] The thoroughness of such a comprehensive sift over a decade of salient cases ensures a range of murders (or other respective offences) has been covered, important since it is a broad offence, and the sheer number involved provides depth which enhances the reliability of the conclusions drawn. Almost if not all issues and provisions will have cropped up in the course of that first ten years of the Schedule's use, and either a coherent response emerged, or criticism likely be merited if confusion still reigns. The approach has been repeated for appeals against the other respective offences explored in the thesis.

[225] SAP, *Manslaughter by reason of provocation* (SAP 2004), 3

By using only cases upon appeal a much better sense of policy is derived for three reasons. Firstly, the Court of Appeal 'remains the most direct channel for the views of the Lord Chief Justice and other senior Lords Justices'[226] who sit there, many of whom are members of the Sentencing Council and other similar policy-making bodies in the field of sentencing and whose views carry great weight in a common law system where the pronouncements of individual judges constitute law.

Secondly, perhaps in part because of this but above all because of the doctrine of precedent in English law, cases from the Court of Appeal are binding authorities on sentencers in lower courts. Thus, decisions of the Court of Appeal should be indicative of the policy and approach all trial/first instance courts, which hear many more cases, are likely to adopt.

Thirdly, their role supervising the application of sentencing guidelines in lower courts,[227] by way of correcting or vetting sentences, in itself applies policy. In such cases we can be more sure that the sentence decided upon is an accurate, valid representation of what the law is, avoiding potentially aberrant or idiosyncratic decisions in lower cases. Because by their very nature appellate judgments engage with the sentencing remarks of judges at first instance an idea is also gained of what is going on at “ground level”, in the Crown Courts where anyone convicted of murder will first be sentenced.

[226] (n 44) 22

[227] ibid

Both the express content of written judgments, and the end sentence will be closely examined. This is for a number of reasons. Firstly, subtle changes in offence seriousness may not necessarily be cognizant or explicitly stated, but subconsciously incorporated into determinations of the appropriate figure.

Secondly, the substance of judgments may not necessarily reflect or comport with the reasoning given in written judgments handed down. Since we are concerned with what is happening in reality and the truth behind it, the actual determination as to sentence length is equally as important as the court's judgment, if not more so.

Thirdly, criminal cases can vary significantly in their circumstances, nature and thus gravity that close attention needs to be paid to the precise details and facts of every case scrutinised. This will aid comparison between various like offences, which by definition have more controls and fewer variables, making identification of variations simpler and enhancing the validity of differences found. In a common law system predicated upon treating like cases alike, this is vitally important in evaluating whether the law has been consistently and equally applied.

Schedule 21 as guidelines

The purpose of Schedule 21 is 'to provide general guidance to the assessment of the seriousness of an offence.'[228] The majority of scholarly comment on Schedule 21

[228] *Attorney-General's Reference 12 of 2008* [2009] 1 Cr App R (S)18 [18]

concluded that the Schedule preserved great discretion for sentencers in doing this. This thesis also propounds that it has done so, while increasing the penalty scale, the two not being mutually exclusive.

Early leading decisions such as *Sullivan*[229] saw the Lord Chief Justice try to maximise the ambiguity of the 'have regard to' phrase utilised by s.269(5) which enabled Schedule 21 as the seriousness assessment instrument. This culminated in him declaring of the guidance in Schedule 21, 'as long as [the trial judge] bears them in mind he is not bound to follow them'.[230] This extremely liberal interpretation of the role Schedule 21 is meant to play has not been exploited to its furthest ends; most judges have increasingly worked within the schedule, certainly in terms of structuring their approach. 'The determination represents the end of the sentencing process which begins at the starting point'[231] and Schedule 21 has been found 'flexible'[232] in doing so.

Leading decisions have also noted the linguistic openness of Schedule 21, para.10 listing aggravating and mitigating factors for instance using the word 'include', which means the list is 'not exhaustive';[233] there may be other aggravating features'.[234]

[229] [2005] 1 Cr App R (S) 67

[230] *Sullivan* [2005] 1 Cr App R (S) 67 [12]

[231] *Attorney-General's Reference 125 and 126 of 2006* [2007] 2 Cr App R (S) 47 [33]

[232] *Randall* [2008] 1 Cr App R (S) 93 [22]

[233] *Sullivan* [2005] 1 Cr App R (S) 67[16]

[234] *Attorney-General's Reference 106 of 2004* [2005] 1 Cr App R (S) 120 [23]

This has seen the courts increasingly take their *initial* lead from the schedule, then complete the determination of the minimum term with a spirit of independence. Cases such as *Healy*[235] and *Brady and Paton*[236] evince a presumptive attitude to the schedule, adopting starting points as per para.5(2) examples being found on the instant case facts, or lack of, respectively. In the former, V was stabbed in his own home by an acquaintance, D, who duly acquired £10 from him. This was upheld as constituting a murder 'for gain' thus justifying a 30 year starting point.[237] However, in cutting the 22 year minimum term to 20 years, a tariff nearer the para.6 15 year starting point was arrived at. In the latter case, the elder D armed himself in advance with knives for a revenge mission where the targets, a married couple, were successively stabbed numerous times over, one dying. Despite possessing a previous conviction for a violent manslaughter on provocation to boot, he was found not to fall in the 'particularly high' seriousness category as none of the facts constituted an example case under para.5(2). A minimum term of 24 years prior to any guilty plea reduction was though judged as commensurate with the seriousness of the offence, a minimum term closer to the 30 year starting point than the 15 year starting point.

Contrariwise, Lord Phillips CJ's favoured approach placed the emphasis on the linguistic test, and treated the example cases as almost bothersome. His method, despite confirming the facts of the case fall within a specific case which normally would indicate that the appropriate starting point is 30 years, is to test the facts against the language, eg 'particularly high' seriousness.[238] This has become the prevailing

[235] *Healy* [2009] Crim LR 209

[236] *Brady and Paton* [2007] 1 Cr App R (S) 117 [17]

[237] para.5(2)(c)

[238] *Bouhaddaou* [2007] 2 Cr App R (S) 23 [16]

approach, favoured also by Lord Phillips's successor as Lord Chief Justice, Lord Judge.[239] The shift is highlighted by the decision of the Court of Appeal in *Khaleel*[240] where Lord Judge CJ held on facts very similar to *Brady and Paton* that a previous conviction for voluntary manslaughter could justify finding the immediate murder for sentence as one of particularly high seriousness, even though such a previous conviction was not listed in the example scenarios under para.5(2).

One could argue that this actually results in a more desert-based examination as it at all times places the gravity of the offence in question at the forefront of the task. There is a risk however that Parliamentary intention that certain cases constitute their specified levels of seriousness be overlooked with this strategy, principally if the declarations as to the kind of cases that *normally* constitute murders of the specified level of seriousness, ie paras.4(2) and 5(2) are not heeded. With some of the subparas, they have been wilfully disregarded on a frequent basis. This trend will be examined in greater detail in due course.

Increase in tariff

As submitted previously during the theoretical examination, Schedule 21 enacts a higher penalty scale for murder than before- yet early judgments were keen to deny this. Schedule 21 was not as radical as 'supposed' Lord Woolf CJ alleged because

[239] *Morley* [2010] 1 Cr App R (S) 44; *A-G's Ref 73 of 09* [2010] 2 Cr App R (S) 42; *Watt* [2012] 1 Cr App R (S) 31; *Khaleel* [2013] 1 Cr App R (S) 122

[240] [2013] 1 Cr App R (S) 122

'the difference in figures are largely explained by their different structures'[241] when compared to foregoing guidelines. Yet the kinds of cases the SAP had recommended start at 15 or 16 years were types that under Schedule 21 are deemed fit for 30, or even whole life starting points, such as racially motivated killings, or political assassinations, respectively. 15 years is however now the starting point for all adult murders that don't fall into such a seriousness bracket,[242] formerly broken down into two categories with starting points of 12 and 8 years- both lower than the new 15 year figure. Lord Woolf CJ's suggestion that the 15 year starting point equates to the structure of the SAP inspired Practice Direction guidelines he issued cannot survive close scrutiny. The SAP guidance stated 'the middle starting point would replace the single "norm" for cases with no aggravating or mitigating features. The higher and lower starting points would then be set at perhaps 3 or 4 years above and below the middle starting point.'[243] That 'norm' is referred to as the 14 year starting point adopted previously by Lord Bingham CJ.[244] It goes on, 'whichever of the three starting points is selected in a particular case, it will always be appropriate then for the trial judge to vary the starting point upwards or downwards, to take account of the presence of aggravating or mitigating factors'.[245] The latter includes an intention to cause GBH (rather than death) and lack of premeditation.[246] These would both result in deduction from a 12 year starting point therefore. Lord Woolf's argument appears to hinge on the contention that the 14 year starting point of his predecessor was

[241] *Sullivan* [35]

[242] para.6

[243] (n 21) [22]

[244] (n 21) [16]

[245] (n 21) [20]

[246] (n 21) [20]

adopted on a different factual scenario to his SAP-inspired 12 year starting point. Bingham's factual basis was one involving an intention to kill and premeditation he contends, otherwise listing a lack of either of those things would be inappropriate as mitigating factors, which Bingham does. In making this argument though he appears to overlook that both his Practice Direction incorporating the SAP's advice lists both lack of intention to kill and lack of planning or premeditation as mitigating factors too, in which case his reasoning applies equally to the factual scenario his 12 year starting point is based on. Those characteristics are also specified as mitigating features in para.11 of Schedule 21, therefore the same conclusion can be reached about the default scenario Schedule 21 is based on. In other words, they're all the same, so Schedule 21 has increased the punishment for the same scenario. Emphasising that the normal scenario the SAP's 12 year starting point was countenancing was a murder arising out of 'a quarrel or loss of temper'[247] misinterprets a description of cases that will commonly be dealt with by that starting point, besides others, as a factual basis which 12 years is essentially a finishing point for, not a starting point. Clearly, the starting point of 12 years would be reduced on account of a lack of premeditation if the killing arose out of a quarrel or loss of temper, and potentially a lack of an intention to kill too [though why he assumes this is part and parcel of a killing arising out of a loss of temper in the same way that a lack of premeditation plainly is, is not so clear]. If they commonly are dealt with by this starting point, then they will commonly also receive mitigation for whatever aspects of mitigation they commonly possess. That the default scenario for the 'standard' starting point is neutral is demonstrated by the simple affirmation that '[c]ases in this central group would, however, be characterised by

[247] *Sullivan* [31]

the lack of any of the distinctive features suggested in paragraphs 18 and 19'.[248] That is really what counts. Which kind of scenarios will more or less often fall to be dealt with under a starting point does not suddenly convert a starting point into a finishing point. Consistency is also ensured through this approach by entrenching a careful examination of each case's own facts and what aggravation and mitigation is evinced.

This is contrasted by Woolf to Bingham's and Schedule 21's higher starting points which are suggested not to entail such a scenario, which he claims already accounts for the mitigating factor of lack of planning or premeditation. The contrivance is contrary to all other facts and statements. Bingham's own 14 year 'norm' was a conscious replacement of Lane's 12.[249] Furthermore, the SAP's guidance is clearly predicated on a fresh look at what figure is appropriate for the starting point,[250] and acknowledges departure from the status quo established by Bingham.[251] If the SAP's 12 year figure equated to Bingham's 14 because of a different factual basis, then it would not redress the large gap the Panel complained had been opened up by the 14 year norm for murder and 5 years for attempted murder,[252] and which justified, in the eyes of a majority of the Panel, 'a return to 12 years.'[253] The phrase 'return' too, intimates movement, change.

[248] (n 21) [17]

[249] *Sullivan* [28]

[250] (n 21) [23]-[29]

[251] (n 21) [29]

[252] (n 21) [27]

[253] (n 21) [29]

Lastly, the Court of Appeal in *Sullivan* emphasise that the 2002 Practice Direction stated that departure from the starting point would be exceptional.[254] Examples stated were where the murder was close to the border with manslaughter, and substantially alleviated responsibility, owing potentially to psychiatric conditions and the like. Unfortunately, this represents another re-writing of history. The phrase is absent from the SAP's advice when expounding the 'lower starting point', and the sense in which it is interpreted by Lord Woolf CJ in *Sullivan* contrary to the notion of it as a starting point adopted 'before adjustment for aggravation or mitigation'[255] as the SAP put it. What Lord Woolf CJ himself in the Practice Direction was actually describing was the circumstances where an altogether different, lower starting point of c.8 years could be adopted. Reasons for stressing this would be exceptional may vary from simply the descriptive, ie the rare occurrence of such circumstances, to the more purposeful, eg trying to guard against the perception by the public that such levels of sentence would be routine. The idea of departure from 12 years being exceptional cannot be referring to movement from the starting point to reflect aggravating or mitigating factors as it would be contrary to Lord Woolf's rhetoric regarding judicial discretion being fettered by specifying the quantum of discount for such mitigating factors. They are listed for judges to apply as they see fit. Why would one specify the degree of reduction for some mitigating factors such as provocation, which can vary hugely in its degree and significance, and not others? No statement is made that some of the mitigating factors listed don't apply for the 12 year starting point. Would we be meant to assume they are eligible for consideration once again at the 8 year starting point? After all, a killing by someone who is mentally disordered could belie many or

[254] *Sullivan* [32]

[255] (n 21) [17]

none of the listed mitigating features. Ultimately, the assertion that mitigation shouldn't be applied to the 12 year starting point where the murder was one arising from a quarrel or loss of temper, and that only the listed circumstances in para.18 of the SAP's report could merit departure from 12 years requires: i) other mitigating features listed as relevant to all starting points to suddenly be irrelevant to the 'starting point' dealing with the majority of murders and ii) both 12 and 8 years to be recast as ending points rather than starting points. Neither of these comport with the plain terms of either the SAP's advice, or the Practice Direction issued by Lord Woof CJ. Consequently, the dictum holding that Schedule 21's 15 year starting point for cases not exhibiting the features that would normally place a case into a higher starting point category equates to the 12 year starting point for such cases under the SAP-inspired Practice Direction is unconvincing.

Finally, Lord Woolf CJ claimed it was ‘wrong’ to infer that it was Parliament’s intention to raise the starting point for the standard murder category in the face of the SAP’s advice.[256] This is untrue however, judging by the plain terms of the Schedule in view of the analysis above, and the express statements of the Home Secretary in the Commons abjuring the SAP/Court of Appeal guidelines of 2002.[257] The starting point of 15 years 'did not exist before' Blunkett emphasises, 'so that, *too*, sends a signal'[258] in addition to the new higher starting points of paras.4 and 5.What is more, Lord Woolf knew this already as he strenuously opposed the statutory guidelines during their passage through Parliament precisely *because*, as he complained, they increased

[256] *Sullivan* [35]

[257] See Chapter 1 coverage of Blunkett protesting he disagreed with Lord Woolf CJ's 2002 Practice Direction

[258] HC Deb 20 May 2003, vol 405, col 871 [emphasis added]

sentencing levels for murder.[259] For him and his allies to decide Schedule 21 doesn't mean what they originally implored it did, having failed to obstruct what they opposed, now they have the power to define its legal meaning, might be viewed as rather convenient.

Unsurprisingly, other learned commentators haven't been persuaded. Ashworth acknowledges 'the overall tendency of the guidelines was to raise substantially the minimum terms of *most* offenders convicted of murder,'[260] which must include the 15 year category since it encompasses 'the great majority'[261] of murders. The Lord Chief Justice's attempts here to distort the effect of Schedule 21 are reminiscent of a previous incumbent's thwarting of a sentencing reform which required a 'flagrant misreading' of 'a mere statute.'[262] However, as will be discovered, Lord Woolf CJ's interpretation has not endured unlike his predecessor Lord Taylor CJ's. Perhaps that is because such an extraordinary course of action eschewing sentencing guidelines 'based on policy disagreements'[263] has otherwise been rejected by the Court of Appeal. If that is appropriate when handling quasi-judicial guidelines from the SGC or Sentencing Council(SC), it certainly is required when confronted with an Act of Parliament.

[259] Second reading of the Criminal Justice Bill, HL, 16 June 2003- Background notes to speech by Lord Woolf, [54], [60]

[260] (n 44) 20 [emphasis added]

[261] *Sullivan* [25]

[262] (n 74) 100, criticising Lord Taylor CJ in *Cunningham* [1993] 14 Cr App R (S) 444

[263] (n 44) 23

Fortunately, even relatively contemporaneous cases recognised the increase in minimum terms that would follow from Schedule 21,[264] and the application of transitional provisions highlighted cases that were sentenced to 12 years under the old scheme, would now get 15.[265] Higher sentences have been upheld for what have been acknowledged as less serious murders than those sentenced under the old rubric,[266] showing that the courts have given effect to the increased tariff of Schedule 21 at the para.6 basic seriousness level, as well as the more palpable rises for graver cases.

Less express[267] obfuscation has taken place vis-à-vis the more obvious ratcheting up of the tariff for those instances of murder classified as being of 'particularly high' or 'exceptionally high' seriousness. As the Court of Appeal commented, 'it seems to us that draconian though the starting point of 30 years undoubtedly is, there is no mistaking Parliamentary intention in this matter. The judge had no choice but to begin with the starting point of 30 years.'[268] *Taylor*[269] rightly recognises this as increasing minimum terms for relevant offences. Maurice Kay LJ goes onto humbly comment, '[w]hatever judges may think about this restriction of their discretion, it is our duty to give effect to it'.[270] However, this confuses sentencing severity with sentencing discretion. As has been argued so far, Schedule 21 increases the penalty scale for murder, but does not restrict discretion. All Schedule 21 is requiring sentencers to do

[264] *Leigers* [2005] 2 Cr App R (S) 104 [23]

[265] *Reid* [2005] Crim LR 161, 162

[266] *Crowston* [2006] 1 Cr App R (S) 103 [21]

[267] Some areas have been undermined in a similar way, but more subtly, as will be seen in due course.

[268] *Cullen* [2007] 2 Cr App R (S) 65 [14]

[269] [2008] 1 Cr App R (S) 4

[270] *Taylor* [2008] 1 Cr App R (S) 4 [6]

is to exercise their discretion on an altered scale, between different figures. That of itself does not restrict discretion; it merely changes where it is exercised. In this specific instance, there was no compulsion to take the 30 year starting point due to the caveat that sentencers should 'normally' use it - although good reasons should surely be found to justify departure from this presumption. Besides, the ranges are now far broader than before: 15-30 years as opposed to 12-16. What Maurice Kay LJ's remark betrays is underlying judicial disagreement with that change in value weighting discussed in Chapter 1, but that is a complex socio-political judgment that lies ultimately with Parliament rather than the courts today.

Rationale

Early decisions had to reiterate that the minimum term was only concerned with seriousness and not dangerousness.[271] However, notwithstanding universal acceptance of this principle, two main challenges have emerged to the determination of the minimum term according to desert theory. The first is through the operation of aggravating and mitigating factors that have no relation to the seriousness of the offence. These will be scrutinised later in the chapter.

A worrying presence those errings may be, they are superseded by developments of an altogether more fundamental nature. They exploit the 'flagrant misreading'[272] of the CJA91 made in *Cunningham* of the definition of what it is to punish

[271] *Leigers* [2005] 2 Cr App R (S) 104 [19]

[272] (n 74) 100

commensurate with the seriousness of the offence, viz. that deterrence is an intrinsic consideration alongside the gravity of the crime. Hence, in *Duffy,*[273] the Court of Appeal recognised 'the urgent need for deterrence for the sake of the public' who were suffering from this worrying form of crime, and, moreover, that 'the judge cannot be faulted for adopting that approach.'[274] To justify this, Hughes LJ declared the aims of sentencing to be 'retribution and, particularly in this kind of case, deterrence.'[275]

The resurrection of this precedent contradicts not only Schedule 21's rationale, the enabling s.269, but also s.153(2) of the CJA03 which declared any period of imprisonment must be for the shortest term proportionate to the seriousness of the offence. It makes no allowance for sentences inflated by deterrence beyond this. The pure focus on the seriousness of the offence has had a cart and horse ridden through it. The criteria muddied by a judge's intuition as to what extra length needs to be added to a sentence to obtain the elusive effect of marginal deterrence are also complicated by the seemingly variable requirement to consider the principle. When Hughes LJ comments 'particularly in this kind of case', he makes a tacit admission that the need can be greater in some cases than others. Thus, not only shall this unquantifiable kernel of criminological fallibility now be a permitted basis for determining the minimum term, it may be "needed" in some cases and not in others, creating inconsistency and so disparity. This is borne out by *Bonellie,*[276] where the trial judge

[273] *Duffy* [2009] 1 Cr App R (S) 53

[274] *Duffy* [8]

[275] *Duffy* [13]

[276] *Bonellie* [2009] 1 Cr App R (S) 55

pondered whether ‘he should enhance the sentence to deter others’,[277] but opted not to. The Court of Appeal declined to rebuke this as an irrelevant and competing consideration. A recipe for unfairness, inconsistency and thus injustice has been created at the stroke of a wand by these cases, and an accurate interpretation of Schedule 21 must be reaffirmed without delay before judges slip back into error. Every so often a case crops up where 'it seems that it is necessary again for this Court to restate its continuing concerns about the prevalence of knife crime and of the need to pass deterrent sentences to ensure that those, and in particular youth, who're minded to use knives have second thoughts and do not do so.'[278] That court, viz. the Court of Appeal, seems slow to catch on that youths are themselves slow to catch on to the latest adjustments made by the Court to sentence lengths for such crimes. As Ashworth has neatly summated, 'it is naive to assume the kind of hydraulic relationship between court sentences and criminal behaviour that some find intuitively appealing.'[279]

SERIOUSNESS CATEGORIES AND STARTING POINTS

Perhaps the predominant feature of Schedule 21 is its format of starting points depending upon the seriousness category of the offence. Judicial interpretation of these is crucial to the first steps of implementing the schedule. Lord Phillips CJ

[277] *Bonellie* [2009] 1 Cr App R (S) 55 [11]

[278] *McLeod* [2013] 1 Cr App R (S) 78 [9]

[279] (n 128) 83-84

exclaimed 'there are huge gaps between the starting points. The difference between 15 and 30 years detention is enormous. The difference between 30years and whole life may, depending on the age of the offender, be even greater.'[280]

Has this alarm influenced judicial interpretation of the categories significantly though, in an attempt to read down or dampen the feasible disparity in some cases?

Paragraph 4- Murders of exceptionally high seriousness

Of the whole life order, Lord Phillips CJ said that cases where such a minimum term was appropriate were 'unlikely to be…borderline',[281] indeed, 'the facts of the case, considered as a whole, will leave the judge in no doubt'[282] as to its deservedness. Otherwise may suggest the offender should be sentenced otherwise. Those facts would include a guilty plea, but he also noted that since whole life cases should be fairly clear cut, it is unlikely such a factor would be decisive.

Yet in *Mullen*[283] the facts 'fell fairly and squarely within para.4(2)'[284] of Schedule 21; the case was not viewed by either the trial judge or Sir Igor Judge P as borderline- it 'plainly' wasn't. However, notwithstanding the appropriate sentence being a whole life order, the trial judge 'decided not to make such an order just because of the early

[280] *Jones* [2006] 2 Cr App R (S) 19 [7]

[281] *Jones* [15]

[282] *Jones* [10]

[283] [2008] 2 Cr App R (S) 88

[284] *Mullen* [19]

guilty plea and to allow for the relative youth of the applicant.'[285] Revealingly, Sir Igor Judge P also admitted that the guilty plea was effectively determinative, since 'the appellant's age and relative lack of maturity alone would not'[286] have resulted in the trial judge's conclusion that a whole life tariff was not the right sentence. This evaluation affords influence to a guilty plea beyond the degree envisaged by Lord Phillips' dictum in *Jones*.

In the now famous case of *Vinter*[287] the Court of Appeal upheld a whole life minimum term where D had committed a second murder having been released on life licence after serving the minimum term for his first. Para.4(2)(d) is clear, yet in finding no reason 'to depart from the normal principle'[288] that a whole life order must follow in such a case, the Court of Appeal imply it is not automatic. That is, of course, consistent with the flexibility of Schedule 21, but also betrays a tension between this particular provision in para.4(2)(d). It is conceivable that a factual matrix falling within the specified scenarios of para.4 doesn't correlate with the ultimate criteria of being a murder of exceptionally high seriousness, just as the same may also be true of para.5 with respect to 'particularly high seriousness.' The trouble is that circumstances where the case falls within para.4(2)(d) are difficult to evaluate against a threshold of seriousness because the category makes no inquiry into the seriousness of the murder committed. Rather, it is deemed to be of exceptionally high seriousness because D has committed a murder *previously*. Thus, without abrogating Parliamentary intention unambiguous from para.4(2)(d), it is hard to imagine when a Court might hold that the

[285] *Mullen* [2008] 2 Cr App R (S) 88 [20]

[286] *Mullen* [20]

[287] [2010] 1 Cr App R (S) 58

[288] *Vinter* [23]

case should not be deemed one of exceptionally high seriousness; nothing in the present offence, nor the previous murder, is required to reach this threshold, save that they both constitute murder. Perhaps it is this chink which has led to *Vinter* being the rallying cry for opponents to Schedule 21's tariff regime to try and chip away at its provisions. Logically the flexibility which operates based on a desert analysis of the murder committed has no role in determining the present murder being one of exceptionally high seriousness, thus normally meriting a whole life order according to para.4. The Court of Appeal detailed what a serious murder it was *Vinter*, but the provision itself suggests the gravity of the present murder isn't crucial. That doesn't sit easily with a schema pivoting on the seriousness of the instant offence. Arguably the recidivist premium's doctrine that renders subsequent offences more serious is a better route to justify the heightened seriousness of the present case, since before long there will be a case where the instant murder being sentenced is comparatively lower on the scale of gravity within cases of murder. Such an analysis would be consistent with that embodied by s.143(2) which is itself part of a section concerning assessment of offence gravity.

Subsequent hearings by the Court of Appeal have resolutely affirmed the provisions in para.4,[289] despite Strasbourg jurisprudence to the contrary.[290] The original Chamber of the European Court of Human Rights (ECtHR) in *Vinter*, obviously returning the wrong answer as far as the great architects of Europe-wide human rights were concerned, convened a Grand Chamber in order to get a different answer. Duly, by a majority of 16-1 it reversed the earlier decision. Punishments need to offer a hope of

[289] *Oakes* [2013] 2 Cr App R (S) 22; *Newell* [2014] 2 Cr App R (S) 40

[290] *Vinter v UK* (2013) 34 BHRC 605

release the Grand Chamber proclaimed, otherwise they amount to inhuman or degrading punishment. The whole life minimum term deprived D of such hope of release, notwithstanding the scope for compassionate release by executive order of the relevant minister,[291] and thus breached the prisoner's human rights. In an attempt to head off such a ruling, the Lord Chief Justice had organised a Full Court to hear the appeal in the case of *Oakes*.[292] In a unanimous judgment of five Court of Appeal judges, Lord Judge CJ affirmed 'whatever the judicial views about the whole life minimum term, it was incorporated in express legislative terms in the 2003 Act. This statutory provision reflects the settled will of Parliament.'[293] Such appreciation and reverence for the 'settled will of Parliament' has not been uniform across the sentencing of murder, even though Schedule 21's salience is. The application of para.5 chiefly has been uneven as will be seen below. However, threatened by another powerful court, the Court of Appeal (Criminal Division)'s leading lights evidently decided they would rather have such matters decided by them in conjunction with Parliament, rather than a foreign court with a single British representative. When the matter came before the Court of Appeal again in the case of *Newell*,[294] a change in the head of the judiciary did not produce a change in outlook. Lord Thomas of Cwmgiedd CJ, once again with the unanimous assent of a Full Court, essentially said "thanks, but no thanks", to the latest decision in *Vinter*. The Court of Appeal politely agreed to disagree with the Grand Chamber, finding the executive power of compassionate release sufficient to offer a hope of release to prisoners serving whole life minimum terms, and thus avoiding a breach of Article 3 that seems to be accepted as resulting

[291] As exercised in famous cases such as Ronnie Biggs in England or Megrahi in Scotland.

[292] [2013] 2 Cr App R (S) 22

[293] *Oakes* [12]

[294] [2014] 2 Cr App R (S) 40

from irreducibility. It is unlikely *Vinter* is the last we have heard from Strasbourg in the saga over the whole life minimum term's compatibility with the Convention. However this thesis is focused on the Court of Appeal's interpretation and application of Schedule 21. There is little dissonance from that court as to the legality of the whole life order as *Bieber*, *Oakes*, and *Newell* all exemplify, and *Newell* represents the current position of English law.

As adverted to already, the Court of Appeal's interpretation and application of Schedule 21 in other respects has not been as obviously fulsome and faithful. To exploration of those tensions, we shall now progress.

Paragraph 5- Murders of particularly high seriousness

Guidance has come in piecemeal fashion on the breadth and remit of the various example scenarios provided in para.5 as 'normally' constituting murders of 'particularly high' seriousness and thus meriting 30 years as a starting point for the minimum term. They shall be taken in turn as the approach to each has varied.

Paragraph 5(2)(a) the murder of a police/prison officer in the course of his duty

Cases of such a nature have been singular on appeal. *Ness*[295] demonstrates how the courts' old approach to guns and the murder of police officers has been endorsed by Schedule 21- though it should be emphasised that it was not actually a para.5(2)(a)

[295] [2012] 2 Cr App R (S) 39

case. D was an accomplice to the infamous crimes of Raoul Moat.[296] D was convicted following a trial of murder, attempted murder of a police officer in the course of his duty, conspiracy to murder police officers, possession of a firearm with intent to endanger life, and robbery. 40 years was upheld by the Court of Appeal, who must have been happy to treat each aggravating factor of independent and so cumulative aggravation, working upwards from the 30 year starting point merited by para.5(2)(b). There were the other heinous crimes too to take into account. Alongside *Hassan*,[297] the minimum term is not out of place, but in *Hassan* D pulled the trigger on both Vs he shot. *Ness*, on the other hand, was an accomplice to Moat; it was the latter who shot all Vs. If the tariff appears long, that is a reflection on the law of complicity rather than Schedule 21, which allows variation to take account of the relative degrees of involvement different parties had. The extent of the difference has often been more than marked where some Ds have been found to be more instrumental than others.[298] Indeed, Padfield names complicity as an area where guidelines 'highlights the need for more consistent definitions of substantive laws: logical sentencing is difficult to graft onto laws which are often illogical or antiquated.'[299]

Paragraph 5(2)(b) a murder involving the use of a firearm or explosive

In *Tucker*[300] doubt was cast on the robustness of this provision. D claimed V, who was in the bath at the time of commission, taunted him about her sexual infidelity and

[296] Who went on a homicidal spree of vengeance around Tyneside before being killing himself after a stand-off with police following a week-long manhunt.

[297] [2012] 1 Cr App R (S) 7

[298] *Nicholls* [2011] 1 Cr App R (S) 67, *Watt* [2012] 1 Cr App R (S) 31

[299] (n 216) 47

[300] [2012] 2 Cr App R (S) 30

how she would prevent him seeing their children. D's response was to fetch a shotgun and shoot V in the back of the head. She died instantly. It should be noted that the Court considered there to be significant mitigation. Sources included health problems ranging from angina to alcoholism and the provocation which was insufficient to establish the partial defence of provocation. The experienced Pill LJ also noted aspects such as D's conduct following the killing, viz. leaving the body in the bath for days, then dumping it in an industrial freezer on the premises, and liaising for sex with other women within a week. The quantum of aggravation these factors provide though must be minimal given the Court of Appeal took four years off the original 26 year minimum term imposed after trial. The reasons given for considering yet further downward movement from Parliament's starting point appear twofold. Seemingly the most significant was D's argument, in the words of Pill LJ, that the '30-year starting point contemplated mainly gangland killings where the public interest is deeply involved and where the use of a firearm may have implications for other people.'[301] On the contrary he implored, 'the Court should bear in mind when assessing the minimum length that had, for example, the appellant strangled the deceased from behind rather than shooting her the starting point would have been one of 15 years.'[302] Together with the Court's conclusion that 'breach of trust should not have been taken as an aggravating factor',[303] this boxed the elbow room for further reduction from the 30 year starting point.

[301] *Tucker* [31]

[302] *Tucker* [32]

[303] *Tucker* [37]

The first justification daubs more than a gloss on the statutory wording. There are no caveats to it. Para.5(2)(b) merely says a murder 'involving' a firearm. *Jones* was relied upon in the sense that it spoke of the dangers of 'carriage' of a firearm and the 30 year starting point.[304] Surely much more would be needed in order to take the tack that the starting point is only really intended for gangland killings where hoodlums cradle guns by default? The passage referred to from *Jones* could easily have been pointing out one of many reasons the starting point was chosen by Parliament, the one that was appropriate to the facts of that particular case. The murder in *Tucker* is plentiful evidence of the swift, sudden, and deadly potency of guns. Therein lies why their use is treated so seriously, not the fact that they are sometimes carried by gang members.

Moreover, when compared to para.5A[305] which had been in force for over a year by the time the Court of Appeal heard *Tucker*, does the precision in para.5A requiring the weapon to be taken to the scene not emphasise that if any particular kind of scenario beyond that stated by para.5(2)(b) were being conjured by Parliament, they would specify it? Further, even where the genesis of the new 25 year starting point was gangs wielding knives used to kill, the terms of the provision made no reference to gangs, but instead the legal facets of offence seriousness which render greater harm or culpability in such cases. Perhaps if *Tucker* pre-dated para.5A, it might be more understandable.

[304] *Tucker* [30]

[305] This new starting point, added in 2010, will be discussed later.

Pill LJ's approach though poses yet more quandaries. For a start, lives lost in domestic settings are cheapened compared to gang and organised crime killings. One of the foremost merits Schedule 21 can been acclaimed for is that it treats all deaths, all murders, more seriously. Given para.5(2)(b) makes no stipulation as to the starting point only applying to gangland murders with a firearm, the most logical approach would be to apply aggravating factors to the 30 year figure where the killing occurred in gang circumstances.[306] Yet the decision in *Tucker* undermines that by inventing two classes of killing with a firearm: gangland and domestic cases. Exacerbating this unfounded distinction is the second reason for lopping another four years off the starting point beyond the four already deducted by the trial judge, viz. that breach of trust should not have aggravated the seriousness of the offence. If the premise for a 30 year starting point is to be a gangland scenario then surely there is no breach of a position of trust entailed in street warfare, and so that aspect should have aggravated the seriousness of this particular offence. What was said in *Thomas*[307] about breach of trust being an integral aggravating factor of killings between people in domestic contexts, is at best overlooked. Instead this aspect, alongside D's disrespectful conduct in the wake of the murder, which the Court of Appeal note is unusual in domestic cases where the enormity of a sudden burst of temper becomes plain none too soon, was highlighted, but seemingly had little affect on the sentence length. The dictum construed this case as a domestic one, where often, but crucially *not necessarily*, the starting point is 15 years, and made some allowance for what was seen as the mere aggravating factor of executing a domestic murder with a firearm rather than another weapon.

[306] Aggravating factors in such contexts are well-rehearsed

[307] [2010] 1 Cr App R (S) 14. Further discussion can be found in the section on aggravating factors

Further problems are created by the notion of a default hypothetical scenario the starting point is envisioning, without any kind of concerted approach. What precisely is that scenario, so we know what will amount to aggravating and mitigating factors when the factual matrix of the case doesn't perfectly co-align, as it rarely will in reality? Without that, we risk double-counting/double-overlooking of certain factors between cases, posing major issues for the treat like cases alike tenet which the doctrine of precedent is founded upon.

On the other hand, the scope of the 'particularly high' seriousness starting point was widened by *Jones* where the Lord Chief Justice held 'murder as a result of using petrol to set fire to the victim's home falls within'[308] para.5(2). Fire fuelled by petrol is analogous to an explosive, the implication being. Owing most likely to the sporadic use of authorities, the Court of Appeal failed to apply the ruling in *Jones* to later cases involving the use of fire as a weapon, such as *Clarke.*[309]

Paragraph 5(2)(c) a murder done for gain (such as a murder done in the course or furtherance of robbery or burglary, done for payment or done in the expectation of gain as a result of the death)

It was clarified by *Hood*[310] that 'for gain' refers purely to gain in a financial sense, and thus couldn't encompass more vague notions of gaining happiness, relief, time,

[308] *Jones* [2006] 2 Cr App R (S) 19 [61]

[309] [2010] 2 Cr App R (S) 13

[310] [2013] 1 Cr App R (S) 49

freedom, reputation, or as potentially implied by the trial judge here, a child or indeed a lover,[311] from V's death.

Expanding the reach of the provision, but within the above bounds, *Tailor*[312] held that para.5(2)(c) includes domestic 'cases where the husband murders his wife in the knowledge, and so in the expectation, that he will thereby…make a significant financial gain',[313] whatever his other motives were. This widens the net of para.5(2)(c) considerably; any spouse with knowledge of their fellow spouse's will, or failing that, their position as next of kin should intestacy apply (which is probably most people) who murders their husband/wife will fall within para.5(2)(c) and its 30 year starting point. Para.5(2)(c)'s language '*for* gain' is evidently an inquiry into the motives of D, so Mitting J's interpretation distorts the purpose of the clause by constructing a motive out of mere awareness. It is perhaps not surprising that the authority has not been followed: in *Singh*[314] the trial judge adopted the 15 year starting point and applied the aggravating factors of planning, premeditation et al to reach a minimum term of 23 years, which the Court of Appeal upheld. Given *Tailor* was not mentioned in *Singh* begs the question whether this was a deliberate but unexplained break from precedent, or merely an inadvertent one arising out of unawareness of *Tailor*.

[311] *Hood* [18]

[312] [2008] 1 Cr App R (S) 37

[313] *Tailor* [20]

[314] [2011] 2 Cr App R (S) 19

A more ambiguous situation was presented by *Griffiths*[315] where the murder was perpetrated in order to enforce gang discipline and protect the commercial interests of their drug dealing by eliminating V, a suspected traitor in the ring. Hughes LJ concluded the seriousness of the offence 'was comparable with the examples given in para.5(2).'[316] He went on to stress:

> The incidence of potential gain, in the sense that the drugs business was no doubt very profitable, is not the determining factor. The position could easily be the same if a similar killing were carried out to enforce discipline in one's followers in a different form of criminal enterprise which was not principally acquisitive, such as gang warfare or the sexual exploitation of minors.[317]

On the one hand this undermines the statutory intention behind listing murders for gain as normally being murders of 'particularly high seriousness' by saying the financial gain motive, which para.5(2)(c) expressly refers to, was not determinative. On the other, it suggests murders done to enforce discipline amongst parties involved in organised crime are of particularly high seriousness because it entails gain for them in their eyes. Not only does that contradict *Hood*, but directly challenge the clear and express wording of para.5(2)(c) 'a murder done for gain (such as a murder done in the course or furtherance of robbery or burglary, done for payment or done in the expectation of gain as a result of the death)'. That clearly contemplates 'gain' in a purely financial or proprietary sense, as other criminal statutes such as the Fraud Act 2006[318] do.

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[315] [2013] 2 Cr App R (S) 48

[316] *Griffiths* [18]

[317] *Griffiths* [19]

[318] s.5

If this prerequisite of enforcing gang discipline was the decisive aspect[319] then it rather warps para.5(2)(c) in suggesting the aspect of enforcing gang discipline has more merit to be deemed a murder of particularly high seriousness than the aspect of doing the murder for gain, when para.5(2) only mentions the latter not the former. Certainly, the Court is right to point out as it has before that para.5(2) is not exhaustive, but it certainly *does* include a murder done for financial or proprietary gain! *Griffiths* betrays the reservations the judiciary have about para.5(2)(c) as it stands and which shall be elaborated on in due course.

The judgment further demonstrates the Court of Appeal's tendency to categorise murders' seriousness according to their own intuitions as to what is 'particularly high' gravity or not. Indeed, it represents a yet more independently minded approach to that of initially categorising according to para.4 or 5, then checking their determination as to which paragraph a case falls into against the broad, abstract description as to the level of the crime's seriousness, which was emerging beforehand.[320]

Para.5(2)(e) a murder involving sexual or sadistic conduct

The leading case interpreting the meaning of this provision is arguably *Morley,*[321] where the Court held that a murder preceded by sexual conduct was not one involving sexual conduct. It would be an essential authority therefore in any case where, for example, a rape had been followed by a murder, even though the sex here had been

[319] *Griffiths* [17]

[320] Eg. *Bouhaddaou* [2007] 2 Cr App R (S) 23 [16]; *Morley* [2010] 1 Cr App R (S) 44; *A-G's Ref 73 of 09* [2010] 2 Cr App R (S) 42; *Watt* [2012] 1 Cr App R (S) 31; *Khaleel* [2013] 1 Cr App R (S) 122 discussed previously

[321] [2010] 1 Cr App R (S) 44

consensual. The distinguishing feature would appear to be whether the sexual activity was bound up with the murder as part of, in essence, a continuing act. Even though the murder followed shortly after the sexual activity here, they did appear to be, though related, separate acts. It might mean therefore that a rape, followed by a decision to kill V to conceal the offence of rape, might fall within the principle decided in *Morley*, whereas a killing where D had always intended to murder V after raping them, may not. An even stricter approach would be to say only murders where there was a sexual aspect to the injuries inflicted in order to kill.

However, the actual facts of *Morley* were not that simple. Following the murder, D tried to cook and eat some of V's flesh. Cannibalism, the Court of Appeal said, would normally take a case into the 'particularly high' seriousness category despite there being no mention of it in the para.5(2) listed examples. We know, after all, they are not exhaustive. Emphasis was once again placed on the linguistic test of whether the murder could be accurately assessed as one of particularly high seriousness.

This approach, not unique to para.5(2)(e), prevailed again in *Watt.*[322] Ds had treated V as a slave to be brutalised, tortured, tormented and attacked at their whim. Over 10 years, V who was mentally vulnerable, was subjected to everything from beatings with a baseball bat to being pulled around by a leash attached to his scrotum. The abuse escalated, culminating in his death from injuries sustained when one D jumped on V's stomach. Although there had been no intention to kill the trial judge found, dismembering V's body and dispersing it at different locations meant all in all, minimum terms of 36 years for the lead perpetrator, and 18 and 15 years respectively

[322] [2012] 1 Cr App R (S) 31

for his accomplices who had meted out humiliating and violent treatment over the years. The latter two did not appeal their sentences. The Court of Appeal upheld the 36 year minimum term on the basis that the trial judge had sat through the trial and heard the full horrors. He was best placed to decide, and though he contemplated a whole life order, his eventual determination remained severe but not one the Court of Appeal would interfere with. In so doing, they distinguished between *Bonellie*[323] and the one instance of torture there where the 15 year minimum term was adopted, and the sustained, systematic sadism here which merited a 30 year starting point on the basis that this was a murder of particularly high seriousness. Once again, that yardstick appears to have been the foremost factor in the minds of their Lordships, as opposed to the fact that murders involving sadistic conduct 'normally' are murders of particularly high seriousness according to para.5. This suggests an overturning of the presumption in favour of treating such cases as deserving 30 year starting points, and starting from scratch to decide whether the case is one of particularly high seriousness. As with other cases identified above, such as *Griffiths*, this neglects to accord Parliamentary intention its due weight. There is a difference between saying normally such a case is of particularly high seriousness, but for x,y, and z reasons here is not, using the spirit of para.9, and saying "we think this is a case of particularly high seriousness because of a, b, and c reasons, and well, the fact Parliament says d and e are reasons it is of particularly high seriousness is by the by". It is submitted the former rationale is more faithful to the statute, as well as producing more consistent results, one of the principal reasons sentencing guidelines were championed in the first place: to help minimise idiosyncratic assessments from all the various judges,

[323] [2009] 1 Cr App R (S) 55

instead grounding the exercise in a common approach based on common rules and principles- much like the essence of the common law itself.

Para.5(2)(f) the murder of two or more persons

In *Donnison*[324] Lord Judge CJ gave the impression of re-affirming the importance of the example scenarios in para.5(2). Referring to D's murder of her two children and the 32 year minimum term imposed by the trial judge, the then Lord Chief Justice pronounced that it would be 'unreal' to expect any major reduction 'given the terms of the Schedule.'[325] This sounds like an important reminder to those elements of the Court of Appeal inclined to arrive at a length of minimum term based on their own intuitions and judgments that ultimately Schedule 21 is the rubric to be used. 32 years was upheld as being 'within the appropriate range',[326] presumably indicated by Schedule 21 given what Lord Judge CJ said about the terms of the Schedule. Why this isn't ubiquitously the approach when it comes to para.5(2)(c) only the Court of Appeal can explain.

But on closer examination of Schedule 21, para.4(2)(a) also refers to the murder of two or more victims, and the starting point for a para.4 murder is the whole life order. Perhaps the real reason it would be 'unreal' to expect any reduction in the minimum term of 32 years 'given the terms of the Schedule' is that, since the killings entailed preparation, D was really quite fortunate not to have found herself being dealt with on

[324] [2013] 1 Cr App R (S) 39

[325] *Donnison* [38]

[326] *Donnison* [39]

the basis of para.4(2)(a)(i) and thus facing a minimum term that makes 32 years look forgiving.

Mitchell has more generally 'argued that Schedule 21 does not adequately address the related issue of the murder of multiple victims',[327] pointing to a whole life order for the planned murder of two victims, with the 30 year starting point for the spontaneous killings of, say, 10 people on the basis of para.5(2)(f). He acknowledges this critique is based 'on a strict interpretation'[328] of the guidelines. In so far as sentencing laws struggle with multiple instances of the same offence through the ambiguous 'totality principle', Mitchell has a point- but it is certainly one that applies equally to D convicted of 10 thefts rather than one, 10 burglaries rather than one, and so forth.
It seems these (thankfully) rare occurrences of ten murders are of the ilk that crop up with any set of sentencing guidelines; you can't specify an outcome for each eventuality. Guidelines for those much more frequently committed crimes such as theft or burglary as mentioned above leave much more to judicial discretion in respect of multiple offences. Criticisms of Schedule 21 on this basis then, as with criticism for its handling of secondary parties, is somewhat unfair. Schedule 21 replicates the broader problems of the general part of criminal liability, but would we expect it to do otherwise? So long as the law on these points remains the same, it would be rather odd to be reforming the general part of the law through sentencing guidelines for a special part.

[327] Mitchell (n 2) 69

[328] Mitchell (n 2) 70

Most sentencers would probably place the murder of ten people into para.4 through an orthodox analysis of seriousness, concluding such offending rendered the murders of 'exceptionally high seriousness'. Schedule 21 perhaps intimates more though. It could be argued that by treating two or more murders as meriting double the starting point for a solitary killing, a multiplier logic emerges. If so, why should the approach cease at two murders? Would three murders not also merit the same cumulative approach of another 15 years, and by the time one has reached four, a minimum term of 60 years or above could be assumed as a whole life order?

Para.5(2)(g) a murder that is racially or religiously aggravated or aggravated by sexual orientation, disability or transgender identity

The apogee of this subparagraph was probably reached in *Herbert.*[329] Though Ds were under 18 at the time of the attack and thus subject to a 12 year starting point under para.7, the trial judge evaluated the murder as being one of 'particularly high' seriousness. This was because Ds had attacked two "goths" on the basis of them being different, killing one, V. The judge at first instance likened this to a murder aggravated on the grounds stipulated in para.5(2)(g), hence treated it as one of particularly high seriousness, albeit working from a 12 year rather than 30 starting point. The Court of Appeal did nothing to dissent from this analysis, and indeed upheld the significant minimum terms. It seems likely henceforth that killing someone because of their 'lifestyle choice' could result in the 30 year starting point being adopted. The difficulty with this broadening out from the stated grounds of para.5(2)(g) are not hard to imagine. Is being a "punk" a lifestyle choice like a "goth"? What about a "Hooray Henry"? What prevents an ardent supporter of Manchester

[329] [2009] 2 Cr App R (S) 9

United falling within the category now if he is attacked by a Manchester City fan because the former is draped in United colours and merchandise? Is not part of the reason for treating people who are targeted because of their skin colour or sexual orientation as particularly despicable people to victimise the fact that they didn't choose that feature? The inclusion of religion may suggest not, as might the omission of gender. Murdering someone because of a 'lifestyle choice' might well commend itself as an aggravating factor,[330] but is it sufficiently analogous to the facets specified in para.5(2)(g) as to render the murder one of particularly high seriousness in the way that other aggravating factors in para.10 do not?

Contrariwise, are the courts failing to implement the provision for those who are expressly caught by it? In both *Morley*[331] and *Khaleel*[332] V's homosexuality did not result in para.5(2)(g) applying. The Court of Appeal held the trial judge in *Morley* had erred by treating the case as one aggravated by sexual orientation.[333] The decision is surprising. Para.5(2)(g) doesn't even require that it is *V*'s sexual orientation that aggravates the offence, but even if it did, that would seem to have been the case on the facts. D had difficulty in accepting his own homosexuality, and was essentially jealous of V's harmony with his homosexuality. That difficulty was the chief reason for the murder, in which case both D and V's sexual orientation aggravated the offence. It was perhaps not the classic case of an individual harbouring hatred for gay

[330] One could cast it as concomitant with the judgments made on Ds motives for murdering others, eg to impose their views on political or ideological matters (para.4(2)(d)), which arguably para.5(2)(g) is a diluted incarnation of. Someone who murders another *because* they are black, or white, straight, or gay, is inherently expressing condemnation of that demographic feature.

[331] [2010] 1 Cr App R (S) 44

[332] [2013] 1 Cr App R (S) 122

[333] *Morley* [21]-[22]

people and heading out to kill them, but it is difficult to say it wasn't a case aggravated by sexual orientation. The killing would not have occurred but for D's own conflicted feelings as to his own sexuality, and his resentment of V's lack of conflicted feelings as to his. According to the Court of Appeal, this amounted to a 'background'[334] where sexual orientation was a 'factor',[335] but we are given no clear reason why this was a case para.5(2)(g) should not apply to.[336]

The Court in *Irinel and Abuculesei*[337] did not even stop to consider whether V's being gay aggravated the offence. The headnote to the report suggests the barrister who covered it took a different view, it being noted in the two line summary of topics the case involved that V was picked up from a 'gay bar'[338]- surely what kind of bar it was would normally be considered an irrelevance where great brevity is necessary? The bench's uninquisitive approach to this facet was exemplified in *Khaleel* also. The Court of Appeal glossed over the fact V was gay as if unaware of para.5(2)(g). Of course, not all murders where V happens to be gay are *aggravated* by the matter of sexual orientation, but it should at least be considered and explicitly ruled out if inapposite. Lord Judge CJ sighed 'quite what led to the killing was unclear.'[339] What was clear was that V was gay, D was likely a rent boy with whom V had interacted before, V 'was found, arms outstretched, lying on his back, wearing a pair of boxer

[334] *Morley* [21]

[335] *Morley* [22]

[336] *Morley* [20], [21]

[337] [2009] 2 Cr App R (S) 27

[338] *Irinel and Abuculesei* [H1]

[339] *Irinel* [5]

shorts, with his shirt pulled up to expose his stomach'[340], and that he had been executed in the estimation of the trial judge. The Court of Appeal observed, 'it looked as though the appellant took his victim by surprise from behind, cutting his throat and jugular vein in two, while stabbing him in the neck'[341] with a knife. Such a cold, ruthless, purposive killing are hardly the hallmarks of an explosive row where someone loses their temper in the heat of the moment. On the contrary, it suggests D already had a motive for killing V. Despite being of an older generation who might have been more familiar with the term's use, the bench would seem to have overlooked the significance of V's shirt being pulled up, or in other words, lifted up. This appears to be a reference to the gay slur "shirtlifter". Given V was gay, it would have to be a bizarre coincidence if it was not. This would indicate sexual orientation was more than merely a background to the murder. Instead though, Lord Judge CJ went down the more convoluted route of effectively etching a new scenario into the list under para.5(2), that of a second homicide where the actus reus and mens rea for murder were present. Whilst his argument is impressive, the oversight pertaining to the pre-existing para.5(2)(g) is less so.

Other cases held to be of particularly high seriousness

Let us look a little closer at the para.5 equivalent of para.4(2)(d) that emerged in *Khaleel*. It is worth mentioning that the trial judge was the first to take this stance, having examined the nature of the previous conviction for voluntary manslaughter. Lord Judge CJ noted that para.4 stipulated a second murder normally deserved a whole life minimum term. He emphasised that the seriousness of the crime was the

[340] *Irinel* [2]

[341] *Irinel* [5]

pivotal consideration, and that just because a feature had not been listed in para.4 or 5, did not mean that it couldn't bring the case within either of those categories of seriousness. Specifically, the then Lord Chief Justice held 'murder committed by a man at large on licence following conviction for manslaughter on an earlier occasion in virtually identical circumstances of violence may be assessed as an offence of particularly high seriousness,'[342] though not necessarily. This is an easily defensible position bearing in mind para.4(2)(d); saying a previous conviction for manslaughter merits treating the current murder as one of particularly high seriousness mirrors para.4(2)(d), just down a notch on the ladder of seriousness of previous conviction and accordingly down a notch on the starting point figure. Lord Judge CJ also pointed to the applicability of s.143(2) to all offences, thus including murder. The Court held the trial judge was entitled to evaluate this as a murder of particularly high seriousness given the aggravating factors and the previous conviction for manslaughter.[343] The observation that the previous manslaughter conviction was based on a partial defence and therefore the actus reus and mens rea of murder had been proved on that occasion[344] did not take centre stage. Had it, the contrary conclusion arrived at in *Brady and Paton*[345] and discussed above, would be even less reconcilable. The question hence posed is would the approach be the same if the previous conviction had been for unlawful and dangerous act manslaughter? Drawing no hard and fast line was probably wise; some voluntary manslaughters are heavily mitigated, whilst some unlawful and dangerous act manslaughters are brutal attacks close to the borderline with murder. It does though seem safe enough to suggest that a one punch

[342] *Khaleel* [14]

[343] *Khaleel* [15], [17]

[344] *Khaleel* [8]

[345] [2007] 1 Cr App R (S) 117

manslaughter would not merit a subsequent murder being treated as one of particularly high seriousness for that characteristic alone. If anything it was the 'virtually identical circumstances of violence' here which appeared to have most traction. Evidently a case by case approach is the most that can be gainsaid at this point, but it remains a genuine and authoritative precedent to be borne in mind.

ISSUES OF ORDINAL PROPORTIONALITY ARISING OUT OF THE COURT OF APPEAL'S APPLICATION OF SCHEDULE 21

What is now merited is scrutiny of how the various seriousness categories have been applied not just within subparagraphs, but between them. Has there been disparity in the assessment of different subparas seriousness which throw up problems for ordinal proportionality, or even paragraphs as a whole. What do the final outcomes- the minimum terms determined by the Court of Appeal, tell us about how they rank the gravity of different types of murders. Are those tariffs consistent with Schedule 21 and its objectives? If not, what are the ramifications? Has the Court of Appeal enforced Parliament's will, or abrogated it?

Of the para.5 subparas, the murder for gain clause has evidently been a source of consternation for the courts. Time and again, minimum terms fixed from the 30 year starting point suggested for such offences have moved below that starting figure, but rarely above it. The most extreme examples are where the court declines to find the murder to fall in the particularly high seriousness category, thus escaping the 30yr

starting point. This pattern suggests the courts do not share Parliament's weighting of such murders for gain as 'particularly high' seriousness and are subtly undermining the valuation. The mindset towards the provision is evident in Sir Igor Judge P's dictum where he asserted that 'the seriousness of this offence is [not] greatly affected by the question of whether the violence was inflicted in the course of trying to obtain money from the victim…The aggravating features in this case are much more significant than that question.'[346] While the case concerned repugnant injuries from sustained beating on an elderly, ill victim who was then left suffering to die, the 'for gain' dimension was the only element of the case that could have prompted a 30 year starting point, beyond a holistic assessment. The implications of this are that in Sir Igor Judge P's estimation, whether a murder is done for gain is of little relevance to the seriousness of the offence, and thus doubling the starting point for murders on account of that aspect is excessive at best.

Furthermore, as Lord Chief Justice, Lord Judge continued his nonchalant attitude to the 'for gain' scenario constituting a murder of particularly high seriousness. In *Attorney-General's Reference 30 of 2009*[347] D, 20, targeted and tricked an 89 year old man to let D into his home so that D could burgle him. Although the Court of Appeal was satisfied there was no intention to kill, D's attack on V was savage by any measure. Lord Judge CJ increased the 20 year minimum term by a quarter to 25 years, but the silence in relation to para.5(2)(c) speaks volumes. If any case was made for para.5(2)(c), it was this- yet there is not so much as a passing recognition of para.5(2)(c)'s existence anywhere in Lord Judge CJ's judgment.

[346] *Attorney-General's Reference 12 of 2008* [2009] 1 Cr App R (S) 18 [19]

[347] [2010] 2 Cr App R (S) 7

Had para.5(2)(c) been followed, would much reduction off the 30 year starting point be deserved? D's youth would afford some, as would the lack of an intention to kill. However aggravating factors in the form of the cruel targeting of this old and vulnerable V, the ferocity of the violence he was subjected to, the palpable planning and premeditation exhibited, all threaten to neutralise the bulk if not the entirety of the mitigating factors leaving a sentence much closer to 30 years. One should not be surprised that References have to be made by the Attorney-General in such cases as the bench has so often overlooked para.5(2)(c) that old inconsistencies creep in with resort to idiosyncratic assessments of the gravity of individual cases. This would suggest the Court of Appeal's approach has been followed in the Crown Court. My submission is that the upshot has warped the ordinal proportionality as a whole laid down by para.5.

Early cases in this field have proved prophetic. In *Arshad*[348] the murder was done for the inheritance of V's house and money - a sizeable sum by anyone's means and in a different league altogether from the burglary in the prior case, *Attorney-General's Reference 30 of 2009*. Despite this constituting a murder for gain under para.5(2)(c), the trial judge chose the 15 year starting point. This was not a knifepoint demand for a mobile phone that went wrong, but a 'cold-blooded, cruel, planned murder'[349] of a close family member. Plus, the dismemberment was industrious to the point of macabre, and the proximity of the relationship between D and V surely amounted to a position of trust. Yet the Court of Appeal did not interfere with the first instance

[348] [2006] 1 Cr App R (S) 65

[349] *Arshad* [2006] 1 Cr App R (S) 65 [8]

ruling that it was not a murder of particularly high seriousness, notwithstanding this being perhaps one of the worst such examples of a murder done for high stakes. Indicating the unjustified brevity of the sentence in *Arshad* are other cases where Schedule 21 *has* been properly followed. *Ghafelipour*[350] upheld a tariff only a year shorter despite being referred to *Arshad* and possessing none of the most serious characteristics of the latter case, for instance being a prima face para.5 case, and lacking the same degree of planning. Ordinal proportionality illustrates adeptly how Schedule 21, and para.5(2)(c) especially has been departed from in *Arshad* without persuasive reasons.

Let us take a closer look at the murder for gain category, or para.5(2)(c). Appeals against 19 sentences for such murders were reported in the Criminal Appeal Reports (Sentencing) for volumes [2009] 2 to [2013] 2, a four year period. To give a flavour of things to come, 16 of those sentences (or 84%) ended up below the 30 year starting point, 1 on the 30 year starting point (5%), and just 2 over the 30 year starting point (11%). This is not an issue per se: if that proportion of cases were truly of that level of seriousness as to equate to a minimum term of the length affirmed, then that is Schedule 21 implemented. Only careful scrutiny of the Court of Appeal's approach, reasoning, and rhetoric can really enlighten us as to whether they are adhering to Schedule 21 in assessing the gravity of these cases or not.

The first port of call must be Parliament's intention that murders done for gain 'normally'[351] be considered of particularly high seriousness. Expressly given as

[350] [2011] 2 Cr App R (S) 48

[351] para.5(2) and para.5(2)(c)

examples in para.5(2)(c) are murders done in the course or furtherance of robbery or burglary. Many of the appeals covered are concerned with robberies or burglaries. Normally the starting point for these cases should be 30 years, or in other words, most of the time, at the very least more than 50% of the time. If para.5 is being applied faithfully therefore, it means the vast majority of cases have a deficit of aggravating factors compared to mitigating features, as the minimum terms are overwhelmingly finishing up under 30 years, and frequently significantly under 30 years. Is that the case, or are cases like *Arshad* representative of the Court of Appeal undervaluing the seriousness of this class of case even in the presence of a surfeit of aggravating factors?

Healy[352] exhibits some of the doubts about murders for gain being treated as murders of particularly high seriousness. D had a disagreement with V over some money that had been used to purchase alcohol. Both were already quite inebriated. D took a knife from the kitchen, went upstairs, and stabbed V with it once. D made off with the money- the price of V's life appears to have been a £10 note. In sentencing the judge worked on the basis there was no intent to kill. Given the length of the minimum term set by him, and the two year reduction by the Court of Appeal to 20 years, a significant factor also must have been a guilty plea from D one might think. Extra-legal sources make it clear that D was convicted after a trial though.[353]

Referring to the phrase 'normally' in para.5, the Court of Appeal held the judge at first instance was not wrong to adopt the 30 year starting point, but did note not all judges

[352] [2009] 2 Cr App R (S) 3

[353] Bournemouth Echo, 'Brutal killer jailed' <http://www.bournemouthecho.co.uk/news/2335956.brutal_killer_jailed/> accessed 3/9/15

would have done the same. Impliedly this is because 'room has to be made in the sentencing process for every type of case' and there are many more murders done for gain which would be considered much more serious, such as 'planned or professional robberies.'[354] Without detracting from the perfectly fair point that not all murders for gain need be placed in the particularly high seriousness category, the notion that it should be reserved for these more serious cases is a non sequitur. 30 years is a starting point, not a mandatory minimum. Ergo, more movement down can be made in cases where the for gain dimension is less culpable, and by the same token movement can be made up from the starting point in cases displaying aggravating factors. In other words, room is made by deviating from the starting point proportionate to the variation in seriousness of the different scenarios that a murder for gain might encompass; it does not require the abjuration of the 30 year starting point in the first place. Further, their Lordships remarked that

> in any event, it seems to us that this is a case in which, whichever starting point was correct, the eventual minimum term would lie between the two starting points. It could well be at or close to the level finally arrived at in this case, which itself was almost exactly halfway between the two statutory starting points.[355]

Not only is it troublesome that sweeping statement is supported by no reasoning, but that it is being made at all. Why is it so obvious it deems no explanation that the final figure would fall between the two starting points when the question should be what reasons are there to depart from the starting point?

The principal mitigating factors the Court of Appeal suggest are lack of intention to kill, the fact that the killing and the robbery happened on the spur of the moment, and

[354] *Healy* [24]

[355] *Healy* [25]

the fact it was for a paltry sum of money. Cumulatively, they justified shearing 2 years off the original 22 year minimum term. The Court of Appeal validate this by assuring us that had the starting point been 15 years, the minimum term would have risen substantially. But is a decade off the starting point really proportionate given the starting point? If D had pleaded guilty, a sentence around 20 years might have seemed more plausible.

The lenience shown both by the trial judge and the Court of Appeal in *Healy* is highlighted by *Wright,*[356] another murder for an apparently petty gain. When intoxicated, D killed his own mother in order to steal money from her which was to be used to purchase drugs. The Court of Appeal held that it was an aggravating factor that V was D's own mother. In *Wright* though D did have the benefit of a guilty plea. Imagine if D in *Healy* had pleaded guilty at the first opportunity; the discount off 20 years would bring the sentence down to 16 and a half years. Cutting the minimum term from 28 to 23 years though in *Wright*, the Court of Appeal argued that the case was not as serious as one committed in the course of a robbery with firearms or even a brutal burglary. This assessment is, of course, fair and accurate. Less justified though is the allusion that only murders for gain of that nature merit a sentence anywhere near 30 years, as if 30 years is a ceiling not a starting point, or that the kind of murder for gain para.5(2)(c) is referring to is an armed robbery or brutal burglary. This misunderstanding echoes that in *Healy* above and suggests there is a defect in the Court of Appeal's approach to the 30 year starting point, at the very least when operating it on the basis of para.5(2)(c). Indeed, if this were the case across the board, we would expect to see a concentration of sentences beneath 30 years, bunched

[356] [2010] 1 Cr App R (S) 9

between 20-30 years in length, and a paucity of cases exceeding the 30 year figure as if that were a statutory maximum term as opposed to a starting point- as we do.

Some have argued that such a bunching is to be expected because classifying a murder as one of particularly high seriousness takes into account many of the aggravating factors associated with such cases. If this were true though, it would present two problems. One is that it overlooks the 'starting point' approach of the guidelines where aggravating and mitigating factors then move the figure above or below accordingly, suggesting they are still to be applied after the offence has been categorised according to the broad factual scenarios listed. The other is that by construing the default murder for gain as one of an armed robbery or brutal burglary, it would have to mean that such serious cases are the standard factual matrix of murders for gain, as para.5 tells us that murders for gain are 'normally' of particularly high serious and hence deserve a 30 year starting point. That is to say that at least a bare majority of murders for gain are of such gravity. If more than half are not robberies with firearms or brutal burglaries, then Parliament must be referring to a different factual matrix, or collection of factual matrices, which comprise at least half of the cases. If they happen to be less serious than armed robberies and brutal burglaries, all that means is that armed robberies and brutal burglaries are particularly aggravated murders for gain, likely indicating net movement up from the 30 year starting point.

What do the other cases suggest? Sentences of 25 years or less were also approved in what appear to be significantly more serious murders for gain than *Healy* or *Wright*, and even for the types of cases (armed robberies and brutal burglaries) suggested by

the Court of Appeal as meriting the 30 year starting point para.5(2)(c) suggests for murders for gain.

One such example would be *Irinel and Abuculesei*, where the brutal burglary was premeditated and planned. Assuming the murder was not 'aggravated by sexual orientation' if V's homosexuality was merely coincidental, there was nonetheless a breach of trust the Court of Appeal acknowledged- an aggravating factor according to para.10(d)- although the degree of it was not 'the grossest imaginable'[357] as the trial judge had described it. Furthermore, significant suffering was inflicted on V the Court of Appeal recognised, another specified aggravating factor under the Schedule.[358] Although there was not an intent to kill, there was an intent to cause extremely serious harm, coupled with an indifference to V dying, an outcome which must have been obvious to D when he abandoned V having used egregious violence on him. Conversely, Irinel's age was considered a mitigating factor- he was 23 at the time of the crime.[359] The trial judge concluded the aggravating and mitigating factors balanced one another out meaning no departure from the 30 year starting point could be justified. This would appear to be a model approach, taking the 30 year starting point since it was a murder for gain, and using an analysis of aggravating and mitigating factors to gauge the extent of any movement up or down from that figure. The Court of Appeal differed in their assessment of the extent of the breach of trust, which when considered against lifelong spouses or professional relationships of trust (the Court of Appeal cited doctor and patient) is compelling. They gave this as their

[357] *Irinel* [10]

[358] para.10(c)

[359] For more on this see the section on youth as a mitigating factor.

reason for abridging the 30 year minimum term to 25, believing the trial judge had treated this factor of equivalent value to the two mitigating factors of youth and lack of intention to kill.[360] But the Court of Appeal's reasoning here omits any mention of the suffering inflicted on V prior to his death, a serious aggravating factor itself which was expressly taken into account by the trial judge, but doesn't seem to form any part of the equation in weighing up the aggravating and mitigating factors by the Court of Appeal.

A comprehensive and balanced weighing of the aggravating and mitigating factors suggests little reason to move significantly below the 30 year starting point, especially given the brutality of attack, and that it was a planned and premeditated expedition. This was the conclusion the trial judge reached on the basis of Schedule 21 too. Even working on the premise that the 30 year starting point *is* reserved for armed robberies and brutal burglaries, of which the present case is undoubtedly the latter, sentences markedly below the 30 year starting point are being settled by the Court of Appeal. It is the trial judges if anyone who appear more faithful to the spirit and letter of the Schedule. One must ask what the Court of Appeal thinks has to be done to exceed a 30 year *starting* point when one is adopted.

Of course, *Irinel and Abuculesei* could just be an anomaly. A string of other reported Court of Appeal authorities dealing with brutal burglaries and horrific robberies would suggest not though,[361] manifesting a bunching of sentences between 23-27

[360] *Irinel* [16]

[361] *Barney and James* [2010] 2 Cr App R (S) 61; *A-G's Reference 30 of 2009* [2010] 2 Cr App R (S) 7; *Sykes* [2009] 2 Cr App R (S) 37

years covering most murders for gain, from the most trivial thefts to plotted burglaries and vicious robberies.[362]

This prompts us to wonder how appropriate some of these sentences look when placed alongside the 25 year starting point for going armed with a weapon to the scene that has now been introduced.[363] Many of the cases would fall squarely within the new para.5A so we would be at a 25 year starting point for that feature alone, not to mention 30 years due to the dimension of gain, suggesting a minimum term in excess of 25 years is merited in order to ensure the latter aspect is recognised. Thus the new 25 year starting point should have the effect of pushing up sentences where there is overlap to ensure ordinal proportionality with the 30 year starting point cases, and consequently delivering more minimum terms over the 30 year starting point to alleviate the bunching of sentences already manifested in the 25-30 year range. Has this happened though since para.5A came into force in 2010?

Connor and Paton[364] does not bode well. Even accounting for the youth of both Ds, the aggravating factors were serious. The two 19 year olds had identified a vulnerable V for their robbery, crept up on him, and threw a huge pole like a javelin at V's head. Felled, they stamped on his head inflicting further injuries, before scavenging items of value off his dying body.

[362] *Sykes* [2009] 2 Cr App R (S) 37; *Sharp* [2009] 2 Cr App R (S) 86

[363] Full discussion of para.5A will follow in due course.

[364] [2011] 2 Cr App R (S) 95

The Court of Appeal was adamant it was a fit case for para.5 by virtue of the robbery, but then the reasoning becomes a little hazy. In a judgment to which all their Lordships assented, including Lord Judge CJ, Henriques J held

> Whilst taking the highest starting point will necessary [sic] embrace many aggravating factors and thus eliminate them so as to avoid double-counting, the highest starting point does not necessarily require a judge to disregard every aggravating factor, so long as double-counting is avoided.[365]

A number of issues present themselves. For one, when does taking a particular starting point embrace 'many aggravating factors', and when does it not? Which 'many aggravating features' are encapsulated by the starting point, and which aren't, such that the latter don't have to be disregarded? These arguments only make any sense if there is a default, hypothetical scenario to which the starting point pertains, so there can be a clear, consistent conception of what kind of murder for gain scenario is worth 30 years, and so any instant case can be checked against that factual matrix to identify differing characteristics affecting the seriousness of the crime. Beyond questioning the propriety of such an approach, when or where has a default hypothetical scenario been pronounced for para.5(2)(c)? One might point to the 'brutal burglary' or 'armed robbery' scenarios referred to above, but terms as breezy and broad as those lack sufficient precision. Could this not be considered an armed robbery?

Without a hypothetical factual matrix agreed and adopted ubiquitously by the judiciary, all that has been drawn up is a recipe for confusion and disparity where differing conceptions are deployed in like cases. What was counted as an aggravating factor in one case is not in another, and what was thought integral to the hypothetical

[365] *Connor and Paton* [20]

scenario in one case is not in another and so there treated as a mitigating factor. The result is haphazard sentencing guided at best by the instincts of the bench. Whither sentencing guidelines?

Another quandary posed by the Court of Appeal's reasoning cited above is that it expressly accepts the 30 year starting point here because it is a murder for gain.[366] Whilst that unequivocal approach giving effect to the plain statutory wording of Schedule 21 is commendable, what is less plain is why 'many' of the aggravating factors in *Connor and Paton* had already been accounted for by the 30 year starting point. The idea that any of the aggravating factors not innate to a murder for gain are accounted for by the 30 year starting point is to confuse why it was adopted in the first place. If it was adopted because of the seriousness of a murder for gain, then a priori, it was not adopted because of forearming, or planning. Neither of those things are integral to a murder for gain. Hence they are aggravating factors making a murder for gain more serious, and so justifying uplift from 30 years. Similarly, the fact that Ds were young, or did not intend to kill, are not intrinsically related to a murder being done for gain; they are mitigating factors.

Ergo, Henriques J's claim that to consider aggravating factors already subsumed by the 30 year starting point would be double counting, is a fallacy. Quite simply, they haven't been taken account of yet.

Furthermore, the incoherence of the Schedule's application is compounded by the omission of any mention of para.5A, in view of the fact the weapon, 'a massively

[366] *Connor and Paton* [20]

heavy pole'[367] almost 2 metres long was carried some 70 yards to the place at which it was launched at V from close quarters. If this case had not had the robbery dimension it did, para.5A would have been the next most likely category the case would have fallen into, along with its 25 year starting point. The presence of another aggravating factor, one so serious as to merit a wholly new starting point, is surely worthy of mention in the calibration of aggravation and militates against a reduction beneath the 30 year starting point unless outweighed by substantial mitigation. Yet Ds in *Connor and Paton* had been convicted after para.5A had come into force, and the appeal was heard a year later. Even though it did not apply to them since the murder was committed before para.5A came into force,[368] it was still relevant in the same way it was material to the sentencing exercise in *Moore* which also concerned a murder before 2nd March 2010, and the Lord Chief Justice's guidance in *Kika* was high authority for any Court sentencing after that judgment was handed down in November 2009, as *Moore* itself reflected.

In *Jones and Smith*[369] where para.5A would have been in force at the time of the murder the approach does not change suddenly either. The facts are more serious than those in *Connor and Paton* and both Ds older. Nevertheless we end up with a minimum term bunched between 25 and 30 years again, and the concept of 30 years more of a ceiling than a starting point. What is transpiring is the Court of Appeal, right from the top, attribute little weight to the fact that a murder is done for gain as an aggravating factor, let alone a facet which doubles the ordinary 15 year starting point.

[367] *Connor and Paton* [6]

[368] SI 2010/197, art.3

[369] [2012] 1 Cr App R (S) 46

Jones and Smith is merely another rubber stamping of this approach, conforming to the precedent laid down in numerous earlier cases, covered above.

As a tonic to the overwhelming weight of cases, there are a few anomalous cases where minimum terms over 30 years were approved. The meagre quantum by which they exceed 30 years though reinforces the principal argument concerning para.5(2)(c) generally, and is part of bigger, broader, trend of bunching many sentences in the 25 to 30 year range, rather than a rough balance either side of the 30 year mark as one might expect when 30 years is the starting point. *Griffiths* saw a minimum term concluded on the starting point of 30 years, but only because the litany of aggravating features were said to be accounted for already by the 30 year starting point based on it being a murder for gain.[370] Only two cases in this four year period exceed the 30 year starting point, and the first of those does not actually result in a minimum term of 30 years or more, owing to D's guilty plea.[371] Finally thus we come to the sole minimum term upheld at more than the 30 year starting point figure. *Cameron*[372] was decided not long after *Young*, but has proved also to be a false dawn. It exemplifies well how extreme beyond the scenario stipulated in para.5(2)(c) must a case be to see the other side of the supposed starting point. Concerning the brutal burglary of an elderly homeowner, it is prima facie in the same class as *Barney and James*, and *Attorney General's Reference 30 of 2009*. Both of those cases involved gratuitous assaults, merciless and sustained, as in *Cameron*. Upholding a minimum term of 33 years though is substantially above the lengths in both of the like

[370] *Griffiths* [21]

[371] *Young* [2012] 1 Cr App R (S) 103

[372] [2011] 1 Cr App R (S) 24

precedents. Perhaps this is explained by the severe battering exacted upon a visitor to the house in the course of the murderous robbery in *Cameron*, which in itself could well have seen a sentence in excess of 5 years, albeit a determinate one. If this did have any significant effect, suddenly it becomes dubious whether we have here anyway a tariff for a murder which itself was worth a minimum term of 30 years or more in the judgment of the Court of Appeal.

Indeed, in light of the multitude of aggravating factors here beyond it being a murder for gain, viz. the bringing of weapons to the scene in itself meriting a 25 year starting point, the planning and premeditation, the joint enterprise of a cabal, the relative vulnerability of V (in fairness notably less than the elderly Vs in the other two authorities), the unremitting physical abuse causing great bodily harm, and the element of sadism or at the very least torture incurring great physical and no doubt mental suffering for V, was 3 years in addition to the starting point sufficient to reflect the gravity of the murder? The only mitigating factor was that of the lack of an intent to kill, which when placed in context the Court of Appeal felt was little more than a footnote.

Scrutiny of murders for gain coming before the Court of Appeal has demonstrated that if anything, they are not normally murders of particularly high seriousness in the estimation of the Court, irrespective of Parliament declaring them to normally be so.

The approach to starting points, particularly para.5(2)(c), that has emerged suggests looser and looser adherence to the example scenarios provided under para.5(2). For

instance, *Attorney-General's References 7 and 8 of 2006,*[373] where the then Lord Chief Justice reminded the court that if a murder was done in the course of a burglary, it *would* normally justify a 30 year starting point, and the facts of that case did not justify otherwise,[374] appears dated. Forgotten are cases like *Cullen*,[375] where Hughes LJ demonstrated a clear grasp of the underlying mechanism. Having established that the facts undoubtedly meant this was a case of murder in the course of robbery, he astutely remarked: 'It seems to us that draconian though the starting point of 30 years undoubtedly is, there is no mistaking Parliamentary intention in this matter.'[376]

It is submitted this is much the better approach as it recognises that, no matter what the court may feel about the seriousness of murders for gain, it must incorporate Parliament's recalibration that they *are* particularly serious, even if they were not treated as such before. The discretion is not there to cancel out, or "correct" the Schedule's disagreeable tariff, but to vary the 30 year sentence according to aggravating or mitigating factors.

Instead, the development of a sophist approach to the category has resulted in the starting point subsuming a raft of aggravating factors which should be applied once the starting point has been identified, rather than used to adopt it in the first place, in circumstances where there already exists a scenario falling within those listed by para.5(2) as normally meriting the adoption of the 30 year starting point. This is undermining Schedule 21, and resulting in lower minimum terms than would result if

[373] [2006] 1 Cr App R (S) 112

[374] *Attorney-General's References 7 and 8 of 2006* [2006] 1 Cr App R (S) 112 [25]

[375] [2007] 2 Cr App R (S) 65

[376] *Cullen* [2007] 2 Cr App R (S) 65 [14]

the Schedule was being properly followed. Nowhere is this more vividly illustrated than with cases that fall into para.5(2)(c). Unfortunately, there is evidence to suggest that it is a ubiquitous trend across all the para.5(2) scenarios.

Bunching of minimum terms between 25 and 30 years across paragraph 5

For example, the practice can be observed in relation to para.5(2)(b) as well. *Tucker* was an appalling case ripe for para.5(2)'s full force and yet D's minimum term was truncated by four years to 22 by the Court of Appeal. The seriousness of the case has already been addressed, it patently being a para.5(2)(b) case, with a raft of aggravating factors. Yet by minimising the sentence, the Court of Appeal have carved room for more serious cases to fall under the 30 year mark, whilst remaining above the 22 year tariff set here. Hence, it should be no surprise that there is a surfeit of para.5 cases replete with further aggravating factors, managing to fit under the 30 year mark.

The same could be said of *Challen*,[377] also a domestic case that factually fell squarely within a more serious category, on this occasion para.5A. Cutting the 22 year minimum term to 18 has carved space for 25 years to be a cap rather than a starting point for para.5A cases. Corroborating this as the Court of Appeal's own approach, Royce J revealingly equated a murder of particularly high seriousness as one 'justifying a minimum term in excess of 20 years'.[378] Para.5 of Schedule 21 actually

[377] [2012] 2 Cr App R (S) 20

[378] *Challen* [14]

states that such a murder should have a starting point of 30 years in determining the final minimum term for the specific offence. Little wonder there is a bunching problem with para.5 sentences overwhelmingly between 20 and 30 years if this represents the Court of Appeal's attitude to the 30 year starting point, with even extremely grave cases normally unable to break what the Court of Appeal have made a 30 year ceiling.

Further evidence of this approach being applied in practice can be seen from the outcomes in a myriad of other para.5 cases, though finding another such indiscreet admission of the Court of Appeal's reasoning is not so simple given that it represents a straightforward abrogation of the statutory schedule the Court purports to be applying.

Clarke[379] was a 'particularly horrific murder'[380] in the Court of Appeal's view. Along with co-Ds, V, who was just 17, was kidnapped, tied to a tree in a deserted location, had petrol poured down his throat and all over him. He was lit and left to die. Ds then attempted to conceal his body. The Court of Appeal acknowledged the killing as being genuinely sadistic and thus of particularly high seriousness. From the 30 year starting point three years had been deducted for D's own youth (c.20) at the time of the offence. Lord Judge CJ upheld the 27 year minimum term as being without 'the slightest basis for complaint'.[381] Indubitably as far as the appellant who was the protagonist of the endeavour is concerned, that must be fair. But just because D may have no complaints, does it necessarily mean proportionality does not either? Why

[379] [2010] 2 Cr App R (S) 13

[380] *Clarke* [1]

[381] *Clarke* [30]

was the substantial and wicked premeditation and planning not considered an aggravating factor driving up the minimum term from the starting point? After all, sadistic killings need not be premeditated or planned, nor entail weapons of whatever lilt. The use of fire escaped critical analysis from the Court of Appeal. At its lowest, the taking of petrol to be used as a weapon to the scene must pitch the case into para.5A. Where a higher seriousness category is already in play by virtue of other features, the facet must nonetheless constitute a serious aggravating factor. At its highest, the use of fire falls within para.5(2)(b) according to the authority of *Jones*, covered already. This would mean the use of fire constitutes even greater aggravation than the observation that bringing a flammable liquid to the scene should fall within para.5A, and is supported by precedent. This should push the minimum term higher yet before the primary mitigating factor of youth be applied, and culminates in a minimum term still comfortably over 30 years. For the two co-Ds not appealing, who received life sentences with tariffs of 22 and 17 years, these points would also be relevant. Overlooking the full provisions of Schedule 21 and pertinent precedents has lead to the full gravity of this offence going unappreciated and thus the minimum term is shorter than it should be.

One of the highest minimum terms for a para.6 case was 25 years after a successful Reference by the then Attorney-General. Few would doubt what a wicked killing it was. D appeared to have premeditated the murder of his 15 year old stepson who he disliked, though it would be hard say there was any real planning. Late at night D grabbed a long-bladed kitchen knife and, yelling that he was going to 'fucking kill him',[382] proceeded to do just that as V lay sleeping. D was seen plunging the knife

[382] Attorney-General's Reference 73 of 2009 [2010] 2 Cr App R (S) 42 [19]

hard into V time and again by his wife, the mother of V, and D's own son. 18 stab wounds were recorded, 'some went right through the boy's arm and into his chest. Some went through the chest into the lungs and some went into the spine.'[383] D then turned on his wife trying to stab her, and his stepdaughter suffered injuries defending her mother. That resulted in his conviction for attempted murder of his wife, and s.18 in relation to his stepdaughter.

The then Lord Chief Justice opined 'this case is a graphic illustration of the dangers of attempting to compartmentalise the seriousness of cases of this kind',[384] assessing the case of one of particularly high seriousness, despite not falling into any of the para.5(2) listed scenarios. Finding no real mitigation, Lord Judge CJ increased the minimum term fixed by the trial judge of 16 years by a hefty nine years. Was that though sufficient given the frenzy of violence unleashed by D on his family, the principal victim of whom was a sleeping child? A textured evaluation, taking into account the full magnitude of the murder, the attempted murder of his wife with a knife, and the s.18 against his stepdaughter, could well conclude that even 25 years was merciful. However, due to the badly aggravated para.5 cases clumping in the 25-30 year range, going any higher would pose problems for ordinal proportionality.

Although not constituting a stated example under para.5(2) either, *Khaleel* was also adjudged as being a murder of particularly high seriousness. Nevertheless, in spite of having made that appraisal, the Court of Appeal then proceeded to ignore many of the other aggravating factors of the case as they had considered them part of the reason to

[383] *A-G's Reference 73 of 2009* [19]

[384] *A-G's Reference 73 of 2009* [35]

classify it as a para.5 murder in the first place.[385] They deducted a couple of years from the starting point because it was not a premeditated or planned murder, allowing the appeal by cropping five years off the original 33 year minimum term. Once more the force of adopting the 30 year starting point has been eroded by conflating aggravating features, blunting the effect of Schedule 21's provisions. If the argument is that a previous conviction for manslaughter should normally constitute the equivalent of a scenario listed in para.5(2), then that seems somewhat logical given para.4(2)(d). It is the next most serious category under Schedule 21 after para.4, and a previous conviction for manslaughter is the next most serious offence one could hold after murder. Where the previous conviction is for voluntary manslaughter, ie where the actus reus and mens rea for murder existed, then the presumption should be particularly strong in adopting the 30 year starting point. Allowance must of course be made for the odd case where culpability was enormously reduced, as might be indicated by a particularly short custodial term or especially a non-custodial punishment. By pushing this sentence under 30 years, the Court of Appeal have bunched more highly serious murders together in the 25-30 year band. Ordinal proportionality is thus being breached by sentencing some cases too close to one another owing to the Court of Appeal's reticence to exceed thirty years, viewing para.5 as a "20 years or more" sentence in practice with a 30 year ceiling, rather than one with a starting point of 30 years as para.5 states. Consequently, there is also an overly large gap between these cases and para.4 cases where whole life minimum terms are ordered, which could easily translate into 60 year minimum terms. This would appear to exacerbate the concerns already expressed about the gap between the

[385] *Khaleel* [17]

starting points for the different categories of seriousness represented by para.4, para.5, and para.6.[386]

A few especially grave para.5 cases have managed to finalise minimum terms actually on the starting point of 30 years.[387] *Stapleton*[388] was a para.5 murder because it involved a firearm. D headed out intending to kill someone essentially for the thrill of it. He organised a gun, carried it on the street, picked an altercation with a random, innocent member of the public, and shot V in the head dead. In the wake of his cold-blooded killing he obtained a tattoo to celebrate the act. The premeditation, arrangement, and carriage, of the firearm, and remorseless attitude to the murder afterwards, 'adds significantly to the seriousness of this crime'[389] Lord Judge CJ held. In upholding the 30 year minimum term, the Court of Appeal must have adjudged D's mitigation, principally that he was 20 at the time of the crime, to have balanced out the factors indicating heightened culpability.

It is worth noting here that in considering the carriage of the firearm as an aggravating factor, the Court of Appeal were not using a default scenario of a murder involving a firearm as one which entailed carrying a gun as a matter of course, contrary to other authorities such as *Tucker*. Immediately the prospect of inconsistency and disparity is apparent. Lord Judge CJ appears to have applied the Schedule on this occasion in a more literal sense, and as suggested elsewhere, this is most conducive towards achieving consistency of approach. If a default hypothetical scenario is to be used for

[386] (n 74) 118-119

[387] *Attorney-General's Reference 116 of 2009* [2010] 2 Cr App R (S) 105

[388] Part of *Oakes* [2013] 2 Cr App R (S) 22

[389] *Oakes* [59]

a murder involving a gun, or indeed a murder for gain as cropped up a number of times, then at the very least the Court of Appeal must be unambiguous, explicit, detailed, and honest about what it is, then apply it routinely.

The seriousness of many of the cases examined above, exhibiting a surfeit of aggravating characteristics and a dearth of mitigating features, yet still ending up clumped in a cluster in the high 20s, suggests "more than 20, but less than 30" represents the Court of Appeal's true operation of para.5. Sensing this practice crystallizing, an Attorney-General's Reference[390] was made to increase a minimum term from 25 years as imposed in the Crown Court. Lo and behold, the attempt was frustrated.

To quote Pitchford LJ giving the judgment of the Court of Appeal,

> It is submitted, on behalf of the Attorney, that the aggravating factors, viewed cumulatively, should have attracted a significant uplift in the starting point from the 30 years provided for in paragraph 5 in the absence of any significant mitigating factors. This is a submission which rests upon an assumption that once it is established that there is a sexual context in the murder, the lowest minimum term must be 30 years before aggravating and mitigating features are brought into account. For reasons which we shall explain, we do not accept this proposition.[391]

At once it should be accepted that the Attorney General's submission is indeed wholly logical and in accordance with Schedule 21. If there are no reasons to depart from the starting point adopted, then that is where the sentencing exercise rests. The only reasons to depart from the starting point, either upwards or downwards, are aggravating and mitigating factors respectively, the latter including the guilty plea for

[390] *A-G's Reference 73 of 2012* [2013] 2 Cr App R (S) 38

[391] *A-G's Reference 73 of 2012* [19]

ease of analysis. Other reasons are by definition, extraneous, immaterial, to the seriousness of the offence, which is the sole rationale in use. Hence, this is really quite a remarkable claim by Pitchford LJ. It amounts to a denial of 30 years being the starting point even where the sentencer has determined it is a case of 'particularly high seriousness', which is in outright defiance of para.5. Paragraph 9 is of crucial importance for the oft-cited flexibility it provides, and that is pivotal flexibility in determining the precise seriousness of the offence. It is worth reiterating what exactly para.9 prescribes though: 'detailed consideration of aggravating or mitigating factors may result in a minimum term of any length (whatever the starting point), or in the making of a whole life order.' It is stressing the importance of identifying aggravating and mitigating factors to accurately ascertain the gravity of the murder, and acknowledging that when numerous this can drag the final minimum term far from its original starting point- but it is aggravating and mitigating factors, factors which address the seriousness of the crime, that do so. Ergo, the Attorney-General's proposition appears to be correct. Not only is Pitchford LJ's construal of what that proposition entails therefore erroneous, it is troubling for the potential disarray it opens the door to.

Other such cases concern Ds who treated V as a slave or punchbag, subjecting V to a systematic stream of physical abuse, humiliation and degradation over a prolonged period; the kind of inhuman treatment notorious in the Victoria Climbie or Baby P cases. The household in *Nicholls*[392] had done precisely this to V through everything from burning him with cigarette lighters, by holding him against radiators, or pouring boiling water over him, to the comparatively mundane beating, kicking, stamping,

[392] [2011] 1 Cr App R (S) 67

whipping, and jumping on him. It was unlikely they intended to kill, but needless to say intended to cause GBH on a plethora of occasions. Minimum terms of 32, 25, and 20 years were upheld for various perpetrators. Only in these circumstances, do we see one D, the ring-leader of the torment, receive a sentence exceeding the starting point- and not by much- despite the case falling squarely within para.5(2)(e). 36 years was upheld for D's minimum term in *Watt*[393] as covered earlier. Although the tariff was severe in the Court of Appeal's estimation, they resorted to their habitual tack that the trial judge had sat through the whole trial and heard all the facts and was best placed to assess the seriousness of the murder. It is a line of argument which if it were determinative, would render appeals redundant. The Court of Appeal's judgment indicates a continued focus on the abstract terminology, at least for para.5, of 'particularly high seriousness'. But the Court of Appeal's judgment lacks regard for Schedule 21 and its provisions, instead coming to the conclusion in the absence of reference to para.5(2)(e) that it was a murder of particularly high seriousness, and then simply declining to interfere with the sentence on a basis which could be said of any judge who determines the sentence following a trial. Certainly, Richards LJ notes that it was a sadistic murder and was rightly assessed as being of particularly high seriousness by the trial judge, but omitting to mention para.5(2)(e) specifically risks intimating that the murder was of particularly high seriousness because the Court of Appeal consider sadistic murders to be so, rather than because Parliament has said they normally are in Schedule 21- an emerging trend in more recent years.

Existence of 2 or more features indicating starting point above 15 years

[393] [2012] 1 Cr App R (S) 31

The use of example scenarios to indicate the types of murder that equate to a specified level of seriousness in itself raises a dilemma as to what happens when more than one such characteristic is present.

In *Connor*[394] 'the starting point for consideration of the minimum term was one of 30 years, it being a double murder and it also being a killing by arson'.[395] Given the premeditation and efficacy the crime was executed with, the Court of Appeal opined that 'absent a larger number of deaths it is nearly impossible to imagine a worse case of murder by arson than this.'[396] The suffering endured by at least one V who managed to dial 999 seemed to elude the court as an aggravating factor moreover. Nonetheless, the minimum term upheld was 32 years, a smidgeon above what might have been handed down if just one of the 'particularly high' seriousness traits had been manifest. Even in this worst of the worst instance, where culpability was high and mitigating factors scarce including no guilty plea, questions must be asked as to why the uplift in minimum term barely exceeded the starting point for a crime featuring just one named circumstance. That such a seriously aggravated case should only limp over the 30 year starting point demonstrates how the bunching between 20-30 years for cases with a single para.5(2) feature has a knock-on effect for the most serious para.5 cases.

Finally some specific guidance was offered in *Bieber*[397] by the Lord Chief Justice. He commented 'the fact that two criteria were present is, of itself, a possible reason for

[394] [2008] 1 Cr App R (S) 89

[395] *Connor* [2008] 1 Cr App R (S) 89 [12]

[396] *Connor* [15]

[397] [2009] 1 WLR 223

raising the term above the 30-year starting point.'[398] Although noting that the seriousness of the offence had already been accounted for largely by the higher 30 year starting point, if that starting point is justified by virtue of just one listed factor existing, then any further must surely be a very strong indicator that an increased minimum term is required, especially given that just one was enough to double the 15 year starting point in the first place that would have otherwise had effect.

What these cases give us is an idea of the extremity of the gravity that is required for the Court of Appeal to uphold minimum terms of more than 30 years for para.5 cases, seemingly disregarding the express intention of para.5 that 30 years is a starting point. *Hassan,*[399] where an automatic firearm was used against 2 Vs with an intent to kill both of them, and did one, grievously wounding the other, resulted in convictions for murder and attempted murder. The deceased was shot in each arm first, and then in the forehead, killing him instantly. Miraculously, the second victim escaped with his life given 5 bullets were fired at him, 2 lodging in his skull where they remained come the appeal hearing. 13 aggravating factors were identified by the trial judge beyond the use of a gun which brought the case within para.5 at first glance. All that could be mustered in mitigation was that D had not premeditated the killing or even the use of the weapon; it was spontaneous upon an altercation, but the Court also bore in mind that D had the firearm easily at hand. 37 years was not 'outside the acceptable bracket'[400] it was concluded on appeal. Indeed, given the murder alone would have deserved in excess of 30 years based on Schedule 21, the attempted murder must have

[398] *Bieber* [2009] 1 WLR 223 [55]

[399] [2012] 1 Cr App R (S) 7

[400] *Hassan* [22]

added scarcely to the length of the minimum term. One can only assume the totality principle has enabled this large deviation from what would be a likely sentence under the SGC guideline for sentencing attempted murder. Many might think 37 years in sum was lenient, not least given the culpability required for attempted murder, and the critical injuries suffered by the surviving V. It is for this reason that the case is included in this section on 'bunching', because this sentence is closer to 30 than the Schedule suggests. The knock-on effect of under-sentencing the average para.5 case is that sentences above 30 years become rare, and seem more extreme to a sentencing court than if 30 years was approached as the Schedule instructs. Thus the whole sentencing scale for murders of particularly high seriousness is depressed by the Court of Appeal's interpretation and application of para.5. This would appear to be the Court of Appeal's attempt to close the gap between 15 and 30 year starting points its leader Lord Phillips CJ denounced as 'huge'[401] at the start of this part of the chapter. Paradoxically, another consequence of this is to open up more disparity than already exists between the sentences for murders of particularly of particularly high seriousness and those of exceptionally high seriousness, which receive a tariff the Court of Appeal can't vary by a few years down. *Hassan* itself indicates further research on the operation of the doctrine of totality is called for.

In sum, *Tucker*[402] remains a rare observation that 30 years 'is itself of course a starting point and not a maximum'[403]- even the other para.5 case of the same name four years later was oblivious.[404] The vast majority, despite in theory starting at 30 years and

[401] *Jones* [2006] 2 Cr App R (S) 19 [7]

[402] [2008] 2 Cr App R (S) 27

[403] *Tucker* [2008] 2 Cr App R (S) 27 [18]

[404] *Tucker* [2012] 2 Cr App R (S) 30

having aggravation and mitigation applied from there result in minimum terms below 30 years. This is especially odd when many of the 'stock' factors apply equally to both 15 and 30 year category cases, for example lack of an intention to kill, or premeditation and/or planning. Such factors are by no means inherent to most of the para.5(2) list and thus there is no risk of double counting them contrary to para.8 The upshot is a bunching of offences between 25 and 30 years, including many of the worst para.5 offences which evidently haven't received proper aggravation. This conflation of severity breaches ordinal proportionality by failing to place crimes in their proper ordinal rank.

Paragraph 6- the 15 year starting point

With relief, the same trend is not manifest amongst para.6 cases, viz. those that don't fall into paras.4 or 5 for adults. The Court of Appeal doesn't seem to have undermined this 15 year starting point in same way it has for para.5. Indeed, Parliament's mission to raise the tariff for murders not of particularly high seriousness has arguably been more successful than it has been for those of particularly high seriousness, given the foregoing review.

Exemplifying this best are domestic cases, which rarely fall into para.4 or 5, and where academic commentary from Ashworth noted earlier had criticised the inadequate tariffs often given in this class of case.[405] Yet the vast majority, on appeal at least, had minimum terms of 15 years or above ultimately approved. Although

[405] (n 74) 118-119

regularly referred to by academics[406] explicitly or implicitly as a leading authority on para.6, there is actually little sign of Lord Woolf CJ's dictum in *Sullivan* having had any resonating effect. It is seldom cited in this class of case, let alone 12 years being adopted as the starting point for murders arising out of domestic disputes. This does beg the question of course, why is the 15 year starting point being observed faithfully, and the 30 year starting point not, instead being turned into a "20 years or more"[407] category.

Some sentences may even be questioned as high. The 22 year minimum term upheld by Hallett LJ in *Bristol*[408] is a couple of years longer than most of the worst domestic cases. Facets are underlined which go without mention elsewhere, for instance that D 'kept stabbing even when she [V] was lying on the ground.'[409] This is certainly relevant to D's culpability, but received no particular mention in *Troughton*[410] even though D there continued to hit V over the head once felled to the ground. Moreover, her Ladyship highlights the background of domestic abuse and even though much of it is doubtfully even criminal, it appears to justify this tariff in her eyes, remarking 'a significant uplift was merited by the appellant's conduct on the day and on the days before'[411] the murder. Whilst *Thomas,*[412] where serious domestic abuse was also involved, is probably a little conservative at 17.5 years, other cases with a deplorable

[406] Eg Mitchell (n 2) 57

[407] *Challen* [14]

[408] [2013] 1 Cr App R (S) 81

[409] *Bristol* [15]

[410] [2013] 1 Cr App R (S) 75

[411] *Bristol* [30]

[412] [2010] 1 Cr App R (S) 14

background of domestic abuse, indicate 20 years is more apposite. In *Birks*[413] 19 years was upheld, and the most like precedent, *Attorney General's Reference 23 of 2011,*[414] increased a 15 year minimum term to 20. There the attack was ferocious also, mounted with an intent to kill, was intermittently maintained over 40 minutes despite breaks, evincing especially high culpability, in front of their three year old daughter. V was beaten to a pulp. Although D pleaded guilty, the Court of Appeal dismissed its materiality, rejoining that credit must be earned. Similarly, an attack made with a kitchen knife, including stabs once V was on the floor, and exhibiting an intent to kill, followed by disposal of the body, 'fully justified'[415] the 20 year tariff imposed by the trial judge in *Ahmed*.[416]

All these cases were decided prior to the judgment in *Bristol* being handed down, but there Hallett LJ failed to cite a single precedent- yet still managed to assert what the appropriate range was for such cases. Additionally, D had pleaded guilty in *Bristol*. Hence, in upholding 22 years, Hallett LJ's claim that 'the term, albeit severe, is not beyond any appropriate range for offences in [sic] committed in these circumstances'[417] is difficult to corroborate from close scrutiny of like authorities available at the time. Furthermore, it provokes queries about ordinal proportionality. The para.5A starting point is of course not far away at 25 years.

[413] [2011] 1 Cr App R (S) 48

[414] [2012] 1 Cr App R (S) 45

[415] *Ahmed* [2012] 2 Cr App R (S) 64 [15]

[416] [2012] 2 Cr App R (S) 64

[417] *Bristol* [30]

Zebedee[418] is an example of a substantially mitigated murder that 'should have resulted in a minimum term significantly lower than the starting point under the statute of 15 years.'[419] Elements of provocation and stress, 'powerfully'[420] present, had prompted D to kill his father in a fit of pique. Those features constituted mitigation, as did the fact that D had cared for his 94 year old father who suffered from senile dementia and was a trying patient, and that the crime was not premeditated. Set against this were the aggravating factors that V was vulnerable and D was in a position of trust. Docking four years from the original tariff, the Court of Appeal held 10 years was nonetheless not 'a sentence which would in any way seem to be undermining the jury's verdict',[421] which had rejected any of the partial defences to murder. Consideration of ordinal proportionality, in particular inter-offence ordinal proportionality, is especially welcome. As will be seen in subsequent chapters, there are now sentences being confirmed by the Court of Appeal in this region for voluntary manslaughter on a much more regular basis. Hence, all courts must remain alert to the issues presented by sentencing for other offences. This should not be too difficult as what increases in sentencing levels there have been for other serious crimes of personal violence all hinge on the guidelines for murder: Schedule 21. As one of the lower sentences for domestic murders since Schedule 21, it illustrates vividly the uplift in sentencing levels for this class of mitigated cases compared to what would have been provided for under the old judicial guidelines.

[418] [2013] 1 Cr App R (S) 37

[419] *Zebedee* [26]

[420] *Zebedee* [25]

[421] *Zebedee* [26]

One or two cases involving elderly Ds or more exceptional circumstances bear witness to lower yet minimum terms, and they will be dealt with separately. Importantly, they are rarer, and are distinguished from the typical domestic case involving a young or middle-aged man murdering his female spouse in the heat of a row, often in the matrimonial home. The above cases, corroborated by *Ibe*,[422] *Symmons*,[423] *Singh*,[424] and *Grimes*,[425] all suggest that the para.6 15 year starting point has been robustly applied for domestic cases as much as any other; heartening success for Schedule 21 in comparison to para.5.

Paragraph 7- Under 18s

Those under the age of 18 at the time of commission are sentenced from a 12 year starting point under para.7. No gradations are provided. This has been the fount of recurring difficulties, especially when the offender in question is just above or below the threshold.

Given the lone starting point, 'Schedule 21 has not increased the tariffs in the case of those under 18'[426] the Lord Chief Justice claimed, but 'the remainder of Schedule 21

[422] [2010] 1 Cr App R (S) 72

[423] [2010] 1 Cr App R (S) 68

[424] [2011] 2 Cr App R (S) 19

[425] [2012] 1 Cr App R (S) 87

[426] *Last* [2005] 2 Cr App R (S) 64 [39]

has to be applied in the same way for a person under 18 as it would in the case of an adult'.[427] Given the rest of Schedule 21 still applies, including age as a mitigating factor, when can we say that being 12 or 16 still constitutes mitigation? It is very well for Judge LJ to proclaim: 'The principle is simple. Where the offender's age, as it affects his culpability and the seriousness of the crime justifies it, a substantial, or even a very substantial discount, from the starting point may be appropriate.'[428] But affects his culpability vis-à-vis what? A standard is required given 12 years is the starting point for those under 18, and 15 for those over. Evidently, both cannot be the starting point for 18. None of the authorities to date answer which is, and so I will try and distil an answer.

In this same judgment, Judge LJ opines that a mechanical ladder starting at 12yrs for 18 year olds and ending at 15yrs for 21yr olds is not what Schedule 21 provides[429]- which it does not. But his choice of end points is revealing and seems to underpin his approach to the quandary. Indeed, accepting that 21 is the age of full responsibility given the whole life order is only open to people of it, if 15 years is the starting point for those over 18, there would either have to be aggravation for those over 18 to account for the fact that at 18 people have not yet matured to full responsibility status, or mitigation for those under 21 who have not yet reached full responsibility status. The former is impracticable as it is easier to give a discount for being one of 3 ages, than trying to aggravate ages of 19 and 20 and have to set a new starting point in effect for those of full responsibility at 21. This would leave 12 years, the starting

[427] *Last* [2005] 2 Cr App R (S) 64 [30]

[428] *Peters* [2005] 2 Cr App R (S) 101 [12]

[429] *Peters* [2005] 2 Cr App R (S) 101 [12]

point for 18 year olds, a conveniently modest figure less than the 15 years for full responsibility. This is however an extensive reading between the lines.[430] Yet it would provide a basis for the broader trend of courts to maintain mitigation for offenders almost right up until their 18th birthday from the 12 year starting point.

Sir Igor Judge P provided some indication when he held that a 14 year old's age 'nevertheless remains a feature because he was significantly under 18, and roughly half way between 18 years and the age when criminal responsibility begins.'[431] *Marks,*[432] a 14 year old D was said to be mature for his age and knew what he did was wrong, but the aggravating factors of his broadly "average" murder could not have amounted to much over a year. His minimum term was upheld at 10 years. The phrasing, 'significantly under 18' implies 18 is the reference point. Yet the court in *Malasi*[433] found D's youth at 16½ a mitigating factor,[434] but did display a sensitivity to 'the relative difference'[435] between it and 18. In *Patterson*[436] the Court of Appeal confirmed that D's age of 16¾ was important[437] after the trial judge had asserted this was 'significantly below 18.'[438]

[430] Of *Peters* [2005] 2 Cr App R (S) 101 [10]-[12]

[431] *Attorney-General's Reference 126 of 2006* [2007] 2 Cr App R (S) 59 [38]

[432] [2006] 1 Cr App R (S) 53

[433] [2009] 1 Cr App R (S) 51

[434] *Malasi* [2009] 1 Cr App R (S) 51 [28]

[435] *Malasi* [2009] 1 Cr App R (S) 51 [32]

[436] [2009] 1 Cr App R (S)19

[437] *Patterson* [2009] 1 Cr App R (S) 19 [13]

[438] *Patterson* [2009] 1 Cr App R (S) 19 [6]

Conversely, for offenders just under 18, neither the trial judge nor Court of Appeal suggested any discount was made for their age, indeed bearing in mind that they were close to a different, higher starting point by virtue of their age.[439]

Thus, age seems to be considered a mitigating factor upto the point where the offender is within touching distance of being 18, consistent with the SGC guidelines on youth sentencing which states 'that, generally, a young person will be dealt with less severely than an adult offender, although this distinction diminishes as the offender approaches age 18'.[440] This does however clash with the thinking that where mitigation is granted for those over 18, but still young, weight is being attached to a factor which alone has merited a whole lower starting point already,[441] illustrating the uncertainty that has arisen on this crucial point of age.

It is coupled at the other end of the scale with mitigation being afforded to those over 21, which would contradict the full responsibility at 21 principle which appears a fair inference to draw from Schedule 21. Failure to adopt a coherent approach to this issue, which often has a major impact upon the final minimum term, risks widespread inconsistency given the number of appeals concerning young people convicted of murder.

The approach to those just over the age of 18 is mounted from 2 perspectives: (i) that had the offender been a bit younger, the starting point would be 12 years, and (ii)

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[439] *Attorney-General's References 98 and 99* [2007] 2 Cr App R (S) 19 [21], [25]

[440] SGC, *Overarching principles- sentencing youths: definitive guideline* (SGC 2009) [3.1]

[441] *Attorney-General's Reference 126 of 2006* [2007] 2 Cr App R (S) 59 [38]

drawing on Judge LJ's spectrum of 18-21. These angles are however contradictory. One seeks to consider if the offender was just a bit younger, nearer a lower starting point for those under 18, the other looks to if the offender was a bit older, 21 being the age at which one reaches full responsibility. This perplexity has, it will be shown, prompted contentions of the faintly ridiculous in the search for mitigation on age grounds.

The former rhetoric concerning the lower starting point for those under 18 is exemplified by *Pile and Rossiter*[442] where distance between a 30 year starting point and 12 year starting point depending on potentially just a few months difference in age was confronted. It was held to be 'of the highest materiality that had Pile been seven months younger, and thus under the age of 18 at the time'[443] he would have been sentenced from a 12 year starting point, not 30. However, despite the reference to the 12 year starting point, the authorities of *Jones* and *Peters* 'do not suggest that the Court should treat this as a special factor requiring a specific quantified adjustment to the starting point before the Court proceeds to consider aggravating and mitigating circumstances'.[444] In that case, being 18 by just a few months at the time of the offence was 'a powerful mitigating factor for the reasons explained in *Peters*… and justifies a substantial discount'.[445]

It is illuminating to compare these cases with those where there are co-Ds in close proximity age-wise, yet one above and one below 18, for the same crime. 'This

[442] [2006] 1 Cr App R (S) 131

[443] *Pile and Rossiter* [2006] 1 Cr App R (S) 131 [13]

[444] *Tucker* [2008] 2 Cr App R (S) 27 [16]

[445] *Tucker* [2008] 2 Cr App R (S) 27 [17]

question raises an acute problem for the sentencer'[446] Lord Phillips CJ surmised. The focus on the 12 year starting point was stretched to tenuous lengths in *Taylor*[447] when the court reasoned 'if Taylor had been just two years and five months younger than he was, then the starting point provided by the statutory scheme would have been 12 years for him'.[448] Realistically, at over 20, Taylor was much closer to 21, which is what Schedule 21 implies as being the age of full responsibility.[449] Indeed, in considering the imposition of a whole life order on D in *Mullen*, his age of 21 was dismissed by Sir Igor Judge P of having any mitigating power-[450] which comports with his early sketching of the age structure in *Peters*. However, this is likely because the fellow D in the case was under 18 and so it reminded their Lordships where Parliament had decided to draw the line both in respect of a lower starting point for under 18s, and exposing over 21s to the whole life minimum term. Indeed, the Court was keen to blame any disparity between the two Ds' minimum terms on the terms of the schedule,[451] yet seem here to overlook the discretion invested in them by para.9 and that they could use it, as Lord Phillips CJ advocated, to 'move from each starting point to a position where any disparity between the sentences is no more than a fair reflection of the age difference between the offenders.'[452] One wonders however whether this would result in altering one or both sentence lengths, up from the 12 year starting point or/and down from 30 just to reduce the disparity between the two joint

[446] *Brown and Carty* [2008] 1 Cr App R (S) 28 [27]

[447] [2007] 1 Cr App R (S) 59

[448] *Taylor* [2007] 1 Cr App R (S) 59 [18]

[449] The whole life order is only passable on those over 21 at the time of the offence- for others who fall within the circumstances of para.4(2) but are under 21 the appropriate starting point is 30 years: para.5(2)(h)

[450] *Mullen* [2008] 2 Cr App R (S) 88 [20]

[451] *Taylor* [2007] 1 Cr App R (S) 59 [21]

[452] *Brown and Carty* [2008] 1 Cr App R (S) 28 [27]

defendants in question, from what would have been a just sentence without such an obvious need to avoid disparity between two Ds in the same case. Hence, treating like Ds alike to avoid perceived injustice in the immediate case, but actually resulting in treating like Ds differently when compared to separate cases where there perhaps a sole D.

Things could bode worse. Where Lord Phillips used the para.9 flexibility in *Brown and Carty* this resulted in a minimum term of 20 years for the D just under 18. In a case largely identical on the basic facts, the D convicted after a trial, as the appellants in *Brown and Carty* were, had his minimum term fixed at 19 years, being 17 also.[453] This puts paid to the notion that there is any 'fullest *permissible* extent'[454] to which disparity can be eliminated- it can be, completely, whilst treating like Ds alike across separate cases. Consequently, it underlines the conclusion that though, prima facie, the gap between 12 and 30 years is colossal, shrewd use of the aggravating and mitigating circumstances, including age, and para.9 discretion, enables sentencers to place different murders in their ordinal rank; the gulf just provides a wider spectrum within which to slot cases of varying seriousness than previously.

Furthermore, in ensuring those under 18 are kept in ordinal rank with those above 18, particularly for those murders in the 'particularly high' group, Schedule 21 *has* increased the tariff for those under 18 contrary to the analysis in *Sullivan*, but via the subtle requirements of ordinal proportionality that arise through the restructuring of adult murders. To treat the tariff increases of Schedule 21 as insulated to adults would

[453] *McGarry and Wells* [2007] 2 Cr App R (S) 19

[454] *Taylor* [2007] 1 Cr App R (S) 59 [21] (emphasis added)

be equally artificial as treating such landmark birthdays like 18 and 21 as revolutionising criminal responsibility.[455]

Ordinal proportionality of paragraph 7 cases

As seen in Chapter 1, the House of Lords had insisted on the insertion of para.7 to distinguish youths from adults. The choice of 12 years as the starting point was as crystal clear indication as any that the figure was not to be the benchmark for adults anymore, whatever was claimed in *Sullivan*. It is worth examining therefore the sentencing levels of para.7 cases, in particular where challenges are posed for ordinal proportionality by cases that would fall in para.5 but for D being under 18.

Malasi, mentioned already above, is a chief candidate for scrutiny. The Court of Appeal upheld a 30 year minimum term for a 16 year old D who had murdered two people on separate but temporally proximate occasions. The first was committed with a firearm and in the course of a gang robbery at a Christening service in a church. Had D been 18 the case indubitably would have come within para.5 exhibiting not one but two indicative facets under para.5(2)(b) and para.5(2)(c). For the second murder, D stabbed V with a knife he had taken to the scene, although the killing was itself impulsive. Had he been 18, this murder would surely have been a strongly aggravated para.6 case as D had taken the weapon used to the scene.[456] At first instance the judge determined 24 years for the first murder, and 12 for the second, and combined them to

[455] *Peters* [2005] 2 Cr App R (S) 101 [11]

[456] Para.5A was not in force at the time. Today the murder would prima facie justify a 25 year starting point for an adult.

reach 36 years. Feeling that was excessive in reflecting the overall criminality, he settled on a tariff of 30 years. On appeal, Thomas LJ held the original sentencer's methodology was 'deserving of the highest praise and commendation'[457] and confirmed the minimum term. The Court of Appeal suggested a sentence in the range of 35-40 years would likely be deserved had D been 18, which can only mean that in excess of 40 years would be justified for "full" adults who do not enjoy any discount based on youth.[458]

Although the approach adopted in *Malasi* was again endorsed by the Court of Appeal in *Miah,*[459] the 23 year tariff upheld is distinctly shorter than that in *Malasi*. Owing to the 2 murders and 3 attempted murders for which D was sentenced in *Miah*, this is somewhat unexpected. As was held by the Lord Chief Justice in *Jones*, 'murder as a result of using petrol to set fire to the victim's home falls within'[460] para.5, which should present the same challenge as when an under 18 year old is convicted for a murder that would be classified as a para.5 murder had they been 18. Furthermore, that the murder of two or more persons in itself normally justifies a 30 year starting point according to para.5(2)(f). Neither of those difficulties is adverted to though in the Court of Appeal's judgment in *Miah* which might go some way to explaining the disparity with *Malasi*. Similarly, the same clarity in determining a minimum term for each of the murders, then adjusting for totality, lauded in *Malasi* is sorely lacking in *Miah*. Then there is the additional complicating element that there were three attempted murders to account for. On the other hand, D was a mere 14 at the time he

[457] *Malasi* [2009] 1 Cr App R (S) 51 [31]

[458] The precise contours of that discount for adults who are still considered young are explored below.

[459] [2012] 1 Cr App R (S) 11

[460] *Jones* [2006] 2 19 [61]

perpetrated these offences. Admittedly, the two cases do not sit easily together. The seriousness of the offending in *Miah* must be appreciably greater than that in *Malasi*, and even if the entirety of that difference were compensated for the 2 years younger Miah was, it does not explain a 7 year deficit in the final minimum term.

The sentence in *Miah* also appears low when approached from the reverse angle. Other comparatively bad cases see sentences in the high teens. 15 years with the benefit of a full guilty plea discount (18 years after a trial) was upheld in *Hylton*[461] for a planned, premeditated 'attack of horrifying and merciless ferocity'[462] with a knife. The judge at the Crown Court had the benefit of *Kika*, but it's likely that in the wake of the subsequent para.5A, which would apply to an adult on the same facts, sterner tariffs yet could be fixed in such culpable cases. D was 17 though, so older than the appellant in *Miah*, as was D in *Matthews*[463] where a minimum term equating to 21 years was affirmed for a vicious, sustained, frenzied assault on V in her own home as D tried to escape with V's belongings he had robbed. This Court of Appeal decision was particularly rigorous and cogent, entailing discussion of like authority to ascertain a suitable proportionate tariff. Once again, though *Miah* was three years younger, we have a minimum term for a single murder that would fall within para.5 had D been 18, and the sentence is a mere two years less than the 5 convictions for an intent to kill, including two deaths, exhibited in *Miah*.

[461] [2010] 2 Cr App R (S) 29

[462] *Hylton* [14]

[463] [2011] 1 Cr App R (S) 88

Paragraph 5A, the relevance of which to determining minimum terms under para.7 was confirmed by the Court of Appeal in *Moore*, should see higher minimum terms for murders committed by under 18s in circumstances where para.5A would apply had they been 18 or above. Subsequent decisions have been disappointing though. 14 years was upheld for a murderous stabbing in *McLeod*,[464] but in declaring the minimum term 'entirely appropriate',[465] the Court of Appeal made no mention of para.5A. Possibly an explanation for this lies in the fact that an accomplice took the knife to the scene, not D, which undermines the central plank of the heightened culpability behind para.5A, but to take the perspective that it was a mitigating factor that D did not have the weapon in his possession long[466] is feeble at best, especially if the analysis was not taking account of para.5A's potential relevance. D was nearly 16 at the time of the killing, yet D who was 15 as well in *Attorney-General's Reference 25 of 2012*[467] was even more fortuitous. As with *McLeod*, it was not certain that D had taken the knife to the scene himself, even though he had been found in possession of bladed articles before and used them to threaten others. Consequently, the trial judge approached the matter as if the starting point would have been 15 rather than 25 years had D been an adult. His 10.5 year minimum term based on a spontaneous single wounding lacking an intent to kill was increased to 12 years. Hallett LJ noted D's previous convictions for violence, experience of knives and their harmfulness, and even suggested Schedule 21 was too lenient in the circumstances- a first for the Court of Appeal. She commented: 'we understand that it may seem to Mr Grisales' [V's] family that the result is unfair. However, we hope that they understand the sentencing

[464] [2013] 1 Cr App R (S) 78

[465] *McLeod* [13]

[466] *McLeod* [10]

[467] [2013] 1 Cr App R (S) 124

regime which we are bound to apply.'[468] Surely that does, though, entail reference to precedents, which Hallett LJ omitted, once again, to make any mention of whatsoever. Pre-para.5A authorities such as *Yemoh*[469] where 13 years was determined commensurate with a joint enterprise knife attack by 13 and 16 year old appellants on a fellow youth, and *AM*[470] where 14 years was upheld for a fatal stabbing by a 17 year old D- both of which would surely now merit more due to para.5A- indicate that the raised 12 year tariff remained fairly generous. Even where a knife was not used, as in *Swellings and Sorton*,[471] a 13 year minimum term was approved for a 16 year old participant in a group attack. The shortcomings relating to the citation of like cases yet again remind us why the doctrine of precedent is the bedrock of the common law's sense of justice. If there aren't good reasons to justify the difference in treatment, why does the fact that a sentencing court is exercising a discretionary power justify disparity?

Age as a mitigating factor outside of paragraph 7

The issue is sometimes bound up with that of maturity, since people mature at different ages throughout childhood and adolescence. 'In many instances, the maturity of the offender will be at least as important as the chronological age'[472] the SGC declare in the first paragraph addressing the 'Overarching Principles' for sentencing

[468] *Hylton* [34]

[469] [2010] 1 Cr App R (S) 97

[470] *M, AM, and Kika* [2010] 2 Cr App R (S) 19

[471] [2009] 2 Cr App R (S) 30

[472] SGC, *Overarching principles: sentencing youths* (SGC 2009) [2.2]

youths their guidelines lay down. It's not surprising therefore to see that in cases such as *Holmes*[473] D's poor upbringing and bad temper both seemed to be factors the Court used to assess D's (lack of) maturity for his age of 20. In these instances, D may receive more or less mitigation than would be given for a person of 'normal' maturity for the age in question. Accordingly, the evaportation in credit for youthfulness as D approaches 18 that the SGC envisage is 'subject to an assessment of maturity and criminal sophistication.'[474]

Perhaps because everyone does not ascend to full maturity at the stroke of midnight on their 18th birthday, confusion persists as to whether those over 21 still have their age considered a mitigating factor. That they frequently do would appear to contravene Schedule 21's approach to the age at which full responsibility, and thus any discount relating to culpability can be said to be valid. In another Attorney General's Reference, the Court of Appeal found the 'youth' of the appellants, 21 and 23 at relevant time, to have 'constituted significant mitigation'[475] on the grounds of *Peters*. If anything, the remarks in *Peters* assumed that 21 was the age of full criminal responsibility, thus negating any mitigation on grounds of age-related culpability for these appellants. 23 was again considered sufficiently youthful to mitigate D's culpability in *Irinel.*[476] But it doesn't stop there. In *Sykes*[477] the Court considered D's age at 25 to be a mitigating factor, and in *Sharp*[478] D's 'relatively young age'[479] of 26

[473] [2011] 1 Cr App R (S) 19

[474] (n 472) [3.1]

[475] *Attorney-General's References 7 and 8 of 2006* [2006] 2 Cr App R (S) 112 [28]

[476] [2009] 2 Cr App R (S) 27

[477] [2009] 2 Cr App R (S) 37

[478] [2009] 2 Cr App R (S) 86

amounted to mitigation. That appears to be the high watermark. Clearly the Court considered whether 27 was young enough to mitigate D's culpability in *Ibe,*[480] but observed that he was not 'just out of adolescence'[481] and had been through other important life course events such as having responsible jobs and getting married.

Besides 26 being some way off 21 which appears to be the age of maturity implied by the Schedule, there is variation in the Court of Appeal's approach as to how old is too old to benefit from any mitigation for youthfulness. Whilst 25 and 26 did in *Sykes* and *Sharpe* respectively above, other Ds of similar age failed to receive any credit by virtue of their age.[482]

AGGRAVATION AND MITIGATION

Paragraph 8: 'Having chosen a starting point, the court should take into account any aggravating or mitigating factors, to the extent that it has not allowed for them in its choice of starting point'

As von Hirsch appreciated, 'aggravation and mitigation are matters of great importance in the determination of sentence. Such factors may substantially affect the severity of the sentence and raise complex ethical and practical questions.'[483] That is

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[479] *Sharp* [15]

[480] [2010] 1 Cr App R (S) 72

[481] *Ibe* [20]

[482] In *Brady and Paton*, the age of Paton, 25, was not mentioned anywhere as being a mitigating factor.

[483] (n 166) xiii

no less true for the sentencing of murder as para.8 indicates: it is via these aggravating or mitigating circumstances that the final minimum term is reached.[484] As such, they are incredibly important. Schedule 21 was the first time a list of aggravating and mitigating factors had been adopted in English sentencing guidelines, before even the SGC did so in 2004.[485] However, no guidance was given as to any principle or criteria that should be used in 'the proper identification of those factors going in aggravation or mitigation'.[486] Even for those factors listed in paras.10 and 11 of Schedule 21 and addressed in Chapter 1, there is much ambiguity. 'Sentencing theorists and scholars have, if anything, been still more neglectful of the subject',[487] and Ashworth laments how 'the concepts of aggravation and mitigation have tended to attract little close examination or theoretical discussion',[488] so this thesis shall ensure aggravating and mitigating factors are thoroughly explored as they deserve to be, given the impact on fixing the tariff they have. First the operation and application of those listed in paras 10 and 11 will be scrutinised, then that of aggravating and mitigating factors not expressly stated in Schedule 21.

Aggravating factors under paragraph 10

Paragraph 10(a) a significant degree of planning or premeditation

[484] Para.9

[485] Cf. (n 166) xiii

[486] *Reid* [2005] 2 Cr App R (S) 12 [17]

[487] (n 166) xiii

[488] (n 128) 156

As one of the oldest and most fundamental aggravating factors going to culpability the Courts have decided little of original interest in respect of how this paragraph is approached. There remain though unexpected factual findings, or as covered later, innovative approaches to individual cases which are always of wider relevance in a legal system predicated on the doctrine of precedence.

An example of the former is *Donnison* where preparations which began for the murders 24 hours before they were committed, resulted in the finding that the homicides were not premeditated. The term has no meaning if D purchasing large quantities of sleeping pills the evening before, and morning of, the day of the murder which itself took place in the evening, does not constitute premeditation. She used the sleeping pills to render Vs unconscious so she could more easily smother them. This inexplicable stance compares with *Connor and Paton* where the idea to rob someone occurred spontaneously whilst out, the plan as executed was formulated on the spur of the moment in the early hours of the morning, utilising things close to hand, yet was viewed as planned and premeditated, even though it all took place much closer temporally to the killing itself than in *Donnison*. Mitchell queried 'how much deliberation is necessary to constitute *planning or premeditation*?'[489] The answer would appear to be: it's flexible. One suspects the reason that the courts were at pains to treat the murders in *Donnison* as unplanned is that, had they been planned, because there was two Vs, both children, the case would then have fallen within para.4(2)(a)(i)- meriting a whole life starting point. If that is true, it only supplies further evidence the courts are ignoring the terms of Schedule 21 when it suits them,

[489] Mitchell (n 2) 59

tending to be towards the range of sentences where Schedule 21's biggest increases should be felt.

Para.10(b) the fact that the victim was particularly vulnerable because of age or disability

When V is a baby, it is hard to imagine a more vulnerable person. Yet sentences rarely seem to reflect this, often being below the 15 year starting point. Usually a lack of planning or premeditation is a feature, which mitigates according to para.11(b). But should para.10(b) not be seen as a particularly serious aggravating factor in this context, not merely for how utterly defenceless a baby is compared to even a 10 year old who may be able to run away, but because of the extent of life deprived? The harsh reality is that a baby has not even seen a glimpse of life if they are killed, and though it must be stressed no life is worth more than another, surely robbing someone of the overwhelming majority of their life is even graver harm than killing someone who has at least lived a decent part of their natural life? A nod in this direction is offered by the judgment in *Essilfie*[490] noting the loss of a 'young life' and that nothing will 'bring back the dead child',[491] but one must wonder what impact on the sentence this actually had. With the benefit of a tardy guilty plea, 15 years was substituted for 13 by the Court of Appeal. How does this sentence reflect the serious aggravating factor that V was a helpless baby with its entire life ahead, ended before it was even cognizant? It is notably under the starting point and without the guilty plea would have probably been on it. If V had been a 10 year old child or an elderly pensioner,

[490] [2009] 2 Cr App R (S) 11

[491] *Essilfie* [14]

how would that lesser aggravating factor have been reflected, given the murder in *Essilfie* was of a baby? We get an idea from *Donnison,*[492] where D asphyxiated her two children to spite her husband. Being a murder of two people, the starting point was 30 years as per para.5(2)(f). Lord Judge CJ in dismissing the appeal against the 32 year minimum term opined that it was 'unreal' to expect any major reduction 'given the terms of the Schedule'.[493] Two years thus represents the aggravating factor of 'the two young, defenceless children'[494] being vulnerable, and the 'grotesque breach of trust'[495] committed by D, their mother. In fairness some of the aggravation must have been offset by the limited mitigation, which somehow included lack of premeditation as addressed above. One can only hope the quantum of credit granted for the 'lack of premeditation' was less generous than the finding itself. If that is the case though, it confirms that the aggravation for para.10.(b) and para.10.(c) was paltry.

One doesn't have to squint so hard when it comes to elderly Vs though. Much time was invested earlier in demonstrating the parsimonious minimum terms for many para.5 cases, especially those which fell into para.5(2)(c). *Young,*[496] where V was 89, was one of the handful of cases identified as actually being a para.5 case *and* where the Court of Appeal approved a proportionate sentence after a trial in excess of 30 years. The fact V was old appears to be the main difference between *Young* and other murders for gain entailing gross brutality, such as *Jones* (27 years).

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[492] [2013] 1 Cr App R (S) 39

[493] *Donnison* [38]

[494] *Donnison* [37]

[495] *Donnison* [37]

[496] [2012] 1 Cr App R (S) 103

Zebedee,[497] where the Court of Appeal cut D's minimum tariff by 4 years to a decade, does not invalidate this analysis as it was a case replete with genuine, heavy mitigation, large elements of which undermined or redressed the aggravation supplied by V's frailty. V was suffering from senile dementia and was incredibly trying to care for, and had provoked V, albeit in a non-legally sufficient way, to lose control. This is in stark contrast to the wholly innocent elderly victims of gratuitous violence inflicted in the course of premeditated burglaries and robberies.

Para.10(c) mental or physical suffering inflicted on the victim before death

This is an important aggravating factor for the purposes of this thesis since it deals with harm rather than culpability. It has regularly been referred to, especially when torture has been involved, grotesque mutilations,[498] or something of a chase or pursuit as V tries to escape,[499] but perhaps the Court should be more willing and open to identify it in any case where D does not die instantly,[500] and is injured whilst conscious. This would encompass therefore most deaths arising out of everything from beatings and other bodily assaults to stabbings like *Healy*[501] or *Grimes*,[502] where the Court of Appeal explicitly stated the only aggravating factor to be disposal of the body, despite V being stabbed 19 times. It is incomprehensible that someone stabbed

[497] [2013] 1 Cr App R (S) 37

[498] *Ghafelipour* [2011] 2 Cr App R (S) 48

[499] *Bristol* [28]

[500] Suffering endured in murder by poisoning noted as aggravating factor in *Singh* [2011] 2 Cr App R (S) 19

[501] Minimum term reduced to 20 years even though it was a para.5(2)(c) case and the killing was with a knife.

[502] [2012] 1 Cr App R (S) 87

19 times and who died from those wounds did not endure substantial mental or physical suffering, to say the least. *Swellings and Sorton*[503] or *Ibe*[504] concern batterings where, again, great pain must have been suffered by Vs as the injuries were inflicted, and continued until they died from those injuries.

Perhaps the most profound employment of para.10(c) though has been in conjunction with para.10(b) and 10(d) to cover domestic abuse. In *Thomas*[505] the Court of Appeal held that the trial judge was entitled to assess the seriousness of the present offence in view of the background, in this instance sustained domestic abuse, both prior to and immediately before the murder. That was established at common law and 'mandated by s.172(1) of the Act and consistent with a proper reading of paras.10(b) and 10(c) of the Schedule.'[506] The Court of Appeal pronounced that 'prolonged, abusive domestic violence which leads to death must always result in condign punishment'[507] and upheld the 17.5 year tariff. A minimum term of 20 years though would hardly have seemed excessive given the horrendous, merciless brutality evinced during the killing.

One assumes their Lordships are contending that V would be vulnerable in the sense of a disability if she was suffering from say battered woman syndrome by referring to para.10(b) in conjunction with para.10(c). There may be occasions when this is apposite, but most domestic cases, viz. those between spouses or partners, will not

[503] [2009] 2 Cr App R (S) 30

[504] [2010] 1 Cr App R (S) 72

[505] [2010] 1 Cr App R (S) 14

[506] *Thomas* [21]

[507] *Thomas* [26]

feature a victim who 'was particularly vulnerable because of age or disability' in that a clinical diagnosis could be made equating their mental fragility to a mental disorder.

Rather, what can be said of most couples, especially those who co-habit, is that due to the close proximity shared by them and that lives are often lived as a joint enterprise, privileging access to intimate or otherwise private settings, a position of trust is held by each towards the other. That trust is betrayed when one abuses it to attack (and kill) the other. Thus twenty years might have been reached had the Court of Appeal considered para.10(d) also to be applicable, as it has when hearing other appeals concerning domestic murders.

Para.10(d) the abuse of a position of trust

Indeed such a sentence was reached in another domestic case, without acknowledgment of any breach of trust, upon the intervention of the Attorney General.[508] Similarly, 20 years was confirmed by the Court of Appeal in *Ahmed.*[509] One of the aggravating factors identified on this occasion was that 'the killing was carried out in the family home'.[510] Evidently, this is not synonymous with para.10(d), but it certainly overlaps to the degree that this would only be an aggravating factor because it is a place where family members would reasonably expect to be safe, and trust one another to live peacefully together under the same roof, and this expectation was betrayed by of all people, another familial inhabitant of the home.

[508] *Attorney-General's Reference 23 of 2011* [2012] 1 Cr App R (S) 45

[509] [2012] 2 Cr App R (S) 64

[510] *Ahmed* [15]

It was expressly referred to in *Zebedee*,[511] though as V's carer, the point could be independently made which weakens any particular link to the domestic facet of spouse on spouse killings. For example, a nurse looking after a patient would hold such a position of trust in their role caring for V. Likewise, the fact that in *Donnison* 'the two young, defenceless children were in the appellant's care'[512] meant their mother's asphyxiation of the pair represented a 'grotesque breach of trust'[513] is also justifiable on the basis that they were dependants of V; she was their carer, and a carer need not have a domestic relationship to a victim. Interpreting para.10(d) to apply to spouses and other partners would be a rational, coherent, legally sound basis on which to treat domestic cases as more serious than say homicides between strangers, and when allied with para.10(c), murders committed against a backdrop of regular domestic violence, more serious further still. Whilst the Court of Appeal appear to have latched onto the latter, the former was rejected by the appellate panel in *Tucker*.[514] Criticism has already been levelled at this decision earlier though, and on this point it is at odds with the implications made in *Irinel*. There the Court of Appeal found the trial judge had given 'undue weight'[515] to the 'friendship' between the two: D and V had met by chance in a bar and

> spent the previous night together; otherwise they were not associated. The victim was not, for example, in a relationship with the first appellant of patient and

[511] [2013] 1 Cr App R (S) 37 [15]

[512] *Donnison* [37]

[513] *Donnison* [37]

[514] [2012] 2 Cr App R (S) 30 [37]

[515] *Irinel* [14], [16]

> doctor, or pupil and teacher. Thus such breach of trust as there was in our judgment was for those reasons overemphasised.[516]

Consequently, we can distil the following: that there was a breach of trust, but that it was not 'the grossest imaginable breach of trust'.[517] Ergo, close friendship could give rise to more serious breaches of trust than that committed here, and presumably, a long-term romantic relationship, greater still. Some may well consider breaches of trust committed by one party to such a relationship to be even greater than the professional examples stated by the Court of Appeal, and most at least on a par. Refusing to recognise the breach of trust when one spouse blasts the other in the back with a shotgun when the latter is laying in the bath seems almost farcical in isolation. When compared to reasoning that identifies a breach of trust arising out of a one-night stand, it becomes plain wrong. That aspect, united with the attempts to distance the case from para.5(2)(b), undermine some of the most noble motivations behind Schedule 21 by devaluing murders with firearms *because* they are in a domestic context as opposed to a gang context, and then going on to devalue the lives of those lost in the domestic context anyhow. Overall the message the judgment sends out about the seriousness of domestic murders is retrograde.

What these developments do illustrate however is Schedule 21's form and structure promote the taking seriously of domestic murders, and can be deployed in conjunction with other fairly contemporaneous sentencing reforms enacted or facilitated by Parliament, to recognise the full gravity of murders committed in domestic circumstances. The references to breach of trust in a domestic context should not be

[516] *Irinel* [14]

[517] *Irinel* [10]

limited to that of carers like those in *Zebedee* and *Donnison*, but encompass also the betrayal of trust by partners that was hinted at by *Ahmed*. A clear position on the spectrum of positions of trust should be developed for spouses and other couples, both co-habiting and otherwise, which can enable the gravity of domestic killings to be fully appreciated, alongside whatever mitigating features there are.

Para.10(e) the use of duress or threats against another person to facilitate the commission of the offence

Rarely encountered in the reported cases, though the principle behind it is reflected in many sentences having drastically higher minimum terms for ringleaders and protagonists.[518]

Para.10(f) the fact that the victim was providing a public service or performing a public duty

Murders of police officers originally fell under para.5, but have now been promoted into para.4. As to this particular aggravating factor, it would seem there has been scant occasion to it in the Court of Appeal.[519]

[518] Eg, *Watt* [2012] 1 Cr App R (S) 31, *Nicholls* [2011] 1 Cr App R (S) 67

[519] Reference to it can be found though in some Crown Court sentencing remarks, such as those in *Cornick*, the notorious case of a school pupil murdering his teacher in the classroom. <https://www.judiciary.gov.uk/wp-content/uploads/2014/11/r-v-cornick.pdf> accessed 9/8/15, 14-15

Para.10(g) concealment, destruction or dismemberment of the body

Unlike some of the other statutory aggravating factors under the Schedule, this is fairly commonly encountered. In *Ahmed*, a domestic case, it was described by the Court of Appeal as 'the most serious of the aggravating factors'[520] present. *Ghafelipour*[521] was a thankfully rare incidence of what might be considered 'destruction' of V's body. D mutilated the corpse in various grotesque ways, including the removal of one of V's eyes from its socket. This, along with other aggravating factors such as the ferocity of the attack (V was stabbed 130 times) and the suffering V would have endured in the course of the onslaught, saw a 23 year minimum term fixed from a 15 year starting point upheld on appeal. Arguably the sentence is on the lenient side, not least with the introduction of para.5A, which would have applied here since D took the knife with him to V's house where the brutality unfolded. Further, it demonstrates the wayward tack of some of the earlier cases, such as *Arshad*.[522]

In *Griffiths*[523] it was held the efficient dismemberment and disposal of V's body was equal in weight to the solitary mitigating factor off the 30 year starting point, and so amended the minimum term to 30 years. This gives a rough idea of the relative force of leading aggravating and mitigating factors under the Schedule. As macabre as dismemberment and disposal of the body is, equating it to the difference between an intent to kill and an intent to cause GBH, affords it very great weight indeed.

[520] *Ahmed* [15]

[521] [2011] 2 Cr App R (S) 48

[522] [2006] 1 Cr App R (S) 65

[523] [2013] 2 Cr App R (S) 48

Mitigating factors under paragraph 11

Para.11(a) an intention to cause serious bodily harm rather than to kill

Frequently encountered prior to Schedule 21, the Courts tend to view this as a continuum. *Attorney-General's Reference 23 of 2011*[524] exemplifies this attitude, appearing less concerned with the niceties of Parliamentary intention, contending:

> 'We can detect no mitigation, and therefore no allowance should be made, or should have been made, for the "lack of intent to kill". Certainly the offender's intention was not confined to an intention to do grievous bodily harm. It went far beyond that.'[525]

A recklessness towards death might be considered to exceed an intention to cause GBH in some circumstances. Nonetheless, as the trial judge recognised it is not an intention to kill, and the only possible alternative is an intent to cause GBH 'rather' than death as the language of para.11(a) indicates.

Whether the Court of Appeal have been consistent in finding para.11(a) applies is only half the equation though. It was accepted in *Peters* that Schedule 21 stated listed factors 'may' act in aggravation or mitigation, and circumstances were outlined where it would be appropriate not to give a discount for lack of an intention to kill.[526] In the case of *King*,[527] following a quarrel with V, D armed

[524] [2012] 1 Cr App R (S) 45

[525] *A-G's Reference 23 of 2011* [27]

[526] *Peters* [2005] 2 Cr App R (S) 101 [16]

himself with a knife and a screwdriver, and used the former to stab V once, deeply and mortally. The court found a lack of an intention to kill, and stated '[t]his plainly is a matter that we can and should take into account'[528] due its status as a mitigating factor under para.11. The same was said of the lack of premeditation, and despite suffering endured by V and the arming of the knife amounting to aggravating factors, the minimum term was reduced from the starting point of 15 to 12 years. Yet in *Blue*[529] it was held that 'in the case of a stabbing injury to the chest, penetrating the heart, intent to cause grievous bodily harm rather than to kill would carry little weight when the injury was inflicted with such a weapon.'[530] The facts of *Blue* mirror those of *King* in a number of basic and so important ways. Thus, the factor was found to exist in similar sets of circumstances, yet bestowed varying quantities of mitigation. This appears to breach the "treat like cases alike" tenet.

Para.10(b) lack of premeditation

In *Khaleel* Lord Judge CJ applied this provision and discount was granted off the 30 year starting point accordingly. However mitigation is not always granted in respect of a lack of premeditation, and this especially appears to be the case when the para.6 15 year starting point has been used, rather than the higher para.5 starting point. Excuses are found to obfuscate the lack of premeditation. In *Swellings and Sorton*,[531] as appalling as the violence used was, manifesting no shortage of aggravating factors

[527] [2006] 1 Cr App R (S) 121

[528] *King* [2006] 1 Cr App R (S) 121 [11]

[529] [2009] 1 Cr App R (S) 2

[530] *Blue* [2009] 1 Cr App R (S) 2 [19]

[531] [2009] 2 Cr App R (S) 30

itself, it was spontaneous upon V remonstrating with Ds to stop damaging his property. Yet the Court of Appeal in no way dissented from the trial judge's analysis that the violence was premeditated 'in the ordinary sense... since the appellants had already been involved as a group in other incidents of street violence earlier that evening, it could not be regarded as wholly out of character.[532] With respect, that appears to be a non sequitur. The fact that Ds had previously, even earlier the same evening, been involved in separate bouts of violence, doesn't make the murderous violence premeditated.

Other para.6 cases such as *Holmes*[533] identify lack of premeditation, and youth, as mitigating factors, yet settle on minimum terms above the 15 year starting point. Although the attack there was horrendous and sustained, what weight the mitigating factors were given is open to question. As with *Birks*,[534] where the killing occurred on the spur of the moment, and a minimum term of 20 years after a trial was sanctioned, classic mitigating factors such as lack of premeditation, are at risk of being undervalued.

Tension is perhaps being created by the fact that Schedule 21 attempts to have it both ways on premeditation. Where it exists, it is an aggravating factor (para.10(a)), where it does not, it's a mitigating factor (para.11(b)). Ergo, it must always result in movement up or down from the starting point. This tends to run counter to the norm of either being a component of a starting point, or a variant to it. For example, an

[532] *Swellings and Sorton* [55]

[533] [2011] 1 Cr App R (S) 19

[534] [2011] 1 Cr App R (S) 48

intention to cause GBH is a mitigating factor, but an intention to kill is not an aggravating factor; it is therefore assumed to be part of the default factual matrix for all murders.

Para.10(c) the fact that the offender suffered from any mental disorder or mental disability which...lowered his degree of culpability

Though the much-publicised case of *Inglis*[535] will be dealt with beneath vis-a-vis para.11(f) also, D's depressive illness was a noteworthy mitigating factor besides what was referred to as provocation. By depleting the tariff deeper into single figures, the role of this culpability-related feature, not sufficient to amount to diminished responsibility, comprised a major chunk of the discount from the starting point. A substantial discount was also applied in *Attorney General's Reference 116 of 2009* where the Court of Appeal declined to interfere with mitigation worth 6 years for D's depressive illness.

Inconsistency has been no stranger to the application of this subparagraph either. In *Donnison* the trial judge '*assumed* that she [D] had been suffering from mild depression at the relevant time',[536] but the Court of Appeal opined that this was a gesture of generosity. Conversely, in *Stapleton*, one of the co-joined appeals reported under the name of *Oakes,*[537] the Lord Chief Justice upheld a tariff of 30 years where

[535] [2011] 2 Cr App R (S) 13

[536] [2013] 1 Cr App R (S) 39, [35] emphasis added

[537] [2013] 2 Cr App R (S) 22

the trial judge had found the personality disorder D laboured under did not mitigate his culpability.[538]

Para.10(d) the fact that the offender was provoked (for example, by prolonged stress)

Articulated discretely from para.11(b), when synthesised in the case of say a spontaneous killing upon provocation insufficient for the new loss of control partial defence,[539] it should provide double-barrelled mitigation. That is of course likely to be a larger tranche of cases than prior to the Coroners and Justice Act 2009 (CJA09) as the new loss of control partial defence is drastically narrower than its predecessor. However, that blend was not present in *Heywood* where D armed himself with a weapon and headed round to V's place of work to attack him. Indubitably that was a premeditated, even planned attack, albeit one arising out of provocation. Yet the Court of Appeal trimmed D's 11 year sentence further still from the 15 year starting point, to 9 years. Bearing in mind that going armed with a weapon would now merit a 25 year starting point, and even though this murder occurred before para.5A came into force, it still enhances D's blameworthiness substantially. Para.11(d) must therefore have had a hefty mitigatory impact, even when in tandem with D's veteran age.

Lord Judge CJ addressed the effect of para.11(d) in the wake of the reforms made to the law by the CJA09 in *Attorney General's Reference 23 of 2011.* What he said

[538] *Oakes* [56]

[539] Coroners and Justice Act 2009, s.54

merits elucidation. The Lord Chief Justice stressed that distinctions relevant to substantive criminal liability may not apply in the same way at sentencing. Hence,

> even if not amounting to a defence of provocation, provocation may provide relevant mitigation to murder. That accords not only with common sense, it reflects the sentencing principle which allows for mitigation when the same material could not constitute a defence as, for example, provocation in the context of attempted murder or provocation in the context of causing grievous bodily harm. The circumstances in which provocation may serve to provide mitigation for an offence of murder are not closed as a result of s.55 of the 2009 Act.[540]

Subsequently he stressed that there was no provocation in that particular case. Because V was D's 'former partner',[541] this would explain why V's sexual activity with men other than D was not sexual *infidelity*, which Lord Judge CJ intimates can amount to provocation for the purposes of para.11(d).[542] *Heywood* appears to reflect that ruling in practice, as does *Tucker* and *Birks*, both where V taunted D over their cuckoldry. However, the impact of that provocation appears, by the minimum terms, to have played an enormous role in the former pair of cases compared to the latter. Minimum terms in the region of a third lower than the starting point were approved in *Heywood* and *Tucker*, from 15 and 30 year starting points respectively, but a third longer in *Birks*. Scrutiny of *Tucker* above, and *Heywood* below, both suggest these decisions are overly generous towards D's calculated, premeditated vengeance, and ungenerous regarding Birks' loss of temper.

[540] *A-G's Reference 23 of 2011* [32]

[541] *A-G's Reference 23 of 2011* [4]

[542] Sexual infidelity cannot in and of itself, be the basis of a qualifying trigger for a loss of control in order to establish the partial defence to murder of the same name: CJA09, s.55(6)(c)

Zebedee also concerns a loss of temper and reminds us that provocation can take forms other than sexual infidelity. There was however some discernible mitigation credited in *Zebedee* where the minimum term varied by the Court of Appeal constituted a third off the starting point, with the opposite result in *Birks*.

Para.10(f) a belief by the offender that the murder was an act of mercy

Inglis[543] is the only reported case covering such a scenario. Of greatest import is the assertion by Lord Judge CJ that a mercy killing by definition involves a number of aggravating factors, specifically at least paras.10(a), (b), and (d). If these are taken account of then para.11(f) becomes meaningless it was held, so they should be disregarded. Firstly, not all mercy killings need be planned or premeditated. The urge may come over someone suddenly confronted with a disturbing sight of, or gloomy prognosis for, a loved one . Furthermore, ignoring the aggravating factors outright, rather than weighing them against the mitigating factor, potentially goes too far. We do not normally say that we must disregard an aggravating factor because it would mean, when balanced against mitigating factors, there was no depreciation from the starting point (or indeed vice versa). So why is this any exception? It is submitted that Lord Judge CJ's argument is predicated on a misconstruction of para.11(f). The provision does not say that a "mercy killing" is normally a less serious murder than other murders, in conceptually the same way that para.4, 5, or 5A says that certain other factual scenarios are normally of heightened seriousness. Those paragraphs suggest a holistic view has been taken of such cases and the judgment reached that usually, these cases in themselves possess a surfeit of such serious aggravating factors as to render the murder more serious at first glance than others. However, they may

[543] [2011] 2 Cr App R (S) 13

not always be so in any particular instance. What Lord Judge CJ's rhetoric does is to place para.11(f) on a pedestal above all other aggravating and mitigating factors as if it were a distinct category of seriousness itself. Furthermore, it implies a conclusiveness to the seriousness of mercy killings that is irrebuttable, in a way that even for the paragraphs representing heightened categories of seriousness ('particularly high', 'exceptionally high', etc) is not true.

Not only does the form and format of para.11(f) suggest it is but one mitigating factor to be considered alongside other facets pertaining to seriousness, as indeed Lord Judge CJ seems happy to treat it when in conjunction with other *mitigating* factors, but the wording too. Speaking only of 'a belief by the offender that the murder was an act of mercy', it narrowly confines the mitigatory force to that aspect of the killing. As the then Lord Chief Justice's dictum details, mercy killings are highly culpable for a litany of reasons. Surely D's motivation is but one factor to take into account, alongside the other factors that make mercy killings wrong in law beyond the ways D thinks they are justified? Lord Judge CJ paid lip service to all these aspects, such as the selfishness of such an action, prioritising only D's feelings on V's plight above anyone else's, including V's, before then vitiating any meaning they might have as far as the seriousness of the offence is concerned by reducing the minimum term to something so negligible nobody can be left in any doubt that the law is saying: these murders are much less serious than any others. If Parliament had intended that outcome, surely it would have created a separate category for mercy killings, a para.(n), 'murders of particularly low seriousness' as it did for murders of high seriousness. The reality is that under Schedule 21 a murder perpetrated in the misguided belief of D that it is an act of mercy may well often deserve significant

uplift from the starting point, before any mitigation for para.11(f) and other para.11 factors are applied.

Para.10(g) the age of the offender

Bountiful benches of mature years have viewed old age particularly sympathetically. In so doing, the dictum in *Symmons*[544] where D was 62 that, 'age...cannot be determinative of the finishing point; it is but one factor to be borne in mind as part of the sentencing process'[545] has been overlooked. The 16 year tariff upheld by the Court of Appeal there looks robust when compared to those in *Heywood* and *Troughton*. What's more, both of those cases were hardly at the bottom of the spectrum. *Heywood* has been referred to already, but requires closer inspection at this juncture. D was 69, under great emotional strain, and provoked (in a non-legally sufficient way) to go armed with an iron bar to V's workplace and attack V, upon hearing that V (a stranger) was sexually involved with his partner. Satisfied there was no intention to kill, this was a mitigating factor. The Court of Appeal trimmed the 11 year minimum term down into single figures by substituting a term of 9 years. It is understandable that D's age would impinge on the sentence here as someone in their seventies is likely to find prison more challenging than a younger person.[546] However, nor was D an octogenarian and frail. These mitigating features are at least compensated for by the aggravating factors which appeared to be neglected in the assessment of seriousness. Easily the most problematic trait is that D armed himself with a weapon and took it to the scene of the crime, intending to use it to cause GBH. That attribute

[544] [2010] 1 Cr App R (S) 68

[545] *Symmons* [21]

[546] *Symmons* [21]

alone now justifies a 25 year starting point under para.5A, and even though that was not in force at the time, it still magnifies D's culpability under classic principles. Furthermore, D wore a mask, exemplifying planning and premeditation, and an attempt to pervert the course of justice by successfully eluding capture for his crime. Even granting the respective aggravating and mitigating factors roughly balance out, 11 years already looked magnanimous. Nine years is unduly lenient territory. Under the new regime of para.5A, it would be wrong in principle. As has been observed previously, the Court of Appeal has dipped beneath the 15 year starting point sparingly, creating issues with ordinal proportionality here. Minimum terms of 20 years in *Birks*, 17 in *Swellings*, 16 years for the spontaneous killing followed by attempts at concealment and escape in *Symmons*, evidence the gulf between tariffs for adults and the elderly. Furthermore, *Holmes*[547] and *Martin,*[548] indicate the figure in *Heywood* is out of kilter given its place on the scale of ordinal proportionality. *Holmes* and *Martin* accentuate the point because they too deal with Ds benefiting from mitigation under para.11(g)- merely young rather than old age. Hence, old age appears to be having a disproportionately large mitigating effect, especially when compared to like cases. Unsurprisingly, despite the centrality of the doctrine of precedent to the English common law, not a single authority was cited by the Court of Appeal in *Heywood*. The outcome of the judgment reflects it. *Heywood* is no anomaly either.[549]

[547] [2011] 1 Cr App R (S) 19

[548] [2010] 1 Cr App R (S) 38

[549] *Troughton* [2013] 1 Cr App R (S) 75

FACTORS NOT LISTED IN PARAGRAPH 10 OR 11

It was noted earlier when critiquing Schedule 21 as a set of guidelines, including the aggravating and mitigating factors provided in paras.10 and 11, that the minimum term is to be determined according to 2 variables, viz. the seriousness of the offence, and any remand credit.[550] Thus, in order to fully observe the statutory rationale for the minimum term, not only do the starting points have to be determined by offence seriousness, but the aggravating and mitigating factors would have to pertain to this too. As already mentioned, one of the earliest points established by the Court of Appeal was that para.10 and 11 aggravating and mitigating factors were not exhaustive.[551] We must now consider whether those factors that have been held to be of aggravating or mitigating effect by the courts comply with desert. If not, then the process of determining minimum terms will have been polluted and terms fixed not have been decided purely according to the seriousness of the offence and any remand credit.

Lord Phillips CJ in *Jones*, in the context of varying starting points due to aggravating or mitigating factors, was at pains to reinforce that 'full regard must be had to the features of the individual case so that the sentence truly reflects the *seriousness* of the particular offence',[552] noting the concentration of s.269 and Schedule 21 on it, and how the list of mitigating factors in para.11 of Schedule 21 all pertain to the culpability of the offender in some manner. Thus, accounting for a factor which does

[550] CJA03, s.269(3)

[551] *Sullivan* [2005] 1 Cr App R (S) 67 [16] etc

[552] Jones [2006] 2 Cr App R (S) 19 [8]

not alter the seriousness of the offence in any way means the sentence will not truly reflect the seriousness of the offence. This problem has crept into the determination of minimum terms under Schedule 21 due to the non-exhaustive nature of the aggravating and mitigating factor lists.

Indeed, in exactly the same judgment, the Lord Chief Justice failed to reprimand the trial judge for taking into account the age of the appellants upon release, and explicitly not as a mitigating factor at the time of the offence[553] (thus relating to culpability). This is evidently a consequentialist consideration as it in no way relates to the seriousness of the offence; if anything, to the effect of the punishment. Ergo, it is immaterial. A textbook rejection of the relevance of consequentialist considerations and focus on proportionality alone can be found in the sentencing remarks of Wilkie J.[554]

This is just one of a smorgasbord of features invoked in aggravation or mitigation by the Court of Appeal, many of dubious validity. These include medical conditions being suffered by D,[555] the execution of the offence in a public place,[556] a bad childhood which can be linked to the killing,[557] no previous convictions,[558] good

[553] *Jones* [2006] 2 Cr App R (S) 19 [49]

[554] R v Jamie Reynolds, unrep 19 December 2013, 9 < https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Judgments/r-v-jamie-reynolds.pdf>

[555] *Reid* [2005] 2 Cr App R (S) 12

[556] *Peters* [2005] 2 Cr App R (S) 101

[557] *Peters* [2005] 2 Cr App R (S) 101; *McGarry and Wells* [2007] 2 Cr App R (S) 19; *George-Davies* [2011] 1 Cr App R (S) 13; *Moore* [2011] 1 Cr App R (S) 94

[558] *Allardyce* [2006] 1 Cr App R (S) 98

character,[559] bad temper,[560] public concern (how this is ascertained is unclear) about the nature of murder in question,[561] that the victim was a member of the criminal classes,[562] loss of unborn baby,[563] use of a weapon,[564] the size of the knife and where on the body V was stabbed,[565] the fact V was D's mother,[566] that D did not hold the weapon long,[567] assistance rendered to the Crown,[568] and 'the plain fact this was a thoroughly wicked plot to kill'[569] - not to mention those already discussed concerning age upon release, conduct and response in prison so far. What this ragbag contains is everything from the tenable to the tenuous and beyond. Some palpably relate to the harm caused or the culpability of the offender, such as the use of a weapon, the loss of an unborn baby, and that V was D's mother owing to a breach of trust that the parental bond innately imbues. Most others however are immaterial to the seriousness of the offence or plain non-sensical.

Some can be seen as extensions of the statutory factors. Vulnerability, stipulated in para.10(b) as an aggravating factor, was deemed equally applicable in spirit to

[559] *Allardyce* [2006] 1 Cr App R (S) 98

[560] *R* [2008] 1 Cr App R (S) 65

[561] *Attorney-General's References 143 and 144* [2008] 1 Cr App R (S) 28

[562] *Henson* [2008] 1 Cr App R (S) 19

[563] *Appleyard* [2008] 2 Cr App R (S) 42

[564] *Richardson* [2006] 1 Cr App R (S) 43

[565] *M, AM and Kika* [2010] 2 Cr App R (S) 19

[566] *Wright* [2010] 1 Cr App R (S) 9

[567] *McLeod* [2013] 1 Cr App R (S) 78

[568] *Hood* [2013] 1 Cr App R (S) 49

[569] *Hood* [16], expressly confirmed by the Court of Appeal as rightly regarded as a 'non-statutory aggravating feature', despite the fact that para.10(b) seems to cover this, and planning and premeditation had already been acknowledged in [14].

encompass a victim who was visibly befuddled in *Connor and Paton*[570]. Henriques J on behalf of the Criminal Division of the Court of Appeal ruled:

> The list of possible aggravating factors in the Schedule is not exhaustive. In all cases of violence, an attack on a defenceless, vulnerable person is an aggravating factor. The victim in this case was the worse for wear through drink and thus ready prey.[571]

Some may question the propriety of this, or find it contradictory with treating drunkenness as an aggravating factor for Ds. The Court of Appeal nonchalantly summed up the position when they commented that 'authorities have established that the consumption of alcohol and drugs may either aggravate or mitigate a crime, or may be a neutral factor.'[572] Not much has changed then since Wilkins found the same 30 years ago.[573] Given the legal doctrines behind the law on intoxication are muddled in their motivations and justifications,[574] it is perhaps to be expected that sentencing drunk Ds is similarly confused. As far as drunk Vs go, it might be claimed that voluntarily acquired vulnerability should not count against D. The reason for the vulnerability is surely not the point though. D is more culpable because he chooses to take advantage, to exploit, someone who is vulnerable. On the other hand, para.10(b) does specify age or disability, which could be interpreted as Parliament trying to limit the provision to factors beyond V's control, or simply ensuring that at least these circumstances are considered as aggravating factors in any case.

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[570] [2011] 2 Cr App R (S) 95

[571] *Connor and Paton* [18]

[572] *Connor and Paton* [23]

[573] L Wilkins, *Consumerist criminology* (Heinemann 1983), cited by Roberts (n 167)

[574] R Williams, 'Voluntary Intoxication' (2013) LQR 264

The rest of this plethora of aggravating and mitigating factors identified above, are what might be described as "good law". That is, there is settled precedent at common law recognising their materiality.[575] However, their establishment as general principles of sentencing usually stems from a time when there was less uniformity in rationale, and thus may have been valid considerations under other aims of sentencing, but not the sole, present one. It is only in fairly recent times that Parliament has begun to wade into the exercise of a discretion that previously was seen as exclusively the preserve of the bench.[576] We also know that right from those earliest attempts, there was resistance from the upper echelons of the judiciary.[577] These findings confirm Roberts' claim that in the field of personal mitigation 'a myriad of factors is taken into account...many of which are hard or impossible to justify on a sound retributive principle.'[578]

Ashworth surprisingly appears to depart from this line of reasoning, contending that a link between an aggravating or mitigating factor and a rationale for punishment is not 'necessary if...supported by other social justifications that are valued sufficiently highly to override the relevant purpose of sentencing.'[579] Besides doubts over the legal enforceability of this argument, which he dismisses,[580] is this not a remarkable revelation? It amounts to a rejection of desert and instead the adoption of at best

[575] (n 167) 16

[576] (n 3) 1

[577] Most notably Lord Taylor CJ's 'flagrant misreading' in Ashworth's words (n 74) 100 of the phrase 'commensurate with the seriousness of the offence' from the Criminal Justice Act 1991, which defeated the intention of Parliament. Though cf. to Ashworth's overall conclusion at (n 44) 15

[578] (n 167) 8

[579] A Ashworth, 'Re-evaluating the justifications for aggravation and mitigation at sentencing' in J Roberts (ed) (n 158) 21-22

[580] (n 579) 28

'limiting desert' as per Norval Morris.[581] Otherwise, it means claims as to 'principled sentencing' were more ambiguous and flexible than one might have been given to thinking. Ashworth acknowledges 'the principled conclusions have been almost entirely negative'[582] and would 'drastically'[583] reduce the number of valid aggravating and mitigating factors in the determination of sentence. Rather than embrace this coherency, Ashworth avers 'two likely consequences would be an increasing resort to the concept of mercy, and concern about parsimony in sentencing.'[584] Essentially, more extraneous concepts, under the current law at least. Parsimony would though still be adhered to through the observance on the phrasing 'shortest term commensurate with the seriousness of the offence'.[585] Unless parsimony triumphs over all else, in which case any reason or rationale which produces the least penal bite should be adopted depending on the circumstances, it clearly is to be considered in the context of desert- and desert only. Padfield supports the rationale that emerges, contending 'desert should certainly fix the upper limits of a sentence, but not necessarily its precise details'.[586] Padfield and Ashworth seem to be united in prioritising less punishment over deserved punishment, in which case the basis for any particular rationale of punishment falls away.

This thesis examines though the Court of Appeal's interpretation and application of a statute where that debate has already taken place, and until the pertinent legislation is

[581] N Morris, *The future of imprisonment* (UCP 1974)

[582] (n 579) 35

[583] (n 579)35

[584] (n 579) 35

[585] CJA03, s.153(2)

[586] (n 214) 96

amended, should continue to respect the settled will of Parliament. It is submitted therefore that relics of a bygone era are best rooted out. Enforcing new statutory provisions provides the ideal opportunity to distinguish them as irrelevant for present purposes. Is it good enough to simply say that because 'the courts do take them into consideration...it would be difficult to ignore personal mitigation entirely'[587] when such factors are immaterial to recent statutory provisions governing this area?

It is suggested that some of the factors extraneous to desert 'are applied because they are relevant to the statutory objectives of sentencing identified in section 142 of the Criminal Justice Act 2003.'[588] Mitchell has posited 'the wording of section of 142 of the Criminal Justice Act 2003 seems to indicate that a court can pursue whatever penal aim it chooses',[589] and we only have the SGC recommending proportionality as a first among equals. These assertions overlook other binding provisions of the CJA03 which are more precise and targeted to our circumstances which solely concern jail terms, since s.153(2) goes on to clarify that desert is the only rationale that should be used for determining the length of any custodial sentence. That is emphasised in the present context of murder by the fact that s.269(3) states the quantum of punishment should be decided according to the seriousness of the offence and the amount of remand credit. Consistent with that, Schedule 21 refers only to the seriousness of the offence. Clearly, the provisions are perfectly compatible; the other rationales for sentencing listed in s.142 can influence what punishment is chosen, providing the offence does not cross the custody threshold. Thereafter, it is very clear: the sentence

[587] (n 2) 66

[588] (n 167) 11

[589] Mitchell (n 2) 64

must be for the shortest term proportionate to its gravity. There should then, in the sentencing of any offence for which custody has been deemed appropriate, be no affect from factors that do not aggravate or mitigate the seriousness of the offence.

Nor can it be seen how 'some factors may be relevant independent of any link to the statutory objectives.'[590] When trying to ensure, as Ashworth demands, 'that the justifications be strong and specific'[591] for each individual 'aggravating' or 'mitigating' factor, it is unclear how any justification be strong, at least legally, when it falls outside the criteria for salience under the CJA03. With many of the aspects it's not clear which of the other 4 specified rationales for sentencing in s.142 they're even relevant to in the first place.[592] No wonder Ashworth once condemned this as 'a sphere in which discretion has led largely to anarchy.'[593] Little has changed, despite stronger reasons for aggravating and mitigating factors generally conforming to desert-based criteria having since come about by way of various aforementioned statutory rules, 30 years on. Indeed, this would evidence Padfield's hypothesis that

> although we do not know nearly enough about the reality of sentencing practice in this country at this time, it may well be that utilitarian aims, such as the reduction of offending and the rehabilitation and reintegration of offenders into mainstream society, never went entirely out of fashion and, indeed, remained uppermost in the minds of many of those who actually sentence.[594]

Benefiting from close analysis of Court of Appeal authorities, we have observed resort to non-desert based aggravating and mitigating features, that suggest whilst

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[590] (n 167) 11

[591] (n 128) 157

[592] (n 167) 16

[593] (n 167) 17 citing A Ashworth, 'Criminal justice, rights and sentencing' (unpublished manuscript at Worcester College, Oxford 1987) 30-31

[594] (n 214) 96

consequentialist considerations are not perhaps uppermost in sentencers' minds, at least when dealing with murder, they are certainly part of the menu of factors from which they still choose.

Besides muddying the rationale for the sentencing of murder, the almost unlimited scope for judicial discretion in this field further detracts from consistency of approach. [595] Firstly, the grounds for an aggravating or mitigating factor may be present, but recognition of those grounds as representing an aggravating or mitigating factor may vary from one case to the next. Secondly, a factor may be acknowledged in separate cases, but provide an undue variation in the degree of mitigation or aggravation. Roberts reminds us that 'if sentencing factors are not conceptually sound and systematically applied, the public image of sentencing will suffer.'[596]

Consistency on the facts

As with aggravating and mitigating features listed in Schedule 21, the inconsistent and irregular application of certain factors, perhaps because they stand alone in one case, but are part of a litany of factors in another, can result in disproportionate weight being afforded to the factor in question.

[595] J Roberts, 'Aggravating and mitigating factors at sentencing' [2008] Crim LR 264

[596] (n 167) 4

In *Richardson* a previous conviction for the trivial offence of affray was treated as an aggravating factor.[597] On one analysis, this is good practice: para.12(a) retains the effect of s.143(2). Conversely, numerous other cases have disregarded more numerous previous convictions, also in the same genre as murder, and more serious than that in *Richardson*. In *Allardyce*, the appellant (of the same name) had 'exceedingly serious'[598] previous convictions, yet nowhere was this identified as an aggravating factor, and it's difficult to accept that it was treated as such when the good records of the other appellants was explicitly said to have earned them a discount.[599] Given the minimum term was 15 years for them all barring the good character reduction, it seems unlikely Allardyce's relevant and severe convictions for robbery and firearms offences actually had any aggravating effect upon sentence.

Consistency in weight afforded

It has been suggested that statutory aggravating or mitigating factors should weigh more heavily in the first place than non-statutory factors.[600] Appealing at first glance, sustaining such an approach is more difficult on closer examination. Indeed, take Roberts' own example concerning previous convictions being a statutory aggravating factor compared with a non-statutory aggravating factor such as 'causing gratuitous damage to property over and above what is needed to carry out the offence.'[601] The

[597] *Richardson* [2006] 1 Cr App R (S) 43 [5]

[598] *Allardyce* [2006] 1 Cr App R (S) 98 [11]

[599] *Allardyce* [2006] 1 Cr App R (S) 98 [27]

[600] (n 167) 13

[601] (n 167) 13

latter feature goes directly to the harm caused and the amount of it, central to assessing the seriousness of the offence in the first place. In the field of criminal damage, the amount of damage caused beyond that needed to be liable for the offence at its legal minimum, could be enormous, and affect the seriousness of the crime much more than one or two previous convictions. Ultimately it will depend, but that recognises that merely because a factor is statutory doesn't necessarily mean it should or will have greater impact. What it does perhaps mean is that the Court should always be sure that it has considered whether the factor exists on the present facts if it is statutory.

Roberts writes 'even if two sentencers agree on the relevance of a particular factor, they may diverge on its relative weight, one considering it to be important enough to make a difference between community and custody, the other as being insufficient to change the appropriate sanction to this extent.'[602] Whilst this is a clear-cut example, the potential for different weightings to be apportioned to the same aspect goes far beyond the limited number of cases falling near the 'custody threshold'. Most difference in weighting probably occurs in determining the quantum of a particular sentence, whether it be number of hours of community service, the sum of a fine, or more likely in our present context, number of months or even years of incarceration. Of course, it is much more difficult to discern such instances due to the existence of all the other aggravating and mitigating factors in play. Controlling becomes difficult between individual circumstances, but as countless previous cases scrutinised demonstrate, and a few of the following, the degree of disparity makes identifying such cases easier than expected.

[602] (n 167) 4

Even so central and settled a concept as premeditation has been a source of disparate practice. In *Clarke*,[603] *Attorney General's Reference 116 of 2009*,[604] and *Hood*,[605] the plans were cooked up between people well in advance, or required preparations to be organised. Yet in *Hood*, the Court of Appeal announced the trial judge 'was right overall to regard as a non-statutory aggravating feature the plain fact that this was a thoroughly wicked plot to kill.'[606] That it was a thoroughly wicked plot to kill is uncontroversial, but the invention of an additional, *non*-statutory aggravating factor to supplement the existing statutory aggravating factor of 'a significant degree of planning or premeditation' is apt to breed confusion and result in disparate degrees of aggravation. Surely it is precisely this kind of case that para.10(a) is referring to? Aren't all plots to kill thoroughly wicked and why premeditation and planning is an aggravating factor? So it is to double count by manufacturing a discrete aggravating factor out of what is a common denominator of plots to kill. One might have expected the Court of Appeal to pick up on this zeal from the Crown Court sentencer and correct the double counting, but instead their Lordships happily rubber-stamped the notion.

It can be hard to know exactly what increase or reduction was made from the starting point for individual aggravating factors as the Court of Appeal warns against overly mathematical approaches. Occasionally though that rhetoric can be cast aside, as when they sighed in *Hylton*, 'it is regrettable that the judge did not set out specifically

[603] [2010] 2 Cr App R (S) 13

[604] [2010] 2 Cr App R (S) 105

[605] [2013] 1 Cr App R (S) 49

[606] *Hood* [16]

the way in which he arrived at the final figure, having considered the aggravating circumstances and the mitigating circumstances.'[607] Those cases where numerous authorities are drawn upon tend to be the most convincing judgments, such as *Matthews*.[608] More often though, no cases are cited whatsoever,[609] or when they are, it is a solitary case dismissed as in *Young* with the rhetoric that

> in each of these cases the court has to make a fact-specific decision on the appropriate minimum term, so we do not consider the decision in that case as binding us or as being of particular value. Our task is to apply the statutory provisions and then decide if the term or sentence was manifestly excessive. In any event there was a substantial difference between the position of this appellant and the appellants in *Barney and James* because in that case the judge sentenced on the basis of the absence of an intention to kill.[610]

Arguing that the case does not offer any assistance simply because there was not an intention to kill is hardly credible. The impact of a single aggravating or mitigating factor should be straightforward enough to control for. Judgments that do as the Court of Appeal suggested in *Hylton*, will facilitate this process greatly. Of course all cases will be slightly different, but some are distinctly more alike than others, and can help sketch the contours of ordinal proportionality. Identifying cases that are slightly more or less serious and noting sentence lengths in those cases, a more consistent and accurate figure can be determined in the present case. In sum, even if the Court of Appeal is not legally bound by a precedent, it does not mean that it wouldn't be good sense or even good law to follow an apposite authority. Instead, just as Walker found, 'what emerges is the unsystematic approach of the Court of Appeal, resulting in

[607] [2010] 2 Cr App R (S) 29 [17]

[608] [2011] 1 Cr App R (S) 88

[609] See eg *Bristol, A-G's Reference 25 of 12*

[610] *Young* [18]

contradictory decisions and special pleading.'[611] Criminal courts are still common law courts. Taking into account that 'the Court of Appeal (Criminal Division) is grotesquely overworked',[612] referring to relevant precedents still appears a necessary part of 'the application of *the law* to the particular facts before them'[613] which Sir Robin Auld in his Review said was pretty much all the Criminal Division has time for. The findings of the analysis herein bears out in practice, in the context of the most serious crime, the general admission Auld made that 'it is thus difficult for them to apply and develop the law in a principled and consistent manner',[614] concluding 'this is a serious shortcoming in the main judicial institution in this country responsible for declaring and developing the criminal law as well as for applying it.'[615] Using like authorities could save the Court time though by swiftly giving an indication of the established norm for particular variants of cases, in the same way guidelines do at a broader level.

It may also be a realistic concession to appreciate 'the balancing of these factors is undoubtedly a difficult and delicate exercise. Perhaps it will be in few cases that two judges would arrive at precisely the same calculation.'[616] Such is certainly borne out from this research which tallies with Jacobson and Hough's findings that 'report considerable variation in sentencers' reactions to mitigating factors. It seems clear that some factors are susceptible of different interpretations- hence the need for

[611] (n 167) 7 citing N Walker, Sentencing (Butterworths 1985) 43

[612] J Spencer, 'Does our present criminal appeal system make sense' [2006] Crim LR 677, 692

[613] (n 612) 693 [emphasis added]

[614] (n 612) 693 quoting R Auld, *Review of the criminal courts of England and Wales* (2011) Ch 11

[615] ibid

[616] *Cullen* [2007] 2 Cr App R (S) 65 [15]

guidance.'[617] Roberts argues, 'it is important to ensure that the relevance of the factor is clear to the community- and guidelines represent a vehicle to communicate with the public. Otherwise, public misunderstanding of sentencing and criticism of sentencers will grow.'[618] The same could, of course, be said about under-reasoned or poorly justified judgments from any Court, including the Court of Appeal. What form that guidance takes is a matter in itself. Ashworth notes,

> sentencing statutes or guidelines may list the relevant factors, and may even group them, but only rarely do they provide any guidance as to the relative weight of those factors or as to the impact they should have on sentence. The role of aggravating and mitigating factors is therefore left largely without structure, unbridled and untamed, a tendency that undermines the rationale of sentencing guidelines in providing common starting points and shared standards.[619]

We are already dealing with sentencing guidelines for the sentencing of a single offence here. We know one of the stated aims was to make them straightforward and accessible to ordinary members of the public to foster understanding of the area and how sentences for murder were being reached. However, as with other guidelines,[620] it would seem from Schedule 21's operation by the Court of Appeal that more structure is required in order for them to achieve their objectives. How detailed it is in relation to individual factors, for example, is likely to be controversial with the bench. At the least, my review suggests further clarification, perhaps through reference to previous decisions, might flag up the potential for variance the application of even day-to-day aggravating and mitigating factors can have, prompting a more nuanced evaluation by the Court of Appeal and in turn the Crown Court. To return to the

[617] (n 167) 3

[618] (n 167) 4

[619] (n 579) 21

[620] (n 579) 21

notion of ‘proper’ sagely qualifying the Court of Appeal’s judgment in *Reid*, it must be ensured that aggravating and mitigating factors are proper on three levels. Proper in terms of relevant to **rationale**, proper on the **facts** (consistent with other comparable cases) and proper **weight** afforded having made those decisions. It goes without saying they should be transparently and openly identified and applied. All must be accurate to ensure each offence's seriousness is correctly assessed. This itself can only be achieved in conjunction with full, thorough, and frequent use of precedent, to ensure present cases can be placed in their true ordinal rank and then like cases treated alike.

THE ONLY MAJOR AMENDMENT TO SCHEDULE 21 SO FAR- PARAGRAPH 5A

Ben Kinsella was stabbed to death with a knife. His killer received a minimum term of 19 years. Kinsella's family then put the celebrity status of some of their number to use, complaining of how short a minimum term Kinsella's murderer was handed compared to those who murder with a gun. This is because the starting point at the time was 15 years for a murder committed with a knife, and 30 for a murder committed with a firearm. Needless to say, the deployment of a weapon as lethal as a knife was a general aggravating factor, long before *Povey*.[621] However, as the use of a knife was not a feature which placed the murder into the para.5 category of 'particularly high seriousness', complete with its 30 year starting point, it was

[621] [2009] 1 Cr App R (S) 42

inevitable that ordinarily, minimum terms would not be in that region where a knife had been employed, rather than a gun.

Their campaign was successful enough to prompt the Secretary of State for Justice to announce a review of Schedule 21 for murders committed with a knife. He indicated he would be consulting 'the senior judiciary and the Sentencing Guidelines Council', but also welcomed 'wider contributions', including from members of the House.[622] The same day a documentary was televised on BBC1 presented by Kinsella's 'celebrity' sister Brooke, about knife crime.

Perhaps most salient for our purposes are the submissions of the SGC to Jack Straw, the then Justice Secretary. A number of members of the senior criminal judiciary sat on the Council at the time, and indeed its Chairman was then the Lord Chief Justice, Lord Judge. He wrote on behalf of the SGC on 26th October 2009 a letter in reply to the Lord Chancellor's request of 17th July 2009 for the Council's views on the topic. Amongst other things, Lord Judge noted the significant proportion of murders committed with a knife or other sharp instrument, namely between one third and one half. However, 'most' of those arose out of an altercation, and 'many' were in a domestic setting.[623]

The SGC was conscious of 'public concern about the carrying of knives'[624] and the harm they are used to inflict, and 'recognised...the need to increase the severity of

[622] HC Deb 16 June 2009, vol 494, col 159

[623] Letter from Lord Judge to Jack Straw (26 October 2009) 2

[624] ibid

sentences'[625] for crimes concerning knives. He identified two cases where the Court of Appeal had treated the pre-arming with a knife as a 'seriously aggravating factor'.[626]

Contemplating the prospect of an increased starting point for such cases applying to adults only, Lord Judge CJ commented 'it will not deal with any concerns about the carrying or use of knives by those under that age.'[627] Any heightened starting point should define clearly in what circumstances it would apply he stressed. The SGC, having been asked to opine on sentencing for murders committed with a knife, implicitly suggest that to differentiate knives from other sharp instruments, or other weapons altogether, would be to find a difference where there isn't one, and potentially treat cases of fairly similar culpability inconsistently. On the other hand, culpability will 'vary widely' depending on whether the weapon is grabbed in the course of a domestic row, or 'taken to a place with a view to it being used'.[628] Unsurprisingly, this is consistent with the aggravating factor of taking a weapon to the scene contained in both the assault and manslaughter upon provocation guidelines.[629] It captures the greater culpability of arming oneself with a weapon, and confines the aggravating factor only to the most blameworthy of such cases by requiring it to be taken to the scene, thus entailing a degree of premeditation, and potentially planning, that would be drastically lacking where the weapon is seized in the heat of a quarrel between partners in the home.

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[625] ibid

[626] ibid, citing *Patterson* [2008] EWCA Crim 1018

[627] ibid 3

[628] ibid 4

[629] ibid 3

The Proposals

Five months after it was initially announced, 'following this review, which included the necessary consultation',[630] the Lord Chancellor disclosed to the House of Commons that he would propose a new starting point of 25 years for adults convicted of murdering with a knife or other weapon carried to the scene for such a purpose.

It thus did not equalise the starting point with that for murders committed with a firearm, but significantly drew up the starting point from 15 years (although using a knife as a weapon would no longer be an aggravating factor once that starting point had been selected).

The paragraph inserted, named 5A, states that if the case is not one that would fall within para.4, 5, or 7, but 'the offender took a knife or other weapon to scene intending to (a) commit any offence, or (b) have it available to use as a weapon, and used that knife or other weapon in committing the murder',[631] then 'the offence is normally to be regarded as sufficiently serious for the appropriate starting point, in determining the minimum term, to be 25 years.'[632]

It must, from one perspective at least, be something of a triumph for the SGC. Despite there only being two weeks between the Chairman of the SGC sending his letter of

[630] HC Deb 10 November 2009, vol 499, col 155

[631] para.5A(2)

[632] para.5A(1)

advice to the Secretary of State for Justice and the proposals being announced to Parliament, the precise formulation of the aggravating element which dictates the higher starting point is that subtly suggested by the SGC, with reference to its existing inclusion within sentencing guidelines for other offences against the person.

The fact that the grounds for the new starting point are narrower than they could have been in requiring forearming cuts both ways. It restricts heavily the number of murders committed with a knife that will be subject to it, notably excluding the facts of the majority of domestic cases, but still managing to include the 'folk devil' scenario of gangs carrying knives as a matter of course. The widening of the basis to all weapons, not merely knives, is counter-balanced by the level of blameworthiness evinced by someone taking a weapon to the scene. Ultimately though, in isolating the factual matrix required for the higher starting point to a more concerted, pronounced level of culpability than had it included all murders committed with a knife, the starting point is amplified by 10 years from 15 to 25 years. That is no mean amount, and more readily draws comparison with the particularly high seriousness category with its starting point of 30 years. By virtue of that, it is more likely to have satiated the calls for murders committed with knives to be sentenced the same as those committed with firearms. A broader factual basis accompanied by a lower starting point, perhaps of say 20 years, may not have been as successful in communicating that sentencing levels would be moving up. The minimum term for Kinsella's killer was, after all, 19 years anyway.

Practice immediately prior to the introduction of paragraph 5A

So what impact has the new 25 year starting point had? There are a number of key respects in which it may have influenced sentencing for murder under Schedule 21.

i) for crimes now subject to the new starting point
ii) for crimes not subject to the new starting point by virtue of D being under 18, but otherwise would be
iii) the ordinal proportionality with sentences arrived at from the 15 and 30 year starting points

Ashworth predicted, 'it seems likely that it will lead to longer minimum terms for those who commit murder with a knife, and perhaps to those who use other kind of weapons taken to the scene.'[633] But this forecast is made without any reference to existing sentencing levels. Aggravation would normally be applied to a 15 year starting point, whereas now that aggravation is subsumed within the higher starting point. To try and distil the impact of para.5A in practice, at least in terms of cases decided by the Court of Appeal, we need to have an idea of what was taking place before para.5A came into force. Once that has been established, we can then compare it with the rulings and tariffs determined in the wake of para.5A's applicability to ascertain what difference, if any, the new starting point is having.

In relation to (i), a good example would be *Martin.*[634] D was initially sentenced, and his appeal decided, before the Lord Chancellor had announced his review of Schedule

[633] (n 3) 21

[634] [2010] 1 Cr App R (S) 38

21. On leaving a party, an altercation occurred between D, then 18, and V, 15. D went home, collected a pair of nunchuks hung on his wall for decorative purposes, and returned to the party. There, he assaulted V with the nunchuks. It might be considered an instance of 'one-punch murder', for only one blow was struck, from which V died. Though there was acknowledged to be no planning nor an intent to kill, there was an element of premeditation. Since D had been 18 at the time of the crime, the starting point was 15 rather than 12 years had he been younger. The Court of Appeal said being on the cusp of the age boundary should result in a graduated approach rather than a sudden uplift, and cut his 15 year minimum term to 13. Now, of course, the starting point for this D would be 25 years as he went to the scene armed with the nunchuks, which though they are not a knife, are a weapon. Even accounting for a significant discount based on D's youth compared to most adults being sentenced from the 25 year starting point, and the fact that a year younger the starting point would be 12 years (although that includes none of the aggravating features), it's hard to conceive of a minimum term much under 18 years. This leaves a major discrepancy between the new sentencing levels and the old, constituting a substantial increase in tariff for cases of this kind affected by para.5A.

Even before the amendments proposed by the Lord Chancellor had been debated in Parliament let alone passed, judgment was given in a new guideline case on street murders committed with knives. On 13th November 2009, just 3 days after Jack Staw's announcement on the 10th of a review into Schedule 21 vis-a-vis such murders, Lord Judge CJ handed down the decision of the Court of Appeal on a collection of similar cases.[635] One of them was even an appeal by the killer of Ben

[635] *M, AM, and Kika* [2010] 2 Cr App R (S) 19

Kinsella, whose sentence had prompted the campaign for longer minimum terms where the murder had been committed with a knife. Before dealing with the individual appeals, more general principles were laid down. The danger that carrying knives on one's person presented to life and limb was reiterated from *Povey.*[636] Lord Judge CJ emphasised '[w]hat is critical and is sometimes overlooked in argument...is that the statutory arrangements do not diminish the principle that the sentence must reflect the seriousness of the crime.'[637] Indeed not, they place that principle at the heart of the exercise. What he appears to be suggesting is that 'anyone who goes into a public place armed with a knife or any other weapon and uses it to kill or to cause injury, and who is brought to justice, must anticipate condign punishment'[638] because it is a very serious thing to do. But what's new there? The focus if anything is on the harm caused, namely death or, importantly, injury, and the threat that such weapons pose to bodily integrity. The points made in *Povey* are ultimately aimed at preventing harm, because it is such serious harm. The seriousness of murders of this nature has either risen or was not being fully appreciated before, Lord Judge CJ is suggesting; that due to the seriousness of such crimes lengthy jail terms are deserved and proportionate. The Court went onto dismiss all the appeals against sentence. The lengths of sentence upheld are once again useful to indicate sentencing levels prior to the introduction of para.5A, although may themselves have been upheld in the wake of the Lord Chancellor's announcement and the thrust of the Lord Chief Justice's remarks, but not before.

[636] [2009] 1 Cr App R (S) 42

[637] *M, AM, and Kika* [4]

[638] *M, AM, and Kika* [9]

In AM's case, 14 years was upheld for D who was just under 18 at the time of the killing. He stabbed V once in the chest, after V offered resistance to D's associate who had stolen V's mobile phone. D was thus forearmed with the knife, and used it 'for gain', meaning a 30 year starting point should have applied had D been slightly older, though this point appears to have been overlooked by both the trial judge and the Court of Appeal. With a second feature, the carrying of a knife, also meriting a 25 year starting point alone, it's hard to imagine the sentence not being higher now with two such strong factors pointing to a sentence of 25-30 years for an adult. It is not clear whether considering the 'prevalence'[639] of such offences detracted attention from the simple but substantial aggravating feature of using such a lethal weapon to attack V with, especially since the trial judge observed that there were no statutory aggravating factors. If para.5A has done anything, it is to give prominence to what would otherwise be a serious aggravating factor inexplicably omitted from the list of such factors in para.10 of the schedule.

Besides being 18 and thus the appropriate starting point at the time being 15 years, other aspects of Kika's case suggest why D's minimum term was fixed at 19 years. Following a confrontation D and his accomplices chased a group of youths which contained V. V fell behind and was pounced upon, being stabbed 11 times with great force. A palpable intention to kill meant in sum there was not a scrap of mitigation. Lord Judge CJ held the sentence to be 'not remotely...excessive'.[640] Ironically, despite this being the case that launched the campaign which ultimately saw para.5A's

[639] *M, AM, and Kika* [16]

[640] *M, AM, and Kika* [32]

enactment as V was Ben Kinsella, the minimum term would probably not be much higher post para.5A due to D's own youthfulness.

The final case in the trio is another demonstration of the impact para.5A is likely to have. D, armed with a knife and braying for a fight, assembled acquaintances and picked on two random, innocent pedestrians on the street. Both were stabbed, one dying, the subject of the murder conviction, the other sustaining GBH for which D was convicted of s.18 in relation to. The only real mitigation was D's very late guilty plea, given the sentencing judge considered D's intention to cause GBH of 'marginal'[641] value in the circumstances, and the Crown's acceptance of D's plea on such a basis criticised as 'over-generous'[642] by the Court of Appeal. It is hard to see, how even if just one V had been attacked, what justification for moving below 25 years there would be given the aggravating factors of an unprovoked stabbing with a big knife to crucial parts of the body. When the fact that two victims were so attacked, a concurrent determinate sentence of 8 years being passed for the s.18, a minimum term distinctly above 25 years would be the shortest term commensurate with the seriousness of the offence. Hence, the 21 years the Court of Appeal upheld based on the pre-25 year starting point regime, gives an idea of the extent of the increase in sentencing levels that para.5A should result in.

[641] *M, AM, and Kika* [40]

[642] *M, AM, and Kika* [43]

M, AM, and Kika, may have had an effect with the successful *Attorney-General's Reference 100 of 2009*[643] which Lord Judge CJ also heard. D had premeditated and planned the murder of his girlfriend's elderly mother, a widow, who had let him into the house before attacking her. It is unclear whether he took a knife with him or acquired it on the scene, though in such a case, when the killing was planned and premeditated and the presence of a knife is virtually guaranteed by virtue of a domestic kitchen, the difference is arguably negligible. Whether the Court considered that to be the case, we cannot be sure. Whilst they did add five years to the 13 given after D's trial, principally on the basis that too much credit had been given for D's previous good character and social deeds, there is not much else in mitigation. Thus the question is begged what grounds would there be for moving below the 25 year starting point if it were the case that D had taken the knife to the scene? Another substantial increase on prior practice further shapes the impression that para.5A would lead to higher sentencing levels for salient cases.

Cases decided after paragraph 5A's commencement

The first case to address the new para.5A once it had been inserted via the appropriate secondary legislation[644] was *Moore.*[645] D was 16 at the time of the crimes and thus not actually subject to the new 25 year starting point. D's counsel advancing the appeal submitted that Parliament had not altered the starting point for under 18s convicted of

[643] [2011] 1 Cr App R (S) 17

[644] Criminal Justice Act 2003 (Mandatory Life Sentence: Determination of Minimum Term) Order 2010/197

[645] [2011] 1 Cr App R (S) 94

murders committed with a weapon brought to the scene. Gross LJ's riposte was 'but the fact that the starting point was left unchanged simply means that the matter is left to the discretion of the judge to deal with'.[646] A more substantive reply might have entailed some identification of why the increase in starting points for adults is relevant to the sentencing of youths too, namely the centrality of desert to the schema embodied in Schedule 21. The clear indication of para.5A is that murders committed with a weapon brought to the scene are to be treated as significantly more serious than murders where, all other things being equal, it was not committed with a weapon brought to the scene. Those factors must surely still aggravate the offence of a youth, just as would features that normally indicate the starting point for an adult is 30 years or a whole life minimum term. How precisely that is done, remains for the Court's discretion.

Guideline remarks on para.5A for adults were finally delivered by the Court of Appeal in *Kelly*.[647] Lord Judge CJ giving the judgment of the Court, confronted the difficulties in defining what amounted to taking a weapon to the scene. Where D took a knife from a kitchen draw to stab V who was also in the kitchen, or in an adjacent room, then D had not taken the weapon to the scene for the purposes of para.5A, though the opening of doors, particularly locked ones, might complicate that analysis he conceded. Travelling a distance of 50 yards with the weapon, even though it was within the same large building, would constitute taking the weapon to the scene it was felt, as was stepping outside of one's home to attack someone on the pavement outside it was held, even though the distance involved would be far less. Of pertinence to

[646] *Moore* [25]

[647] [2012] 1 Cr App R (S) 56

many cases of murder committed on the street with a knife by gangs where joint enterprise is alleged, the Lord Chief Justice made clear that only those who knew the knife was being to taken to the scene for use in a way described in para.5A(2) would be subject to the 25 year starting point.

The upshot was that D in *Kelly* did not fall within para.5A when he took a knife from the kitchen downstairs, and headed upstairs to the bathroom where he broke down the locked door to gain entry and stabbed V in the neck severing his carotid artery and jugular vein. D proceeded to watch V choke to death on his own blood before calmly washing the knife clean. A premeditation- not merely an intention- to kill, as well as the suffering endured by V, both aggravated the offence, as did, 'seriously',[648] the fact that D had broken down the door in his determination to end V's life. Without any mitigation from so much as a guilty plea, and a bad criminal record, the 25 year minimum term handed down by the trial judge was, nonetheless, 'fully justified'[649] according to Lord Judge CJ.

Bowers[650] who charged out of his house onto the pavement with a knife in each hand to stab V with both was held to fall within para.5A as D had taken the weapon to the scene. The Court thus implicitly rejected the notion that para.5A was intended by Parliament to apply only to cases of carrying the weapon as a matter of course. That must be right. The plain language of para.5A cannot stand up such a limitation; it goes further. However the incident was spontaneous and provoked to a degree by V

[648] *Kelly* [21]

[649] *Kelly* [22]

[650] One of the co-joined appeals reported under the name of *Kelly*

arriving at D's premises armed with a baseball bat and a couple of hoodlums. The Court of Appeal held the 20 year minimum term properly reflected the mitigating factors, including D's youth, being just 19 at the time.

It's hard to imagine Singh's case[651] in the same set of co-joined appeals not being successful to some extent before para.5A. D responded to verbal abuse by running down 50 metres of stairwell to stab V once with the knife D claimed he had been using to eat with. V died from that wound. D was of good character but drunk at the time. No mention was made of a lack of intent to kill or premeditation. It is not impossible that the Court would have considered these mitigating factors to have at least balanced out what appears to be the sole aggravating factor: the use of a knife. If one considers *Martin*, the only substantive difference is D's youth. It's unlikely that alone would have justified a 7 year disparity in sentence, in which case, the extent of the difference between 13 years in *Martin* and 20 years in Singh can only otherwise be explained by the 25 year starting point instigating a higher sentencing levels for crimes of this class than were being handed down before.

The final case in the quartet is perhaps not the best example, though that is owed to an(other) error. All four Ds, aged between 20 and 17, had participated in a 'wicked plan'[652] to murder V, 61, who was two of the Ds' father. SR came armed with a knife, and GH took another from the kitchen when they arrived at V's abode in the early hours of the morning. Whilst V lay asleep GH proceeded to stab V 'at least 15 times

[651] *Kelly* [2012] 1 Cr App R (S) 56 [29]

[652] *Kelly* [46]

to his face, neck and upper body, including four stab wounds to his back'.[653] Extensive lengths were gone to in order to eradicate evidence and concoct alibis. Thus there were numerous aggravating features on top of the 25 year starting point with the planning, premeditation and obvious intention to kill rending culpability high. Age was the primary mitigating factor, resulting in minimum terms of 20-22 years for the 3 young adults. An 18 year minimum term from a 12 year starting point for the 17 year old, who had been one of the protagonists, reflected her major role. All of these sentences were upheld by the Court of Appeal.

However, what the trial judge appears to have missed, and which was not corrected by the Lord Judge CJ, was that it was not merely a murder committed with a weapon brought to the scene, but a murder for gain, as in *AM*.[654] Accessing V's safe was all part of the plot,[655] and indeed V's jewellery was found to be missing after the killing.[656] What reason is there for not adopting the 30 year starting point para.5 stipulates should normally be taken? No reason is given as both the trial judge and the Court of Appeal omit to recognise the significance of the theft as part of the whole conspiracy. It is submitted that taking the 30 year starting point together with the 25 year starting point that was, as acknowledged, justified on the basis of bringing a combat knife with them to the scene, and all the aggravating factors, could easily have pushed the minimum term over 30 years, before credit was given for all of the Ds' youth. This would have seen minimum terms 2-4 years higher than those upheld.

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[653] *Kelly* [39]

[654] One of the cojoined cases reported as *M, AM, and Kika* [2010] 2 Cr App R (S) 19 and covered just a few pages above.

[655] *Kelly* [45]

[656] *Kelly* [41]

Thus, in this instance, the new para.5A starting point may be said to have distracted the bench from applying Schedule 21 fully and properly resulting in sentences out of kilter with like murders for gain. One such example, useful in comparison to the youngest D, "HR", is that of *Matthews.* There D, 17 at the time of the crime like HR, made a vicious, frenzied attack on V in order to escape with stolen property from V's abode. As the Court of Appeal noted in *Matthews*, D made trips to the kitchen to continue the attack, including obtaining a second knife with which to cut V's throat. These trips mean D potentially started taking weapons to the scene in the sense meant by para.5A, once he had chased V. Certainly D's culpability in such a situation wouldn't be any lower than many cases falling in para.5A as was remarked vis-a-vis *Kelly*. The sentence in *Matthews*, reduced even as it was to 18 years, amounted to 21 years after a trial. This is 3 years longer than the 18 year minimum term after a trial upheld for HR. Moreover, the planning and premeditation would raise HR's culpability above Matthews', before getting onto the much more straightforward analysis that a weapon was brought to the scene in HR's case. The sentence in *Matthews* is also more robust and reliable in the sense that a number of Court of Appeal authorities were considered, including *Taylor and Thomas.*[657]

Thus, for a guideline case, one could have hoped for a more durable and dependable guide to sentencing future cases falling within para.5A. The main uncertainty facing the sentencing court is aptly highlighted by some of the dicta in *Hood.*[658] The killing there entailed luring V to a deserted location by a lake using one of the co-D's and V's child, then the other co-D creeping up on V from behind and smashing V over the

[657] [2008] 1 Cr App R (S) 4

[658] [2013] 1 Cr App R (S) 49

head about 10 times with a claw hammer brought to the scene for that very purpose. Despite suffering 'massive injuries'[659] D did not die immediately so was gagged with duct tape, stuffed into a bin liner, and thrown into the lake 'weighted down and left to sink out of sight.'[660] Confronted by the very high culpability of a considered and carefully planned murder, the trial judge grappled with the scope for overlap between the various aggravating factors and the extent to which they were already catered for by the 25 year starting point. This difficulty arises of course in relation to the example scenarios laid down as being demonstrative of murders of particularly high seriousness in para.5. As there, what it appears to hinge on is a notion of the "default" scenario in order to ascertain which of these other aggravating factors has already been accounted for by the higher than normal starting point. Otherwise the potential for double counting is endless. If the standard case to which the 25 year starting point applies to is for instance a case with the features of *Hood*, then a spontaneous killing arising out of a disagreement between two people on the street, one of whom or both carries a weapon as a matter of course for gang-related reasons, should receive a sentence notably less than 25 years. There are simply not the aggravating factors present in *Hood*, and there are perhaps some mitigating factors too, for instance para.11(b), maybe (a), and conceivably even (d) or (e) depending on the circumstances. This might mean minimum terms closer to the 20 year mark than the 25 when all is said and done. Contrariwise, if the gang scenario is the default, then there would be no reason to discount off the 25 year minimum term as those mitigating factors mentioned above would already be accounted for in the kind of scenario that, nonetheless, merits 25 years. By the same token, a case such as *Hood*

[659] *Hood* [10]

[660] *Hood* [10]

with its heavy aggravating factors might easily have crept up to nearer 30 years once aggravating factors absent from the default scenario have been incorporated.

With no guidance on this pivotal issue from *Kelly*, the Court of Appeal has tried a variety of tacks. In *Hood* itself, Hughes LJ clearly indicated that the starting point should be worked from in all instances. He said

> There might in some cases be scope for overlap, but that was not this case. The statutory 25-year starting point applies when the weapon has been taken to the scene with a view to committing an offence. The offence does not need to be murder and sometimes is not. Likewise, the statutory starting point of 25 years applies to the case not infrequently encountered of a spontaneous disagreement between two men, after which one departs to his home and comes back immediately with a weapon. This was not that case. This was a case of careful planning over a substantial period.[661]

This is, in many ways, the most simple and straightforward approach, applying the statutory provisions without any gloss. Furthermore, the chances for double counting are rare as it's difficult to conceive of what is inherent to the starting point besides merely taking a weapon to the scene intending to 'have it available to use as a weapon' or 'commit any offence'. Put another way, taken at it's lowest, there appears to be no requirement for any kind of premeditation, or planning. Someone who carries the weapon for the purposes of self-defence, then happens to use it in a spontaneous encounter, would come within the provisions. The mitigating factors provided for within the schedule itself suggest a number of aspects would reduce D's culpability here, viz. paragraphs 11(b), (e), and possibly (d) and (a). Plainly, classic aggravating factors such as the use of a weapon, have been taken account of by virtue of the higher starting point.

[661] *Hood* [14]

Quite understandably, in *Hood* the raft of aggravating features mounted up so that the minimum term arrived at prior to any discount for a guilty plea[662] was 30 years.

But this uncomplicated approach has been veered away from in the handful of other reported appeals. *Challen*[663] is difficult because there was some genuine mitigation, though the degree to which it affects the sentence could be open to question given the presence also of aggravating features. The Court of Appeal was angling to reduce the sentence of 22 years, reached after consideration of the aggravating and mitigating factors by the trial judge working from the 25 year starting point, on the basis that he contemplated adopting the 15 year starting point. What would have been an error however is seized upon by the Court of Appeal to suggest the trial judge did not consider this particular case one 'of particularly high seriousness justifying a minimum term in excess of 20 years.'[664] Such a non sequitur is an unfortunate premise for shearing the sentence to under 20 years, since the question for the trial judge was not whether this was a murder of 'particularly high seriousness' but whether it was one committed with a weapon taken to the scene- which indeed it was. Some stereotypical notion of what kind of murder committed with a weapon taken to the scene, or even worse, one of particularly high seriousness, seems to be at play here. Because this isn't one, the trial judge almost overlooked the 25 year starting point. The Court of Appeal's approach was to resort to that instinctive rather than rational analysis and substitute a minimum term of 18 years.

[662] Or, unusually as was the case in *Hood*, assistance to the Crown

[663] [2012] 2 Cr App R (S) 20

[664] [2012] 2 Cr App R (S) 20 [14]

Surely a more consistent regime would be precipitated by the approach of Gross LJ in *Hood*, enabling significant credit for the mitigating factors in *Challen* to reduce the sentence from the 25 year starting point, rather than giving the impression that the case didn't merit such a starting point in the first place. A final minimum term is all but plucked out the air, presumably from a 15 year starting point otherwise.

The Court of Appeal's reluctance to adopt the 25 year starting point was apparent in *Troughton*[665] too. V had a long history of mental illness. On the day in question, D was summoned to another location on their farm to assist V's brother fend off V's bothering behaviour. D arrived in a JCB and took a shovel from the back of the mechanical excavator. 'He went straight to the back of the house to confront Robin [V], taking the spade with him.'[666] In the course of an altercation, D struck V round the head with it. As V lay on the ground D hit V again with the spade, over the back of V's head, and left. He omitted to check on V when he returned to the scene an hour later, even though V was still lying on the ground. The trial judge abjured the portrayal that D had taken the weapon with him to the scene and thus used the 15 year starting point. Defensible as that conclusion may be if the trial judge was not satisfied D had taken the weapon to the scene with any thought of using it, it is difficult to imagine what other purpose he had taken it with him for, if not to use it on V. Yet again the bench has sidestepped para.5A, which as the Court of Appeal notes, the trial judge was entitled to. However, if he felt that this was one of the abnormal instances where the offence could not be 'regarded as sufficiently serious for the appropriate

[665] [2013] 1 Cr App R (S) 75

[666] *Troughton* [3]

starting point...to be 25 years', then he should expressly state so and give reasons.[667] Moreover, thereafter remains a series of aggravating factors to be applied to the 15 year starting point that are difficult to ascertain the inclusion of from either the judge's remarks or his minimum term.

For example, it remains a serious aggravating factor that D did use a weapon. Furthermore, D used that weapon on a vulnerable and crucial part of V's body, and did so more than once, most objectionably when V was already laying on the ground defenceless from the first blow. Even an hour later D failed to assist V, appearing to show no remorse for what he had done. It is undeniable there was weighty aggravation here from which the 15 year starting point should have been moved up from. Similarly, D being 75 there was mitigation in his old age, and his good character. Royce J for the Court of Appeal made no mention of V's age though, unlikely to be far from D's own given they were cousins. If V was indeed elderly, that would offer further aggravation as he was a vulnerable victim in the first place, not to mention his mental illness which could render V 'particularly vulnerable' in itself under para.10(b).

The original minimum term of 12 years was further shorn down to 9 by the Court of Appeal on the basis of D's age, making a total discount of 6 years for D's age based on a 15 year starting point- disclosing not an iota of aggravation. Additionally, the quantum of such a discount could be questioned not least because even though D was 75, he mustered the strength to strike V sufficiently hard with the spade as to kill him.

[667] *Bowering* [2006] 2 Cr App R (S) 10 [11], [13] (Sir Igor Judge P)

From the cusp of a 25 year starting point we have ended up with a 9 year minimum term. It might be argued this is para.9 at its acme, but detailed examination of the case's actual aggravating and mitigating factors raise doubts as to whether this single figure sentence really does reflect the gravity of the crime. As to the effect of para.5A on sentencing levels, it remains to be seen whether the consistency and coherency of insisting upon a legal analysis of D's culpability and the harm caused to V that is equally applied across both certain highly publicised factual matrices[668] and other less notorious scenarios has been implemented in practice. Ironically, it was the judiciary that argued for this. In Lord Judge CJ's aforementioned letter on behalf of the SGC to Jack Straw, then Justice Secretary, he pointed out that there was likely to be 'high culpability...where a weapon was carried to the scene "with the intention of using it or having it available for use should the opportunity or need arise"'.[669] The same principle was written into the guidelines on provocation he went on. Distinguishing between knives and other weapons would 'risk...substantial differences in sentence...from "legal niceties". That in turn will cause inevitable and understandable public concern.'[670] The legal principle that if you take a weapon to the scene, whatever weapon it be, and whoever you are, it increases your culpability markedly, has all but been dispensed with in some of the above cases, notwithstanding the factual differences between each. It might be asked should that inevitably and understandably cause public concern?

[668] Such as the gangs-carrying-knives stereotype

[669] (n 623) 3, citing, in speech marks, SGC, *Definitive Guideline on Assaults and other offences against the person* (SGC 2008) [22]

[670] (n 623) 4

The impact of aggravating and mitigating factors can and often does, as demonstrated by a number of the cases in this category, substantially affect the minimum terms decided upon and thus sentencing levels for murder in reality. It is open to question, on these cases at least, how evenly, fairly, and consistently para.5A is being applied given the divergence in minimum terms of cases whose sentencing exercise should have commenced with the same starting point. As with para.5, the Court of Appeal appears to be wriggling free from applying Schedule 21 properly, in the process diluting if not destroying the effect both of these statutory reforms to past practice were intended to have.

Conclusion

Schedule 21 has few discernible friends. Other scholars approach the subject from the perspective that it 'is inadequate.'[671] The Schedule has though been slowly accepted by the Court of Appeal as an inevitable part of the furniture, but its familiarity has also led to the bench sidestepping some of its most basic, and arguably most credible features. The rationale, *de temps en temps*, is threatened by deterrence. For some reason, judges think it sagacious to deride Parliament's 'draconian' tariff increases from the bench, then engage in equivalent practices when *they* think it required "to send a message" of deterrence, the latter on a basis that leads to disparity and unfairness.

However, this chapter's greatest reservations lie in the consistency of application that, still with the schedule, is far from uniform. Evidence was worryingly bountiful that

[671] Mitchell (n 2) 53

evaluation of aggravation and mitigation was haphazard even for the most elementary features such as arming with a weapon, lack of an intention to kill, premeditation, and so forth.

Such findings suggest the early fuss made lambasting Schedule 21 for restricting judicial discretion were wide of the mark. If anything, it is a reminder of the genesis for sentencing guidelines, and it is worth noting there is now criticism that 'Schedule 21 seeks to provide no more than partial guidance for sentencing murder cases and in the process offers only limited clarity in the law.'[672] By the sounds of it, Schedule 21 can't win; in the same guise, it either fetters discretion too greatly, or is too loose.

The approach to aggravating and mitigating factors is pivotal, and Schedule 21, alongside the sentencing regime mandated by CJA03, throws open the question of whether proper heed it being paid to the rationale set down for sentencing murder. There is much inconsistency in this field, exposing Ds to the risk of unfairness when like cases are not treated alike, or dislike cases are treated alike. Once again, scrutiny of judgments has found few authorities are cited in determining whether a sentence is manifestly excessive or unduly lenient, and rectifying this would minimise the occurrence of contradictory treatment of similar scenarios.

Above all it found significant cynicism towards a number of the seriousness categories. The Court of Appeal clearly view the para.5(2)(c) ‘for gain’ category as exaggerated in the 30 year category, and treat it more akin to a para.10 listed aggravating factor. It is the most noticeable symptom of a general reticence to use 30

[672] Mitchell (n 2) 59

years as a *starting point* for all para.5 cases, resulting in cases rarely aggravated above the 30 year starting point, and clumped between 20 and 30 years instead, compromising ordinal proportionality. The description of para.5 as essentially "20 years or above"[673] was probably unguarded, but importantly is accurate as far as the Court of Appeal's operation of it can be discerned. The implementation of the new para.5A has also been circumvented numerous times already on less than compelling grounds. The question of age should be relatively simple, yet has seen discrepancies have at times disproportionate impact.

Promisingly for the remainder of the thesis is that the Court of Appeal have, perhaps with the exception of elderly Ds, applied the 15 year starting point as Schedule 21 suggests, and not as Lord Woolf CJ suggested in *Sullivan*. Domestic cases now regularly see minimum terms above 15 years, as opposed to beneath 12. Whilst their implementation of para.5 has been far from perfect, they have nonetheless broadly approved heights of sentencing hitherto unseen for many murders in the post-capital punishment era. In so doing, they have ensconced the primary objective of Schedule 21 to more fully recognise the harm of death with longer sentences in a desert-based schema.

A number of scholars though have attacked the guidelines as 'a crude political attempt to increase the length of minimum terms...[that] may well have produced not only unduly severe sentences in some murder cases but also an unjustifiable discrepancy in the punishment of murder and manslaughter.'[674] Chapter 1 concluded that such

[673] *Challen* [14]

[674] Mitchell (n 2) 59

aspersions as to the political intent were flimsy and undermined by contrary evidence. Consequently, greater disparity may have been opened up than existed before, but can only be deemed unjustifiable if courts have *yet* to take account of the new higher sentencing levels for murder when determining custodial terms for manslaughter. Whether the Court of Appeal has responded to the implications those have for ordinal proportionality when sentencing for other offences where death is caused is where the attention of this thesis shall now turn.

CHAPTER 3

The sentencing of manslaughter before judicial recognition of Schedule 21's relevance: the old approach

MANSLAUGHTER SENTENCING PRE-SCHEDULE 21

If, as Chapter 1 concluded, the statutory intention behind Schedule 21 was to better recognise the grave harm of death in sentencing, then other crimes besides murder, where causing that harm constitutes the actus reus are affected too. Sentencing for other homicides needs to be increased[675] to take account of the greater value placed on the harm of death inherent to them all. Disparity will arise between sentencing for murder and for other homicide and non-fatal offences against the person where the court is not determining the seriousness of the crime using the same valuations on common harms between them. Murder, CDDD, CDCD and the unlawful driving causing death offences have all been subject to express primary legislation in the past decade addressing this. But one offence has not. Manslaughter appears to have been lost in the melee. Thus, this chapter will examine the sentencing for that precise crime. It will explore whether the increased valuation on death signalled by the primary legislation of the past decade has translated into the sentencing of manslaughter.

[675] D Jeremy, 'Sentencing policy or short-term expediency?' [2010] Crim LR 593, 594

First sentencing levels for manslaughter at the time Schedule 21 came into force on 18th December 2003 are established. Even where hearings occurred after that date, murders committed before were to be sentenced according to the tariff used at the time of the murder.[676] Therefore it would be improper to expect any policy of Schedule 21 to be reflected in manslaughter sentencing when it wouldn't apply to murder sentencing. Following this study, a comparison will be made with sentencing practice post Schedule 21's applicability, to discern what, if any, evidence exists that greater value has been placed on the harm of death by the courts.

Methodology

This mirrors that employed in the previous chapter to analyse sentencing practice for murder for the same reasons. Hence, every manslaughter sentencing case reported in volumes of the Criminal Appeal Reports (Sentencing) from 2004 until 2013 has been read, analysed, and contributed to the findings of this chapter. Manslaughter cases vary so greatly in their circumstances, nature and thus gravity that especially close attention needs to be paid to the precise details and facts of every case scrutinised.

The structure of the caselaw analysis will be chronological, loosely utilising different categories to aid comparison of like cases over time and notice differences in sentencing levels more readily. This will best enable small, gradual changes to be detected when manslaughters committed after the enforcement date of Schedule 21 are critiqued in the next chapter.

[676] CJA03, Sch.22

Manslaughters arising out of physical assaults

Wasik's summary of sentencing levels for different varieties of manslaughter in 2000 is a useful, succinct digest. Adopting categories used in Thomas' *Current Sentencing Practice* and working on the basis of the cases contained therein, he claims that manslaughters stemming from a fight are sentenced in the range of 2-4 years for less serious cases, and 5-8 years for the upper bracket.[677] However he asserts that one such example of cases falling in the lower category is "one punch" manslaughter.[678] Neither *Coleman*[679] nor cases from the early 2000s would seem to support this.

"One Punch" Manslaughters

Coleman concerned D who had punched two men, once each to the face. One of them fell over as a consequence and his skull fractured when his head hit the ground. V died from that injury. Lord Lane CJ presiding over the Court of Appeal (Criminal Division) conducted a review of the precedents concerning the scenario

> where a person receives a blow, probably one blow only, to the head or face, is knocked over by the blow and unfortunately cracks his head on the floor or the pavement, suffers a fractured scull and dies. It is to be distinguished sharply from the sort of case where a victim on the ground is kicked about the head. It is to be distinguished sharply from the sort of case where a weapon is used in order to inflict injury. It is

[677] M Wasik, 'Sentencing in Homicide' in A Ashworth and B Mitchell (eds) *Rethinking English homicide law* (OUP 2000) 185

[678] ibid

[679] *Coleman* (1992) 13 Cr App R (S) 508

> further to be distinguished from where the actual blow itself inflicts the injury which causes death.[680]

That such a narrow definition can be made in the notoriously broad offence of manslaughter offers a rare opportunity to compare sentence levels with a greater degree of controlled factors than is usually the case. Thus, particular focus will be made in the thesis on this class of manslaughter which offers the firmest foundations for comparisons of sentencing levels over time. Lord Lane CJ concluded 'the starting point for this type of offence strictly confined, as we have endeavoured to confine it, is one of 12 months' imprisonment on a plea of guilty.'[681]

This exact approach still seemed to be in operation a decade later, as exemplified by *Edwards,*[682] where D was convicted after a trial of a one punch manslaughter and had his sentence cut to 18 months on appeal. 18 months is the logical starting point without the benefit of a guilty plea- which affords upto a third off any length of jail term[683]- where 12 months is given as the starting point with the benefit of a guilty plea, as in *Coleman*. In *Grad*[684] a sentence of 9 months jail, described by Pill LJ as 'at the very bottom of the bracket in this type of case'[685], was substituted for the original imposed at the Crown Court of 18 months.

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[680] (n 679) 510

[681] (n 679) 512

[682] [2001] 2 Cr App R (S) 125

[683] SGC, *Reduction in sentence for a guilty plea* (SGC 2004)

[684] [2004] 2 Cr App R (S) 43

[685] (n 684) [30]

Yet there were symptoms that prevailing norms had evolved since *Coleman*. In *Lumsden*[686] the levels of sentence seen in *Cheetham and Baker*[687] and *Hamar*[688] appear to have been a factor in upholding a three year sentence on an early guilty plea for a one punch manslaughter.[689] The trend Davis J drew from some of the recent cases is most enlightening. It,

> amongst other things, indicates that the court in recent years has perhaps been inclining to move upwards from the starting point indicated by the case of Coleman (1992) 13 Cr.App.R.(S.) 508. The other case to which Mr Heywood referred us, Attorney General's Reference No.100 of 2001 (Welch) [2002] 2 Cr.App.R.(S.) 81 (p.365), contains some pertinent observations as to the importance which the Court will attach in these cases to the loss of life which arises.[690]

When speaking of what has *changed* in recent years though, the Court referred to 'increasing' concern about drunken violence- of which it urged a 'stern view'- but spoke more routinely about 'holding inevitable concern at the loss of innocent life involved.'[691] This might indicate that any rise in tariff constituted by this case owes more to the former than the latter.

With occasional departures appearing anomalies in the context of the majority of appeals following *Coleman* and *Edwards* in habitual fashion, *Coleman* unsurprisingly remained the 'leading'[692] case in 2005 according to the most eminent sources. The

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[686] [2005] 2 Cr App R (S) 27

[687] [2004] 2 Cr App R (S) 53

[688] [2001] 2 Cr App R (S) 61

[689] (n 686) [17]-[18]

[690] (n 686) [18]

[691] (n 686) [20]

[692] (n 74) 121

retrospective character of the common law is aptly highlighted by the difficulties in changing an approach when an authority is so entrenched and relied on routinely almost as a matter of procedure. Breaking new ground or pioneering even minor evolution based on the present let alone future is hamstrung by a cursory reversion to old cases.

This is exacerbated when reference is usually only made to a couple of old but 'leading' authorities and fail to take into account other more recent or indeed more factually similar cases. More thorough analyses, as performed in *Lumsden*, can produce more accurate attuned sentences. This illustrates how the doctrine of stare decisis, which our common law hinges upon, may not be at fault so much itself, but is sometimes let down by those who operate it. The maxim that each case turns on its own facts, which it undoubtedly does in criminal cases unlike in any other field of the law, should not be allowed to provide a loophole by which judges evade the equally important tenet of treating like cases alike. Indeed, where variation in crime and criminal can be so great, even more reason to seek like precedents to assist in the complex task of arriving at the sentence that accurately reflects the gravity of the crime in its proper ordinal rank, rather than start from square one each time. This is a benefit that the SAP saw in using three starting points in their proposed sentencing guidelines for murder and an improvement upon Lord Bingham's one.

More substantial physical attacks

Other assaults resulting in death in the period preceding the enforcement of Schedule 21 do seem to fall within Wasik's ranges though. Placing one punch manslaughters in a league of their own, assaults which fall towards the lower half of the physical

assault category, do appear to fall in his 2-4 year bracket. One such example is *Heslop*[693] where seven punches of moderate force were made to V's head and face. The term was two and a half years on a guilty plea for D, 18 at the time.

More serious batteries also appear to fall in a 5-8 year range consistent with Wasik's categorisation. *Attorney General's Reference No. 49 of 2004*[694] illustrates how even the most brutal assaults conform to Wasik's upper bracket. V exhibited countless injuries and had suffered 'non-consensual'[695] sexual trauma to her anus.[696] Keene LJ held:

> Cases like *Silver* do indicate that on a plea of guilty to manslaughter because of the absence of the intent necessary for murder, even where great violence was used on the victim, a sentence of five years will often be appropriate where there is no weapon employed.[697]

The sexual assault, 'which must have caused her [V] great pain and humiliation', aggravated the crime[698], which in sum deserved 'a commensurate sentence of between seven and eight years'.[699]

There is evidence however that terms could exceed this. In *Wadsworth*[700] a 17 year old appellant had a 6 year sentence upheld but deemed "as towards the top end of the

[693] [2004] 1 Cr App R (S) 72

[694] [2005] 1 Cr App R (S) 72

[695] *Attorney-General's Reference 49 of 2004* [10]

[696] *A-G's Ref 49 of 2004* [7]

[697] *A-G's Ref 49 of 2004* [19], *Silver* (1994) 15 Cr App R (S) 836

[698] *A-G's Ref 49 of 2004* [22]

[699] *A-G's Ref 49 of 2004* [22]

[700] [2004] 1 Cr App R (S) 14

acceptable range".[701] Given that without a guilty plea and the mitigation of youth available to this appellant, the starting point would have been around 10 years, this must indicate a very high level of culpability.

Ten years without a guilty plea was expressly affirmed in *Attorney General's References 72 and 73 of 2005.*[702] The Court of Appeal, evaluating in late 2005 whether the sentences of 5 2/3 and 3 2/3 years were unduly lenient, were troubled by the aggravating feature of kidnap in the case. Latham LJ found

> merit in the argument of the Attorney General that the judge in approaching the matter on the basis that the appropriate sentence was seven years' imprisonment for manslaughter in the commission of an offence, which itself could have resulted in the sentence of three-and-a-half years' imprisonment, failed adequately to reflect the gravity of the offence.[703]

This rare instance considering inter-offence ordinal proportionality highlights the under-valuation of the harm of death in manslaughter sentencing compared to other offences. It echoes Blunkett's insistence in the Commons that there was a disproportionately small distance between sentences for some lesser crimes and homicides,[704] indicating the harm of death was undervalued in evaluating crimes' seriousness prior to Schedule 21.

[701] *Wadsworth* [21]

[702] [2006] 1 Cr App R (S) 112, [24]

[703] ibid

[704] HC Deb 20 May 2003, vol 405, col 871

At five years on a guilty plea, *Reece*[705] and *Bertram*[706]are at the bottom of the bracket. In *Reece* D and V were acquainted with one another. An altercation erupted which left V on the ground. He had been kicked at least once whilst down there because one 'blow was of sufficient strength to leave a bruise and a shoe impression on the deceased's cheek',[707] which had killed V. Referring to cases more than a decade old stating the range was 2-7 years, Scott Baker LJ ascertained the appropriate length to be in the region of 4-4 ½ years which was increased to five to reflect D's previous convictions. Scott Baker LJ's bracket must be seen as low due to the era of cases he was referred to by counsel acting on behalf of D arguing for a lower sentence. Research of his own or by the Crown would have unearthed more contemporary cases indicating the slightly higher range as discerned by Wasik. Conversely, the Crown Court judge's punishment was six and a half years.

It is worth asking whether there are repercussions of uncontested appeals against sentence where no counsel is instructed for the Crown as in *Reece*. A one-sided presentation of a case in the adversarial system is to abrogate its most quintessential dimension. Whilst this may occur in appeals against sentence in all manner of crimes, its effect on the "treat like cases alike" tenet must be considered where in other cases argumentation and case law is submitted by the Crown in an effort to uphold or even increase the sentence of the trial judge. The consequence is to warp ordinal proportionality.

[705] [2005] 1 Cr App R (S) 21

[706] [2004] 1 Cr App R (S) 27

[707] *Reece* [5]

Assaults on infants

Manslaughters of infants are often treated by the Court of Appeal as being a category of their own and thus are addressed separately here. Wasik found the range to be between two and eight years for offences of this nature. That is, arguably, merely a broader brush stroke than the 2-4 and 5-8 year brackets he gauged for assaults resulting in adult fatalities. If so, it would seem to suggest that the age and vulnerability of infant victims wasn't being treated as an aggravating factor by the courts in the period upto 2000.

Only two cases precisely concerned the manslaughter of infants committed shortly before 18th December 2003 without overlapping into other categories. One was *Khair,*[708] where the Court of Appeal upheld a seven year sentence after a trial as 'at the top end of the scale'.[709] Waller LJ had noted *Yates*[710] where Roch LJ remarked that the range for this class of case was two to five years on a guilty plea.

At the lower end of the bracket was *Attorney General's Reference 16 of 2005.*[711] There the Court of Appeal upheld a three year sentence for a childminder who had shaken a 5 month old baby to death. The trial judge was satisfied the injuries were inflicted out of exasperation and frustration. Even so, he admitted 'the resulting sentence may seem to some somewhat on the short side'.[712] Not Rose LJ who upheld

[708] [2005] 1 Cr App R (S) 29

[709] *Khair* [9]

[710] [2001] 1 Cr App R (S) 124

[711] [2006] 1 Cr App R (S) 28

[712] *Attorney-General's Reference 16 of 2005* [17]

the sentence on the basis that it was 'impossible'[713] to deem it unduly lenient since it was within the range of sentencing options established by authorities in the field. Firstly, such a rationale misses the point that each case has an appropriate place on that scale; merely being within it does not mean like cases have been treated alike according to their respective gravity. Secondly, those precedents cited by the Court of Appeal stretched back to the 1980s. The retrospective nature of the common law, answering today's problems with yesterday's answers, appears to be an inherent problem when judges fail to question how relevant an old authority might be. There is, certainly from Rose LJ, no inkling that such old authorities, and indeed, more recent authorities that merely restate the law based on old cases giving outmoded precedents fresh life,[714] need to be seen through the lens of contemporary standards.

Similarly, once again, one must wonder whether the approach of narrow, discrete categories has, not per se but in practice, retarded development of the tariff by militating against considering ordinal proportionality between this and other classes of manslaughter. It must be asked why a serious manslaughter of a young child does not receive even a slightly longer sentence than a serious manslaughter of an adult, all other things being equal. The former is defenceless, vulnerable, more easily harmed and loses more by having the opportunity of living the overwhelming majority of their life deprived of them.

[713] *A-G's Ref 16 of 2005* [19]

[714] E.g. *Yates* [2001] 1 Cr App R (S) 124

Stabbings

Indeed, although stabbings are given their own sub-category by Thomas, the range of five to eight years stated by Wasik to be the norm is the same as that for the serious assaults.

In two cases it was explicitly considered whether the bracket of 10-12 years enunciated in *Latham*[715] should apply, seemingly because it involved a knife. *Latham* was a manslaughter upon provocation case however. Such confusion tends to indicate the classifications used in manslaughter sentencing 'reflect frequently recurring factual situations' rather than 'significant moral distinction'[716] as Wasik mooted.

Where a single wound 'unsurprisingly'[717] proved fatal unconsciously seems to acknowledge the case must be close to murder in gravity. All the same, the Court of Appeal commented that 8 years was the shortest commensurate term of imprisonment for the offence[718]- in real terms four years to the twelve or so that would be imposed for murder at the time. The gulf between the jail terms for the most aggravated manslaughters and unaggravated murders is again palpable.

This can be contrasted to *Silkstone*,[719] where the Court of Appeal sheared 8 years down to 5, and well below five years, *Attorney-General's Reference 64 of 2004*[720].

[715] [1997] 2 Cr App R (S) 10

[716] (n 677) 185

[717] *Attorney-General's Reference 143 of 2002* [2004] 1 Cr App R (S) 12 [9]

[718] *A-G's Ref 143 of 2002* [15]

[719] [2004] 2 Cr App R (S) 78

[720] [2005] 1 Cr App R (S) 107

The latter reveals the most egregious disparities may be found amongst what is deemed the lower rungs of seriousness. D, on being told V (who had old convictions for paedophilia) had been 'messing' sexually with her children, headed round in a drunken frenzy to V's abode. There, she set about assaulting V rending him lying- possibly unconscious- on the floor. She grabbed a 'jagged' piece of wood and plunged it into V's chest 'five or six times, with considerable force, looking mad with rage.'[721] D suffered 'large lacerations' to his bowels which would have 'needed a significant degree of force to cause those lacerations, which are injuries of a kind usually found in road traffic accidents or falls from a height.'[722]

Increasing her 2½ year term to 3½ upon the Reference, the Court of Appeal can hardly be said to have remedied the unduly lenient sentence. The mitigation identified by Rose LJ cannot account for how far this case lies outside its ordinal rank, even given pre-Schedule 21 sentencing levels ascertained above. This included consequentialist considerations such as the chance of reoffending and the behaviour of D in jail,[723] and the Victorian notion 'that, if the offender had not been a woman, with the mitigation in her favour arising, in particular, from her family circumstances'[724] the sentence would have been 5 or 6 years. Mention of the aggravating factors that D looted property from the house of the deceased, or that the victim was an elderly alcoholic and thus vulnerable, [725] reinforces the aberrance of this decision. Rose LJ is thus liable to the same criticism that he levelled at the trial

[721] *Attorney-General's Reference 64 of 2004* [8]

[722] *A-G's Ref 64 of 2004* [10]

[723] *A-G's Ref 64 of 2004* [17]

[724] *A-G's Ref 64 of 2004* [19]

[725] *A-G's Ref 64 of 2004* [4], [8], [12]

judge having been 'unduly influenced by the mitigation in relation to this offender and paid too little regard to the gravity of this offence.'[726]

The upshot is the appellant in this case will serve 1 ¾ years in jail before being released. Under Schedule 21 which had come into force for murders committed at the time of the Court of Appeal's hearing, 15 years is the starting point for an unaggravated murder. Not only is the disparity set to be even greater than before without major increases for manslaughters like this, but the lack of any disparity to mark the difference in gravity of this furious onslaught and other crimes is highlighted by the sentences for two men who 'pleaded guilty to assault with intent to rob and were sentenced respectively to three and two years' imprisonment'.[727] They had attacked V the day previous to D.

Hence, it is difficult to see how Rose LJ's revised sentence can be said to have met his own objective which he claimed he was pursuing[728] on the authority of Kay LJ:

> As in the other settings in which death may result to which we have referred, this public concern and the need for deterrence must be reflected in sentences passed by the court. This inevitably will mean longer sentences than might have been considered appropriate some years ago in a different climate of opinion and concern.[729]

Rather, it prompts concern about the value of life judges were evidently *content* placing on the loss of life in sentencing around the early 2000s . Only they were

[726] *A-G's Ref 64 of 2004* [21]

[727] *A-G's Ref 64 of 2004* [6]

[728] *A-G's Ref 64 of 2004* [14]

[729] *Attorney-General's References 19, 20 and 21 of 2001* [2002] 1 Cr App R (S) 33, [42]

exercising control over tariff levels for manslaughter. Little wonder corrective legislation was needed when the prospect of the bench sentencing the gravest of homicides dawned.

Manslaughter upon provocation

This category follows that on stabbings because the vast majority of manslaughters upon provocation involve the use of knives. Thus it should aid comparison of the two, divided as they are by a different level of mens rea, and semi-justificatory circumstances for that.

Wasik summates that five to eight years was the usual bracket, but pointed out exceptions. Firstly non-custodial sentences had been known in cases of 'cumulative provocation'.[730] Secondly, the then recently decided *Latham* had somewhat set the cat among the pigeons prescribing terms in the region of 10-12 years 'where an offender deliberately goes out with a knife, carrying it as a weapon, and uses it to cause death, even if there is provocation'.[731] The court had expressly been asked to address the gravity of causing death in *Latham* by the Attorney-General. Thus cases that follow it entail a higher valuation on the harm of death by virtue of its status as a leading authority.

Yet in practice the Court of Appeal had been reluctant[732] to embrace the lengths of sentence espoused in *Latham*. This leaves higher-end terms in single figures at seven

[730](n 677) 187

[731] [1997] 2 Cr App R (S) 10, 18

[732] *Lahbib* [2005] 1 Cr App R (S) 68

years[733] and nine. In the latter, *Bennett*[734], D was convicted following a trial of killing his 3 ½ month old baby through 'severe'[735] violence including vigorous shaking and a blow to the head 'equivalent to a fall on to the head from a height of six feet.'[736] The trial judge assessed the measure of provocation as 'low'.[737] It is a mystery when exactly it became the reaction of a reasonable person to respond to a baby's crying not with exasperation but its killing. Latham LJ expressed scepticism commenting 'people are expected to exercise reasonable control over their emotions, and that as society advances it ought to call for a higher measure of self-control.'[738] This point is of broader importance it is argued since it demonstrates recourse to any violence is gradually less and less acceptable as society develops, therefore making it more serious when it does occur. Needless to say, this goes for the gravest result of violence, death, as much as any other bodily harm if not more so.

At the five year mark is *Brooks*,[739] a sentence on a guilty plea. There had been sustained sexual abuse by V of D, who was 17 come the time of the offence. When V indicated another session was imminently to be commenced, D grabbed a knife and stabbed V seven times in the back, four times in the neck, and walloped him over the head with a dumbbell. Having left the house to purchase a hacksaw he then dismembered the body. An intention to kill is conspicuous. Together with the finding

[733] *A-G's Ref 192 of 2003*

[734] [2004] 1 Cr App R (S) 65

[735] *Bennett* [7]

[736] *Bennett* [3]

[737] *Bennett* [6]

[738] *Bennett* [7]

[739] [2004] 1 Cr App R (S) 53

of fact that D could have broken free from the relationship on many occasions casting the dynamic of the provocative conduct in a different light, D's culpability remains very high. Mitigation was identified in the D's youth, offer of a guilty plea and perhaps mistakenly[740] the years of abuse he was subjected to. In common with most other provocation cases it was not contemplated whether D possessed an intention to kill rather than an intention to cause GBH, a major factor influencing culpability.

In sum, these sentences disclose no evidence of the courts adopting a higher valuation on the harm of death given their consistency with the trends discerned by Wasik. The authority of *Latham* is something of an anomaly which sentences for other classes of provocation outside those it deals with have failed to adjust to.

Diminished Responsibility

This is the other form of voluntary manslaughter covered in the appeals reported upto the enforcement of Schedule 21. Wasik wrote that where a hospital order was not adjudged to be appropriate then a sentence of between three and six years was usual. Certainly two of the cases conform to that pattern, and at the lower end.

Those are *Lawrenson*[741] and *Derekis*.[742] There were common features to both. The Ds were women, subjected to a prolonged narrative of distress. The trigger in each

[740] *Brooks* [19]. This was mentioned discretely from the provocation. As another bout of the abuse constituted the provocation there is risk of double counting in evaluating the mitigating factors here.

[741] [2004] 1 Cr App R (S) 5

[742] [2005] 2 Cr App R (S) 1

episode was another bout of the distress or fear of it about to happen. Both Lawrenson and Derekis stabbed their Vs only once and pleaded guilty.

In *Lawrenson* Goldring J gave much credence to reports of D's progress in prison and fresh probation reports in reducing a five year jail term to three years. He is open to the same criticism made by Thomas of the Court of Appeal in the 1980s for 'acting not as an appellate court, but as a parole board, adjusting sentences in light of a favourable prison report'.[743] Such consequentialist considerations at any rate are irrelevant to the gravity of the crime, the rationale for determining the length of custodial sentences.[744]

Derekis had her sentence varied downwards from six years. Potter LJ cited a number of authorities from the mid to late 1990s from which he garnered 'no more than four years at the most should have been imposed in circumstances of the extenuating nature which existed in this case.'[745] Three and a half was most appropriate and the term ordered by the court.

These two cases are in sharp contrast to the anomalous *McMilan.*[746] Kennedy LJ failed[747] to follow his own evaluation of the law that the seriousness of the offence was the sole criterion. He set a minimum term the equivalent of an 18 year

[743] M Wasik, 'Going round in circles?' [2004] Crim LR (50th Anniversary Edition) 42, 49

[744] CJA03, s.153(2)

[745] *Derekis* [16]

[746] [2005] 2 Cr App R (S) 63

[747] ibid [9], [13]

determinate sentence, seemingly based on the length of time the psychiatrist assessed as necessary to rehabilitate V.[748]

Death by driving

Much attention was devoted to ascertaining Parliament's purpose in raising the statutory maximum for CDDD and introducing the new crimes of the RSA06 in the first chapter. It is perhaps expected then to see that there was something of a trend towards higher sentences for vehicular manslaughter in the period examined which covered much of the time the CJA03 was being debated as a Bill, no doubt raising awareness of the government's heightened maximum sentence for CDDD.

Earlier cases such as *Wright*[749] and *Scott*[750] reported in early 2004 saw sentences of eight years upheld and seven years cut to six respectively. In order for comparison to later cases to be possible, since every individual case turns on its own facts, it is necessary to once again give some detail about the behaviour that those sentences were deemed suitable for.

In *Wright* Goldring J cautioned against adopting a level of sentence from *Mahmood*[751] as that case 'was heard some years ago and may be thought to be out of line with present authorities'.[752] He made the same observation in *Scott*.[753] D's culpability in

[748] ibid [9]

[749] [2004] 1 Cr App R (S) 4

[750] [2004] 1 Cr App R (S) 50

[751] (1993) 14 Cr App R (S) 8

[752] *Wright* [8]

this case is inescapably high, evidently intending to hit and so harm V and being reckless as to causing death.[754] As such it must be very close to the border with murder. Nonetheless, the eight years was described as 'severe'[755] but not manifestly excessive.

In *Scott* the length of sentence in *Gault*[756] was effectively followed to leave a period of 6 years incarceration. It was a common feature of both that there was a late guilty plea. That judgment given by the then Lord Chief Justice is the de facto starting point for motor manslaughters after the CDDD statutory maximum was raised to ten years, so following it evinces no shift from early 1990s practice shortly after *Mahmood*. Hence, no more recent emphasis on the harm of death was noted.

Although mention of the new 14 year sentencing limit for CDDD was not made until *Ballard,*[757] two cases prior to that did sanction terms of imprisonment notably longer than prior practice. The nine year sentence in *Franks*[758] was however intended to be consistent with contemporary practice.[759]

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[753] *Scott* [12]

[754] *Wright* [7], [9], [11]

[755] *Wright* [12]

[756] (1995) 16 Cr App R (S) 1013

[757] [2005] 2 Cr App R (S) 31

[758] [2005] 1 Cr App R (S) 13

[759] *Franks* [23].'

Conversely, in *Parfitt*[760] Kay LJ sought to carve leeway from existing precedents because 'this case was worse than each of those other cases [cited] in any event.'[761] The most outstanding merit of the late Kay LJ's judgment is however the consideration of inter-offence ordinal proportionality, specifically between murder and manslaughter.

> It is perhaps right to observe that if the jury had thought it was murder, the least sentence that we see that could have been determined as being the appropriate sentence in respect of him would have been one that would have led to him remaining in custody for 14 years before such time as he was considered for parole, the equivalent of a minimum of a 28-year sentence. Thus, this sentence of 12 years has to be seen in that context, and it is clear that the judge was making a very significant allowance for the fact that the jury were not satisfied that this was a case of murder.[762]

Having made these sagacious, broad-minded and thorough contentions, the Court of Appeal upheld the sentence of 12 years imposed on D concluding 'we can see nothing wrong at all with the sentences.'[763] From this comparison it is quite clear how large the gap stood between ordinary sentences for murder and sentences for the worst manslaughters before Schedule 21 was even in force. Needless to say, without adjustment to take into account Schedule 21's rises for culpable killings, the gulf will be stretched further.

This trend was continued in *Ballard* when the Court of Appeal upheld an 11 year sentence as 'severe but appropriate' for a 19 year old offender. D, inebriated, drove

[760] [2005] 1 Cr App R (S) 50

[761] *Parfitt* [20]

[762] *Parfitt* [22]

[763] *Parfitt* [26]

wildly,[764] mounting pavements driving at pedestrians who desperately tried to flee. Finally, 'the car mounted the central reservation and struck the victim with such force that he was tossed into the air.'[765]

The conviction was 'prosecuted…to bring into play even the increased sentencing powers that now arise in relation to the statutory offences.'[766] This is revealing as it intimates the Court of Appeal has adverted to the relevance of the tariff increases for one homicide (CDDD). We should expect therefore to see them do so for the offence of manslaughter holistically when Schedule 21 (pertaining to all murders) is applicable. Maurice Kay LJ showed an understanding of the impact of those rises where similar interests are at stake. Consequently, he declined to adopt the sentencing levels of CDDD authorities counsel submitted to him from previous generations in trying to reduce the sentence.

The erudite and contextually aware development in *Ballard* was not heeded in *Dwyer*[767] though. This case was in one sense worse than *Parfitt* since D appeared to actively try to dislodge V from the bonnet of the car she was driving by swerving between different lanes on the multi-carriageway she was driving down at speed. Arguably the crime was in the course of a property offence too.[768]

[764] Driving fast, performing wheel spins, swerving, pulling handbrake turns

[765] *Ballard* [5]

[766] *Ballard* [12]

[767] [2005] 2 Cr App R (S) 9

[768] *Dwyer* [1]

Dobbs J paid lip service to the patent gravity of the case, with robustly phrased reasoning.[769] Conversely she then ruled the original starting point too high, and lessened the term to five years taking account of D's guilty plea and age, 18. Whilst this is not inconsistent with old sentencing practice of the 1990s based on *Gault*, it fails to reflect the higher sentences seen since in *Parfitt* and *Ballard*, and the salience of the new maximum penalty for CDDD. The case is a classic example of tough-talking judgments bearing little relation to the substance- the sentence.

Clarke[770] decided in late 2005 regarding a motor manslaughter committed before 18th December 2003 cut a sentence from nine to seven and a half years. It was manslaughter in the course of a property crime. The basis of plea was that D did not realise he had driven over someone as he manoeuvred the stolen lorry in a tight courtyard to escape the premises, though the trial judge pointed out that D's 'conduct showed a total disregard for the safety of others in the vicinity'.[771]

The trial judge 'remarked that the sentence must reflect public abhorrence of a man losing his life as this man had',[772] but Leveson J for the Court of Appeal merely felt the manslaughter 'to some extent overwhelms the albeit serious

[769] *Dwyer* [15]

[770] [2006] 1 Cr App R (S) 132

[771] *Clarke* [6]

[772] *Clarke* [8]

planned theft of the lorry.'[773] The sentence for stealing the lorry and its valuable cargo of electronics was four years. Whilst the advertence to inter-offence ordinal proportionality is welcomed, the actual assessment made of the gravity of the two offences is less so. It certainly incorporates no greater valuation on the harm of death by virtue of the CDDD increase. Indeed, it is suggested it is a good example of the under-valuation on harm those reforms potentially help redress, and provides further fuel for Blunkett's ordinal proportionality complaints.[774]

Gross negligence

This is a convenient moment at which to look at manslaughters arising out of gross negligence, a morally distinct category of manslaughter not covered by Wasik's summary of sentence levels. This part examines precedents from manslaughters committed in the run up to 18th December 2003, so comparison can be made with cases post that pivotal date.

Perhaps the reason Wasik didn't provide a bracket for this class of case is the how little rhyme or reason the sentences evince. At both ends of the period scrutinised, were sentences much lower than those in the mean time. Sentences varied from two and a half years after a trial to six years on a guilty plea for no convincing reason.

[773] *Clarke* [16]

[774] HC Deb 20 May 2003, vol 405, col 871

The former was *Hood*[775], an earlier case where D's negligence in failing to get medical attention for his sick wife was not the sole cause of her death. The carelessness spanned weeks however. On the contrary, *Onley*,[776] another case of failing to care for a relation (this time a mother and her baby) equates to a nine year sentence in a contested matter. Although a higher sentence in the latter was merited, seven and a half years is a greater gap than between some one punch manslaughters and assaults verging on murder. Yet the latter have been conflated with selfish omissions in *Onley*.

Walters[777] also saw six years upheld on a guilty plea. The extent of Scott Baker LJ's reasoning appeared to be the noble observation: 'the fact is that by his criminal conduct the appellant took an innocent life'. Without the coherent structure of mens rea applicable in unlawful act manslaughters, the focus seems to shift onto the harm of death in gross negligence cases. Contrariwise, the lack of any reasoning as to why one instance of criminal conduct resulting in the death of an innocent victim might be more or less serious than another, more or less deserving of nine years after a trial, is disappointing.

Two vulnerable young men died in *Rodgers*[778] due to the profiteering of a landlord who had been put on notice about problems with a gas heater. Waller LJ ruled the

[775] [2004] 1 Cr App R (S) 73

[776] [2005] 1 Cr App R (S) 26

[777] [2005] 1 Cr App R (S) 100

[778] [2005] 2 Cr App R (S) 19

sentence of five years 'can in no way be described as manifestly excessive'. Finally Judge LJ declined to rule a 12 month sentence as unduly lenient.[779]

In these cases it appears the harm of death was brought to the fore, often sub-consciously as there was less for the court to concentrate on and analyse in terms of culpability. When more than just a fleeting factor in the shadow of culpability, the result appears to be substantial sentences that manage to convey the gravity of the harm done. The upshot is cases of unlawful act manslaughter by assault, where by definition someone needed to have intended to cause V a degree of harm, were actually sentenced at a similar or lesser level than these instances where there was no malice whatever towards V.

Fire (arms)

Wasik claimed six to twelve years was the normal range for manslaughters involving firearms, upto a maximum of fifteen. In *Kent*[780] that bracket would appear to be stretched to the limit. With the benefit of a full guilty plea discount the jail term was upheld at ten years, meaning a starting point of fifteen years. D was young and their culpability significantly below the ceiling that would still qualify for a manslaughter rather than a murder conviction.[781] More serious, adult cases would thus justify sentences considerably in excess of fifteen years, on the basis of *Kent*.

[779] *Attorney General's Reference 134 of 2004* [2005] 2 Cr App R (S) 47

[780] [2004] 2 Cr App R (S) 67

[781] They intended only to frighten, not even hurt V.

Yet it is doubtful this escalation in tariff owes much to the motivation behind Schedule 21 or its counterpart motoring reforms. Hedley J made extensive reference to the trial judge's entitlement to use deterrent sentencing to send out a message to people in the city afflicted by gun crime. Satiating the public concern that cases like these 'excite' was perfectly proper he asserted. Such justifications for what appear to be heightened sentencing levels are baseless[782] and demagogic.

Use of a firearm is a major aggravating factor for reasons *Kent* exemplifies all too regrettably. They are incredibly dangerous and cause great harm, often the gravest harm, when used, indeed even misused as here. In that sense it is representative of how dearly we treasure life that we are keen to protect it from such potent threats as the firearm. Logically there is a principled case for conduct risking death to be ranked more seriously as a result of an increased valuation on death, but on a proportionally lesser basis given those crimes are not, of course, actual homicides. *Kent* however encourages longer sentences based upon marginal deterrence and public concern about a certain type of crime. That leads to figures being plucked out the air idiosyncratically and pushes a conventional but proper evaluation of harm and culpability to the background.

Hussain[783] was an arson case where the Court of Appeal upheld an eighteen year sentence for no less than eight counts of manslaughter. Remarkable for the sheer loss of life, *Hussain* was in Rose LJ's words 'demonstrably in line with the 12-year sentences in the authorities to which we have referred imposed following pleas of

[782] A von Hirsch et al, *Criminal deterrence and sentence serverity* (Hart 1999)

[783] [2004] 2 Cr App R (S) 93

guilty.'[784] In being so, it cannot constitute any aggravation for the fact that eight deaths were caused rather than one. Rose LJ perhaps reflects that in upholding the sentence as not 'even arguably manifestly excessive'.[785]

A case understandably[786] at the other end of the scale was *KC,*[787] where four years was reduced by one year. An unpleasant game amongst children was taken too far when and then went badly wrong as the risk to V's life foreseen by D unexpectedly materialised when a door accidentally became wedged shut.

Manslaughter in the course of a property crime

These had noticeably higher brackets than most of the other categories, manslaughters in the course of burglary being subject to sentences of six to ten years according to Wasik, and twelve to fifteen years for armed robberies resulting in manslaughter.

Only one reported case fell purely within this category in the lead-up to Schedule 21's jurisdiction commencing. *Ali and Lotay*[788] concerned Ds perpetrating what the Court of Appeal dubbed 'street robberies'.[789] Ds selected V, 83 and frail using a stick to walk, as an easy target. They followed her, until Ali alighted from the getaway car driven by Lotay, ran upto V, wrenched her shopping bag including her purse from her grasp causing her to fall over, and ran back to the car. V died from the injuries she

[784] *Hussain* [11]

[785] *Hussain* [12]

[786] D 'had available to him all the mitigation that he could possibly have had': *KC* [2005] 1 Cr App R (S) 97 [14]

[787] [2005] 1 Cr App R (S) 97

[788] [2005] 2 Cr App R (S) 2

[789] *Ali* [3]

incurred from the 'accelerated fall'[790]. Tugendhat J for the Court of Appeal ratified 10 years imprisonment for Lotay and nine and a half for the younger Ali, 21.

The manslaughter was, but for the robbery, essentially analogous to *Coleman.* The Court of Appeal adopted the position in *A-G's Ref 19, 20 and 21 of 2001*[791] that the property crimes were worth six years in themselves, reconciling differences between that case and the present. In resolving that Lotay and Ali's sentences were 'in accordance with other comparable cases',[792] an indictment of the treatment of mid-level property crimes and high-level offences against the person is contentedly confirmed by the Court of Appeal. Little else can explain why this case merited 10 years on a guilty plea and yet an ordinary one punch manslaughter merited between one and two on contemporaneous standards.

Conclusion

Overall, this Chapter has established the sentencing level for manslaughter across a variety of its incarnations at the point immediately preceding Schedule 21's advent. This enables us to proceed onto investigating what, if any, change has occurred in manslaughter sentencing levels since greater importance was attached to the causing of death by Schedule 21's increased sentencing regime for murder. In the process, it has sought to cast a critical eye across the relativities between sentences for manslaughter and murder, and both within and between different species of manslaughter, to accentuate some of the injustices that Schedule 21 has the potential

[790] *Ali* [8]

[791] [2002] 1 Cr App R (S) 136

[792] *Ali* [33]

to help remedy. By looking at cases spanning a few years prior to Schedule 21's operation, any updates to the summary Wasik made of sentencing levels from the 1990s has been made, as well as identifying any trends that may have been set in motion and how the reasons for them comport with the objectives of Schedule 21.

Most illuminating has been the first shoots of recognition that death as a harm has increased in gravity calling for sentences to reflect this, in the context of one punch manslaughter. By the same token, that the same appreciation was not made in other class of case characterises the narrow-minded, species-specific approach of the Court of Appeal, whose commendable concentration on the intricacies of offence gravity within categories is sorely missing from consideration of the brackets the Court uses for each category. Gross negligence manslaughters are consequently sentenced on a scale with the same bounds to that used for manslaughters arising out of assaults. Escalations in the tariff for other types of manslaughter were noted, though inspired by deterrence or prompted by perceived public fear of that type of crime. Most classes however proffered little or no signs of an upward drift in prison terms with Court of Appeal judgments regularly working from levels endorsed in the 1980s or early 1990s. Suggesting no heightened valuation on the harm of death elemental to manslaughter, Schedule 21's rebalancing is just as required for manslaughter sentencing as it is for murder, if not more so.

MANSLAUGHTER SENTENCING POST SCHEDULE 21

Schedule 21 came into force on 18th December 2003. Sentencers are required to 'have regard to'[793] it when sentencing any murder committed after that date.[794] This thesis has argued that Schedule 21 is relevant to the sentencing of manslaughter, it also being a homicide offence and that the sentencing levels for it should relate, in some way, to those for murder, and thus take account of Schedule 21 and any changes it mandates in relation to murder sentencing.

The next part of this thesis examines whether any increases in the sentencing levels for manslaughter occurred for manslaughters committed after 18th December 2003.

No guideline authority

Often when a significant piece of legislation comes into force, guidance is offered by the Court of Appeal on its interpretation and operation.[795] Such a leading judgment, often issued by the Lord Chief Justice or another high ranking judge, helps provide uniformity of approach and gives answers to the most pressing problems presented by early appeals. An authority of this nature would be especially helpful in our context, since Schedule 21 does not explicitly deal with manslaughter, nor do the other salient new laws enacted by the CJA03. However, no such case emerged as the first appeals against sentence for manslaughters committed after 18th December 2003 started to

[793] CJA03, s.269(5)

[794] Different, 'transitional provisions' apply for those committed before this date but being sentenced after the commencement of Schedule 21 The material aspect of those transitional arrangements is that no sentence should be greater than what it would have been under the old system where the sentence was decided by the Home Secretary: paras 9-10, Sch.22, CJA03.

[795] Eg *Sullivan* [2005] 1 Cr App R (S) 67; *Lang* [2006] 2 Cr App R (S) 3

come before the Court of Appeal.[796] It appears the leadership of the Court of Appeal had missed the relevance and importance of those statutory reforms outright. They were not alone. Whilst there was a guideline on the new sentences devised by the CJA03[797] and academic commentary discussing other sentencing developments, [798] Schedule 21's broader repercussion were lost in the melee.[799]

It was not until a change in the leadership of the criminal judiciary that the logical consequences of Schedule 21 for manslaughter sentencing were given any credence, and then on a gradual basis. The first part of this chapter will map the Court's progression to that point to glean any evidence of treating manslaughters as more serious than before. This is because sentencers may have sub-consciously been reflecting a higher valuation upon the harm of death amongst society at large when they came to determine the gravity of crimes and thus the lengths of sentences.[800] If so, this might, unwittingly, to some greater or lesser degree, have implemented the rises in sentencing required by Schedule 21. Depending on the reasons behind any such increases, and the uniformity of their application, conclusions as to the role of the harm of death in determining the seriousness and thus severity of sentence across different sub-categories will vary.

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[796] *Taylor* [2006] 1 Cr App R (S) 12; *Binstead* [2005] 2 Cr App R (S) 62; *Barnard* [2005] 2 Cr App R (S) 81

[797] SGC, *New Sentences: CJA03* (SGC 2004)

[798] Eg A Ashworth and E Player, 'CJA03: The sentencing provisions' (2005) 68(5) MLR 822; A von Hirsch and J Roberts, 'Legislating sentencing principles' [2004] Crim LR 639

[799] After Shute (n 12) was unwelcoming of Schedule 21's introduction, the next published article was Jeremy (n 675) after *Appleby*.

[800] A discretionary custodial sentence must be 'commensurate with the seriousness of the offence': CJA03, s.153(2)

Manslaughter by reason of provocation sentencing guidelines

An early opportunity was presented to recognise the materiality of Schedule 21 and the other relevant aspects of the CJA03 to manslaughter sentencing when the Home Secretary asked the SAP to draw up guidelines for sentencing manslaughter upon provocation. By quoting in the introduction from a government consultation paper on domestic violence voicing concern

> 'that current sentencing in cases of manslaughter by reason of provocation in domestic violence homicides does not adequately reflect the seriousness of the cases and the loss of life, and that the tariff is out of line with levels of sentencing in other cases of homicide and serious violence'[801]

the SAP showed it was on notice as to the focus of this thesis.

The SAP did advert to the potential relevance of Schedule 21 itself.[802] Their advice to the SGC conceded 'there is clearly a very large gap'[803] between sentencing levels for manslaughter upon provocation and the starting point for unaggravated murders. However, they noted the Lord Chief Justice in *Sullivan*[804] gave no reason to increase manslaughter sentences because, on his analysis, those for unaggravated murders hadn't been raised by Schedule 21.[805] Similarly, the 'majority' who responded to the SAP's consultation were against Schedule 21 influencing manslaughter upon provocation sentencing.[806] Manslaughter is of 'a distinctively different character' the

[801] SAP, *Manslaughter by reason of provocation* (SAP 2004) 2

[802] (n 801) [55]-[59]

[803] (n 801) [57]

[804] (n 795)

[805] (n 801) [57]

[806] (n 801) [58]

SAP's guidance concluded due to the pivotal difference in culpability between the two crimes, culpability being the 'primary factor in determining seriousness'.[807] A strong argument can be made for this contention, but it is not normally made by those academics who partly comprised the SAP. Rather, it is made by those who assert murder is a uniquely heinous crime and thus worthy of a mandatory life sentence to mark that. The usual polemic of the academy is that murders vary widely in their gravity[808] and murderers in their dangerousness, so the mandatory life sentence is wrong for arbitrarily treating different cases alike, in simple terms.[809] This recognises that of course, some of those who are guilty of manslaughter are on the cusp of murder, because just like murder, manslaughter is a spectrum too.[810] Thus to claim they are of a 'distinctly different character' is inconsistent, even more so where the two offences share the same level of mens rea.

It has already been argued in preceding chapters how Schedule 21 and other related sentencing reforms constitute an increased valuation upon the harm of death, contrary to *Sullivan*. The SAP's reliance on *Sullivan* is buttressed by the implication that even if Schedule 21 did amount to a heightened valuation on the harm of death, it would not be of great prescience since culpability is chief in determining seriousness anyway. That must be true within offences, within the same harm levels. Where the magnitude of harm caused is equal, a crime perpetrated with low culpability is less serious than that with a greater degree of blameworthiness. But above all we see

[807] (n 801) [59], citing SAP, *Advice to the Sentencing Guidelines Council – 3, New Sentences – Criminal Justice Act 2003* (SAP 2004)

[808] (n 675) 607

[809] (n 128) 118-119

[810] A Ashworth, 'Reforming the law of murder' [1990] Crim LR 75, 77; M Wasik, 'Form and function in the law of involuntary manslaughter' [1994] Crim LR 883, 888

offence seriousness, where culpabilities are equal, are determined by harm level. It is the fact someone dies that makes an intentional killing more serious than an intentional theft; that we as a society consider that harm loss of life more serious than that of loss of property. As such, harm is the cornerstone of offence gravity, upon which culpability varies on a spectrum to determine how serious one particular theft is than another, one killing than another. Murder and manslaughter are merely brackets on that spectrum devised for the purpose of labelling different levels of culpability. Hence, the approach to sentencing manslaughter should start from the same basis as that of murder, adjusted to vary proportionately as the culpability does.

The advice produced by the SAP recommended a tariff largely duplicating that used at the time, entrenching the sentencing levels of a previous generation. This is, in many ways, unsurprising since what other authority could be used to gauge sentencing levels having discounted Schedule 21's germanity. The mid range appears to be a little broader at 4-9 years in comparison to Wasik's research finding 5-8 years, with a starting point of 12 years in a range of 9-15 for a low degree of provocation, mimicking *Latham*. One difference is that it is not however characterised by the use of a knife only. Where there was a high degree of provocation, potentially a non-custodial sanction upto four years prison, with a starting point of three years jail was suggested. Those levels were largely accepted by the SGC, whose definitive guidelines of November that year set a slightly higher range for the low provocation category, at ten years to life.

Given the entrenchment of old sentencing levels by the guidelines, sentences have remained as static in their severity as any category. The first appeal where the

guidelines came into play was *Douglas*.[811] The Court of Appeal concluded that *Douglas* fell between two authorities pre-dating the sentencing guidelines, one of which was *Latham*, and that nine years was therefore more appropriate. In referring to pre-guideline cases the Court is displaying something of a nonchalance towards the guidelines themselves. Unsurprisingly the final sentence bears little resemblance to the guidelines and burnishes the hypothesis that appeal judges are disinclined to depart too greatly from the original sentence.

Other judgments finalised sentences commonly of six years, whether upheld[812] or cut from the upper limit for 'substantial provocation'.[813] They were rarely outside this range drawing into question whether deep, detailed thought was going into the exact degree of provocation present, tending instead to deem all provocation 'substantial'. It may be worth considering the semantics at play here: between "high" and "low" normally comes "medium". Using the term substantial may mistakenly lead sentencers to think that because provocation has been established, it must therefore have been substantial. An exception would be *Calvert,*[814] which made a deeper, more careful investigation into the level of provocation. This did come post *Wood*[815] however, which urged sentencers to consider more carefully the exact degree to which the abnormality of mind diminished D's responsibility.

[811] [2007] 1 Cr App R (S) 58

[812] *Gant* [2007] 2 Cr App R (S) 100

[813] *O'Reilly* [2008] 2 Cr App R (S) 67; *Kehoe* [2009] 1 Cr App R (S) 9

[814] [2010] 1 Cr App R (S) 50

[815] [2010] 1 Cr App R (S) 2

Certainly the great merit of the guidelines that they encourage a culpability orientated approach to determining seriousness is at risk of being overlooked by the Court of Appeal. Indeed, notwithstanding the established SGC guidelines, attempts were made by the Court of Appeal to derogate from them on the basis of 'public concern.'[816] The platform for this echoed *Latham* in justifying more robust sentence levels in scenarios where the manslaughter occurs as a result of young men carrying knives on their person. Thus any increase in the tariff *Daley* constitutes is not owed to the stimuli behind the statutory provisions discussed in this thesis.

PIECEMEAL PROGRESS?

It took five years and two Lord Chief Justices after Schedule 21 came into force before the broader significance of it and the death by driving legislation was appreciated by the upper echelons of the judiciary The delay in bringing to bear the repercussions of those reforms on manslaughter sentencing reveals the likelihood of years of injustice. Thus, this section of the chapter will map the road to Lord Judge CJ's seminal judgments in *Wood* and *Appleby*, attempting to discern what, if any, kind of piecemeal progress may have been made towards implementing the thrust of the aforementioned legislative reforms from a detailed analysis of decisions from the Court of Appeal.

[816] *Daley* [2008] 2 Cr App R (S) 95, [15]

One punch manslaughter

At first it appeared to be "business as usual", the Court of Appeal picking up where they left off, for example cutting a sentence of 2½ years for a one punch manslaughter to 18 months, citing *Coleman* and *Edwards*.[817] Coming after a trial, the starting point evidently was 12 months on a guilty plea. In *Furby* Lord Phillips CJ paid lip service to the gravity of the harm of death,[818] but then endorsed a 12 month sentence on the basis of *Coleman*. It was the first instance sentencer who had seen the light, observing

> 'What is clear, however, is that there has been a recognition in recent years that too little attention was sometimes paid in the past to the fact of loss of human life, and in my judgment that must be right. Causing the death of another human being by unlawful violence must result in a sentence of some length.'[819]

The source of this 'recognition' can only be Parliament as there has been scant meaningful reference to the harm of death and its under-reflection in sentences purporting to be commensurate with the seriousness of the offence in the case law examined thus far in the chapter. The Lord Chief Justice on appeal refused to endorse the Crown Court judge's remarks or give any succour to their factual basis. Instead, he asserted the mantra 'it is right, however, that the length of the sentence must reflect the culpability of the offender.'[820] He claimed that the 12 months figure in *Coleman* was a lower limit of a range rather than a starting point[821] yet ultimately concluded: 'we turn back to *Coleman*. We can see no reason on the facts of this case to go

[817] *Binstead* [2005] 2 Cr App R (S) 62

[818] [2006] 2 Cr App R (S) 8 [11]

[819] *Furby* [10]

[820] *Furby* [12]

[821] *Coleman* 513

beyond the recommended starting point of 12 months.'[822] It is clear from this judgment that no increased value upon the harm of death in sentencing manslaughter was incorporated beyond 1990 levels.

Even more intriguing is the abjuration of Lord Phillips CJ's attempt to turn the tide of cases preceding it. Perhaps in *Cheetham* and *Lumsden,* and certainly after *Binstead* it appeared the Court of Appeal was trying to wriggle free from the constraints of *Coleman,* establishing a de facto tariff of about 30 months.[823] The fact that no one punch manslaughter sentence sanctioned by the Court of Appeal post-*Furby* was at the twelve month level, indeed not less than 2½ years,[824] highlights how retrograde *Furby* was in the eyes of other judges. Despite its status as a leading case, examination of everyday practice by the Court of Appeal uncovers a different story, shunning its quite literal 'turn back to *Coleman'* levels. Detailed analysis of numerous, lesser Court of Appeal authorities is thus essential to reach the truth and a hallmark of this thesis's methodology. Yet few decisions of that court do the same, following one or two 'leading' cases like *Coleman* without paying heed to the rest of the canon of sentencing precedents in the same class.

Where *Furby* was cited, it was the element of the judgment acknowledging sentences upto 4 years had been known rather than the re-adoption of twelve months as a

[822] *Furby* [31]

[823] *Attorney General's References 3 and 4 of 2005* [2005] 2 Cr App R (S) 98: 2-3 years; *Attorney General's Reference 9 of 2005* [2005] 2 Cr App R (S) 105: 3 ½ years; *Roberts* [2006] 1 Cr App R (S) 31: 2 ½ years

[824] Those being *Warwood* [2006] 2 Cr App R (S) 113; *Cunningham* [2007] 1 Cr App R (S) 14; *Hogan* [2007] 1 Cr App R (S) 110 (where it wasn't even in issue)

starting point.[825] Instead the approach espoused by Judge LJ in *Attorney General's Reference 9 of 2005,* pre-dating *Furby,* appeared to gain traction, judging by steadily increasing sentencing levels in one punch cases. Judge LJ's judgment gives an early insight into the origins of the approach he was to pioneer as Lord Chief Justice in *Wood* and most seminally *Appleby*.

Judge LJ gave complexion to consequences of actions, even when unforeseen, by reminding the Court 'the blow administered to him [V] resulted in his death, his life brought to a cruel and sudden end, to the great distress and grief of those who loved him.'[826] He laid down the standard of behaviour and civility subjects expect[827] with the effect of accentuating the importance of the doing of harm. Thus he held, 'those who are violent, as this offender was, and in the circumstances in which he was, have to face up to the consequences of their actions, even if the consequences were unintended.'[828] What comes through as a strong and consistent theme is the sheer importance of the consequences of people's actions, when they infringe or as here vapourise core principles and values protected by the criminal law. In placing particular emphasis on the harm caused, Judge LJ, without citing the provisions of the CJA03, but in accordance with s.143(1), has increased its role in the determination of offence gravity based on culpability and harm. Since a custodial term is determined by the seriousness of the offence by virtue of s.153(2), the sentence of 2 years was consequently increased to 3½.

[825] *Warwood* [4], [15]; *Attorney-General's Reference 78 of 2006* [2007] 1 Cr App R (S) 114, [18]

[826] *Attorney-General's Reference 9 of 2005* [2005] 2 Cr App R (S) 105, [13]

[827] *A-G's Ref 9 of 2005* [15]

[828] *A-G's Ref 9 of 2005* [16]

Indeed, the fact that two and half years or more had become the accepted level is reflected in length of sentence of 2 ½[829] and 3 years[830] not even being challenged in subsequent appeals where the matter in issue was the selection of an indeterminate sentence. Where it was, three years was upheld[831] or the level to which terms were pruned down to.[832] Affirming 3 years for a boy of 15 pleading guilty at the first opportunity, Hughes LJ said the range was 'properly' between been two and a half upto five years.[833] Such sentences were hitherto unheard of and utterly incompatible with *Coleman*, which is briefly dismissed as 'at or near the bottom of the scale'.[834] Does this new consensus betray a sub-conscious transformation in appellate judges' conceptions of the harm of death too in such cases?

The justification for such levels appears to be as much supposed public concern about violence on the streets than the harm of death however,[835] even in the two References quoted above.[836] This is reflected by the lack of any substantial rises in tariff for types of manslaughter not customarily involving those "aggravating" factors, as will be seen below.[837] That exposes the fickleness of an approach based upon 'public concern' as opposed to one rooted in shared societal values. The latter

[829] *Hogan* [2007] 1 Cr App R (S) 110

[830] *Frazer* [2007] 1 Cr App R (S) 69; *Nobes* [2008] 1 Cr App R (S) 17

[831] *Attorney General's Reference 113 of 2006* [2007] 2 Cr App R (S) 29; *Gosling* [2009] 1 Cr App R (S) 10

[832] *Chapman* [2008] 1 Cr App R (S) 103

[833] *Attorney General's Reference 113 of 2006* [2007] 2 Cr App R (S) 29, 169

[834] *A-G's Ref 113 of 2006* , 168

[835] *Furby* [25]-[28]; *A-G's Ref 78 of 2006* (n 825) [18]

[836] *A-G's Ref 9 of 2005* [15]; *A-G's Ref 113 of 2006*, 169

[837] Also *Keen* [2008] 1 Cr App R (S) 8 and *Wilson* [2008] 1 Cr App R (S) 75 are good examples of pre-Schedule 21 business as usual.

can and should be applied anywhere if its roots giving rise to public concern are soundly founded- including where there is not public concern merely for lack of awareness or publicity for instance.

Moreover, despite increasing sentences in this branch, it is clear any kind of ordinal proportionality with murder is a long way from being achieved. Hughes LJ suppressed the notion that there is a relationship between the sentencing levels with the non sequitur that, 'of course the sentencing regime would have been completely different.'[838]

The heightened appreciation of the gravity of death was something that Crown Court sentencers seemed to be grasping more acutely[839] than their appellate colleagues.[840] Perhaps it is because they are "closer to the ground" in their local courts, more involved with and in more frequent contact with ordinary people, bearing out the oft-touted virtues of decentralisation. Does sentencing at first instance tend to be in better touch with reality, entailing judges' own, full understanding of the harm of death, rather than hamstrung by outmoded precedents? Do cursory Court of Appal judgments where only one or two leading cases like *Coleman* are referred to[841] omit scrutiny of more recent and relevant precedents that might cast sentencing practice in a more dynamic light, compared to those more thorough ones?[842] These

[838] *A-G's Ref 113 of 2006*, 165

[839] 5 years in *Roberts*, 4years in *Cunningham* [10]; *Coleman*'s 12 months derided as 'far too low' in *A-G's Ref 78 of 2006* [15]

[840] *Roberts* 2½, *Cunningham* 2½

[841] *Edwards*, *Binstead*

[842] *A-G's Ref 9 of 2005* [8]-[9]

methodological aspects of legal practice may have highly significant impacts on the law and are worthy of further research.

Even so, cases virtually identical to *Coleman* begun to receive 18 months longer in the Court of Appeal.[843] Hughes LJ, now Vice-President of the Court of Appeal (Criminal Division), did follow Judge LJ in arguing, 'although he did not mean to do it, he had certainly caused not just serious harm but much worse and the consequence of what he had done is a proper factor in sentencing'[844] in another one punch case. But such reasoning was the exception rather than the norm. Often there was no discernible reason for the escalating trend in the Court of Appeal.

At best, in the vast majority of cases there seems a reluctance on the Court of Appeal's behalf to pare down first instance judges' sentences too greatly, perhaps out of regard for the latter's proximity to the facts. Reductions in sentence of more than half[845] might be seen as almost insulting in a profession where deference remains important. This of course does have the effect of retaining a degree, albeit a lesser one, of the Crown Court judge's increased tariff. This might explain why four[846] and five[847] year sentences on a guilty plea were cut to two and a half years, rather than the eponymous 12 months of *Coleman*.

[843] *Cunningham*; *A-G's Ref 78 of 2006*

[844] *A-G's Ref 113 of 2006*, 165

[845] *Roberts* is 50%

[846] *Cunningham*

[847] *Roberts*

More substantial assaults

Indeed, ordinal proportionality within different manslaughters by assault had been pushed to narrow extremes. The developments in one punch cases mean deep problems of principle are prompted by the proximity of some custodial terms for more serious assaults, which were not subject to the same upward trend. They infringe ordinal proportionality by appearing to conflate the gravity of crimes distinctly different in their moral reprehensibility.

Whilst the sentences in *Case*[848] of twelve years is beyond anything else before or after Schedule 21's remit, the other grave assaults seem to conform with the levels of punishment identified in Chapter 3. 9 years in *Liu and Tan*[849] , and starting points in the region of 10 years in *Fisher*[850] and *Attorney General's References 27 and 28 of 2008*,[851] do not stretch the apparent limits witnessed for manslaughters committed before Schedule 21's applicability.[852] Predictably, no reference to Schedule 21 was made in any.

Similarly in *D and P*[853] the persistent abuse, degradation, and torture of a vulnerable V meant the behaviour was close to the murder threshold.[854] In a Court of Appeal judgment devoid of any real reasoning for the sentence length, the starting points of eight years for D, 16 at the time of the crime, and seven years for P, 14, were

[848] [2007] 1 Cr App R (S) 57

[849] [2007] 2 Cr App R (S) 12

[850] [2008] 2 Cr App R (S) 34

[851] [2009] 1 Cr App R (S) 87

[852] *Wadsworth*; *Attorney-General's References 72 and 73 of 2005* [2006] 1 Cr App R (S) 112

[853] [2008] 2 Cr App R (S) 23

[854] *D and P* [12]

implicitly approved. Thus the IPP minimum terms of 3 ½ and 3 years including aggravating factors compare to murder minimum terms in the region of seven years, excluding remaining aggravating factors. In determinate terms that equates to roughly 7 years gap. The disparity is emphasised by the sentences only being c. 4 years longer than the sentence in an otherwise comparable one punch case. So much for being close to the murder threshold.

In *Jones*[855] D, having already brawled with V, pulled V's legs away as he walked down the stairs, causing V to fall down them. D then kicked V whilst V lay on the floor so hard V's pancreas was crushed against their spine. 'It was the kind of injury that is normally associated with a road traffic accident.'[856] Richards LJ for the Court of Appeal ruled the Crown Court judge's starting point of nine years- duly reduced for an early guilty plea- too high. Four years on a guilty plea was appropriate. Once again, first instance sentencers' attempts to update the tariff for manslaughters was struck down by appellate judgments offering no consideration of ordinal proportionality or increases in sentencing levels amongst other manslaughter categories. The facts of *Jones* merit a significantly higher sentence to distinguish it from the evolving tariff for one punch manslaughter, which was regularly approving three years on a guilty plea.[857] Instead, statically it echoes pre-Schedule 21 standards.[858]

[855] [2009] 1 Cr App R (S) 73

[856] *Jones* [9]

[857] e.g. *Gosling* [2009] 1 Cr App R (S) 10

[858] *Reece* (n 705)

Infants

Not unexpectedly, the picture with regards to infant victims is parallel. Old authorities, which themselves merely reviewed even older precedents to decide what the appropriate sentencing level was, are relied upon once again. Thus, obsolete standards which the Court has failed to distinguish as from a bygone era out of touch with modern valuations on the gravity of the loss of life are approved. One such paragon is the decision in *Fletcher*,[859] where following the usual mention of the harm of death, an old case along the lines described above[860] is applied in an habitual fashion. Seven years was sheared down to five, excising any increase upon previous practice reflecting the greater valuation upon loss of life.

Stabbings

Amongst plenty of cases finding little development from the pre-Schedule 21 exploration, *Porter*[861] is a case of great significance. 'The judge was clearly very conscious, as indeed is this Court in many cases before it, of the great disparity between the effect of a life sentence for murder and the sort of determinate terms of imprisonment passed on offenders convicted of manslaughter.'[862] Recognising the suitable starting point if it had been a murder was fifteen years, he set a minimum

[859] [2006] 2 Cr App R (S) 67

[860] *Yates* (n 710)

[861] *Porter* [2007] 1 Cr App R (S) 115

[862] *Porter* [2007] 1 Cr App R (S) 115, [29]

term of nine years considering the facts came 'as close to murder with mitigating circumstances as may be imagined'.[863]

David Clarke J for the Court of Appeal though overruled this sensible reasoning because 'we are not satisfied that those high starting points prescribed by Parliament for murder are of relevance to the issue of sentencing for manslaughter.'[864] He was later to change his mind in subsequent case law.[865] Instead of giving force to the trial judge's coherent approach which had ample Parliamentary justification, David Clarke J found the sentencing level laid down in *Latham* 'inadequate' due to severer sentencing in crimes involving knives and public concern regarding them since that authority had been decided.[866] That was augmented by the 'serious aggravating feature' of D carrying the knife on his person and using it.[867] Thus at 14 years *Porter* does represent an increase in tariff for manslaughters by stabbing, though not for the reasons which this thesis advocates.

Manslaughters in the course of a property crime

Curiously the Attorney General requested sentencing for these offences take account of Schedule 21. The 30 year starting point normally appropriate for murders for gain 'must be reflected to some extent in the appropriate sentence'[868] for manslaughters done for gain he submitted. Although Latham LJ urged 'caution' with respect to such

[863] *Porter* [28]

[864] *Porter* [30]

[865] *Holtom* [2011] 1 Cr App R (S) 18

[866] *Porter* [32]

[867] *Porter* [32], [31]

[868] *Attorney-General's References 90 and 91 of 2006* [2007] 2 Cr App R (S) 31 [16]

a proposal due to the different mens rea between the two offences, the substance of his judgment *does* appear to defer to the Attorney General's advocated approach. He held the right sentencing range for the offence in question was ten to twelve years, appearing to accept the Attorney's suggested tariff.[869] Compared to *Ali and Lotay* however the difference is unclear. 10 years was the sentence there after guilty plea mitigation, and the range here described as 10-12 before. If a degree of ordinal proportionality has been achieved between Schedule 21 and like manslaughters for gain due to the former Reference, that must be welcomed. Since the starting point of ten years adopted by the Court of Appeal there was at the top but not outside the pre-Schedule 21 range, it remains to be seen whether the Court would be prepared to exceed it where more serious cases arise, inching the tariff higher.

What remains consistent is the disproportionate impact of the manslaughter coming in the course of a property crime when compared to the likely sentence for merely the killing- around seven years. This appears to be urgently needed when confronted by the parity in sentence confirmed in *Attorney General's Reference 38, 39 and 40*.[870] Equating the robbery in V's home with the one punch manslaughter as the Court of Appeal did is open to the full force of the criticisms levelled at the treatment of offences against the person and property crimes. Applying the effect of Schedule 21 in a coherent way across all manslaughters would help rebalance the weighting of the gravity of these crimes by the courts in sentencing.

[869] *A-G's Refs 90 and 91 of 2006* [11]

[870] [2008] 1 Cr App R (S) 56

In manslaughter by assault cases no judgment refers to a respective submission that it should be borne in mind the corresponding starting point for murder is equivalent to a 30 year determinate sentence. The existence of a specific circumstance in a case, particularly one that appears in para.4(2) or para.5(2), seems to increase the likelihood that comparisons to Schedule 21 are made. This is corroborated by precise factual features resulting in other relevant sentencing laws influencing the tariff, as seen below.

Death by driving

For example, some mention of the repercussions of the higher statutory maximum for CDDD upon sentencing for motor manslaughter was made early on by the Court of Appeal in *Brown*.[871] Gage LJ held 'the sentence was bound to reflect the fact that he had pleaded guilty to a more serious offence'[872] than CDDD for which the maximum penalty was now fourteen years. Ten years detention in a YOI was thus 'severe'[873] but upheld due to the circumstances. D had driven the wrong way down the A1(M) in an attempt to kill himself in a collision with another vehicle. He steered to hit a car that had swerved to avoid his oncoming car and killed a young mother.

New heights were reached in the aftermath. *Dudley* upheld fourteen years for the manslaughter of two policemen on a dual carriageway where D, attempting to evade capture by the police, careered into a patrol car containing Vs to avoid a road block

[871] [2006] 1 Cr App R (S) 124

[872] *Brown* [14]

[873] *Brown* [15]

they had erected to stop him. This extends the trend of double digit prison terms seen before the theoretical applicability of Schedule 21.

The length of nine years custody was not even challenged in *Bennett*. Two cases of gross negligence manslaughter where the fatal injuries were inflicted with a motor vehicle saw sentences finalised by the Court of Appeal at six[874] and eight[875] years. Being well beyond the usual range for that class of manslaughter must indicate a more robust tack to all driving-related deaths in the wake of the CDDD penalty increase and the principles behind the RSA06.

Fire (arms)

Both Schedule 21 and other provisions of CJA03[876] had signalled offences involving firearms as meriting greater punishment than previously. Once again, the courts appeared to pick up on this and respond to Parliament's palpable intention. Older authorities submitted to the Court of Appeal in *Briggs*[877] were treated with caution because 'Parliament and the courts have generally adopted a more severe approach to homicide involving firearms since.'[878] The increase in tariff from 12-14 years in the mid-1990s to 30 years under Schedule 21 was cited as a key example.[879]

[874] *Attorney-General's Reference 111 of 2006* [2007] 2 Cr App R (S) 26

[875] *Bissell* [2008] 1 Cr App R (S) 79

[876] s.287

[877] [2007] 2 Cr App R (S) 67

[878] *Briggs* [12]

[879] ibid

The judgment in *Briggs* also takes account of other recent development in firearms sentencing, primarily the five year mandatory minimum for possession of a firearm. Such considerations of other recent developments concerning similar offence features consolidates the approach this thesis has taken to the salience of Schedule 21 to manslaughter sentencing. It throws into starker relief why provisions concerning mandatory sentences for a different but related offence are taken into account in this instance, but not Schedule 21. Again, the Court of Appeal is characterised by a conscientiousness when certain easily identifiable factual circumstances arise, keenly considering inter-offence ordinal proportionality between various gun crimes. Contrariwise, it failed to see the bigger picture with regards to the fundamental core offence being dealt with and Schedule 21, clearly of much greater structural importance and general influence. Why the Court of Appeal seems perfectly capable of adverting to the relevance of increased sentences in the context of aggravating factors by virtue of Schedule 21, but not in the essential ingredients of the offence is unclear. Certainly the rises have been greater for firearms in Schedule 21, but are still obvious in the escalation to 15 years from 12 for unaggravated murders. This highlights one of the chief problems with a narrow category-specific approach; there is rarely any attempt to ensure ordinal proportionality *between* them, even if there is a keen focus on it *within* them.

Gross Negligence

Deaths occurring after 18th December 2003 do not seem to have been punished any more seriously than those before. Although a seven year sentence in *Connolly*[880] was substituted for one of nine, the fact that four lives had been lost would justify the two additional years to the five year sentence upheld in pre-Schedule 21 *Rodgers* where two people died. Sentences of 12[881] and 15[882] months were also confirmed by the Court of Appeal showing how low sentences could still commonly be in this species of manslaughter.

Diminished Responsibility

D was a cannibal in *Bryan*[883] and had been sentenced for two voluntary manslaughters to a whole life minimum term, having already been convicted of diminished responsibility manslaughter before in 1994. D had killed and dismembered the first V, then cooked and eaten part of V's brain. In custody after his arrest for this killing, he slaughtered an elderly fellow inmate who he'd selected as the most vulnerable and bottom of the food chain.[884] 'The seriousness of the case, I have no doubt whatever, is exceptionally high, even having regard to your illness' which 'substantially impaired' D's culpability, the original sentencer decreed.[885] It is hard to avoid the linguistic commonality between the judge's assessment of the gravity as 'exceptionally high'

[880] [2007] 2 Cr App R (S) 82

[881] *Roys* [2009] 1 Cr App R (S) 91

[882] *Attorney-General's Reference 86 of 2006* [2007] 1 Cr App R (S) 101

[883] [2006] 2 Cr App R (S) 66

[884] *Bryan* [12]

[885] *Bryan* [26]

and the phrasing of para.4 of Schedule 21, which suggests a whole life term as the starting point for such heinous murders. Indeed, a whole life term is what D received. No less than two Treasury counsel were enlisted by the Crown to try and uphold the sentence on appeal.

Lord Phillips CJ noted that the statutory basis for determining the gravity of a crime, namely both culpability and harm.[886] He declared 'There is no greater harm known to the criminal law than death. It robs the primary victim of his or her life and causes deep distress and deprivation for relatives and friends of the victim.'[887] Summarising, he said 'the harm that was done by the appellant was immense; the circumstances in which that harm was done were horrifying; but his culpability was very considerably diminished by his mental illness.'[888] The notional determinate sentence was fifteen years on each count, running consecutively, notwithstanding that terms didn't reach double figures for this species of voluntary manslaughter normally.[889]

Nevertheless, just a few months later the Court of Appeal denied the Attorney General's critique 'that the case law establishes a bracket of six to eight years for manslaughter by reason of diminished responsibility, above which the court should not normally go'.[890] But they asserted 'the absence of a coherent body of developing authority, or of any adequately reasoned argument on behalf of the Attorney General

[886] *Bryan* [29]

[887] *Bryan* [30]

[888] *Bryan* [36]

[889] *McMilan* is best treated as anomalous for the period

[890] *Attorney-General's Reference 49 of 2005* [2006] 2 Cr App R (S) 12 [20]

to support'[891] an increase in sentencing practice militated against it. Cases following afterwards tended not to exceed six years on a guilty plea,[892] rather substantiating the Attorney General's criticism and meaning sentencing in this field was left behind, overlooking the changing environment. It is not surprising that diminished responsibility manslaughter was the catalyst for the revolution, when it came.

[891] *A-G's Ref 49 of 2005* [21]

[892] *Gilliatt* [2007] 1 Cr App R (S) 78; *Kehoe* [2009] 1 Cr App R (S) 9

CHAPTER 4

Judicial recognition of Schedule 21's relevance to the sentencing of manslaughter: the new approach

This chapter examines how the approach to Schedule 21's materiality to manslaughter sentencing changed eventually, looking at how and why in the first place, before going on to sketch the degree to which these changes in the law, engineered through a number of major guideline precedents, have been implemented by the Court of Appeal. As with previous chapters, a rigorous critique of these leading appellate authorities sheds light on the extent of uniformity in sentencing decisions and a more detailed, accurate picture of the law in practice, the law in reality. In turn, greater clarity is provided as to where the law now stands, and where there are deficiencies or challenges that remain to be overcome.

R v. WOOD

Lord Judge CJ pioneered what proved to be a turning point in assessing the gravity of an offence in *Wood*.[893] Classic desert theory as defined by its leading exponents states 'the gravity of a crime depends upon the degree of harmfulness of the conduct, and the extent of the actor's culpability.'[894] The statutory enactment of this principle in

[893] [2010] 1 Cr App R (S) 2

[894] (n 174) 144

s.143(1) also omits to give special credence to either factor.[895] Yet as has been seen, in determining the gravity of many manslaughters, especially voluntary ones (ironically because of the level of intention), the focus has either been excessively on culpability to the neglect of harm and its role, or simply to value the harm of death at such a low level when taken together with culpability as to wholly under-represent the sanctity of that wrong in our society. Now as Lord Chief Justice, it appears Lord Judge was on the first leg of a project to rebalance this ratio. He started from the touchstone of assessing the seriousness of a crime:

> self-evidently, s.143(1) of the 2003 Act requires the assessment of the seriousness of any offence to address the offender's culpability and the harm consequent on his actions. However neither consideration is paramount, and more important for present purposes, they are not exclusive considerations.[896]

It is all too easy to glide over the significance of this. The classic legal stance when it comes to sentencing is culpability intense. Motoring homicides perhaps put the matter into starkest relief. The original causing death by dangerous driving (CDDD) offence created under Eden's administration was by 1960 'in danger of being fairly regarded as…inhuman'[897]- or so it was thought in academic journals. This view is hardly surprising given the attitude of leading legal lights at the time. Streatfeild J perfectly encapsulates this with his proclamation from the Suffolk Assizes of November 1963:

'The fact that a death resulted from a piece of dangerous driving did not make the dangerous driving any more or less. It would be quite wrong for the court to measure a man's culpability by the amount of damage he did.'[898]

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[895] CJA03. Indeed, it goes further than the harm caused and includes any harm 'the offence…was intended to cause or might forseeably have caused' too. Cf. SGC, *Overarching Principles* (SGC 2004)

[896] *Wood* [14]

[897] ELB, 'Causing death by dangerous driving' (1960) JP March 19th

[898] 80 LQR 18, 19

Accordingly, a fine of £50 and a driving ban for 5 years were handed down to an unlicensed young woman who rounded a bend on the wrong side of the road in a Jaguar, colliding with an oncoming car, killing two of its female occupants and seriously injuring a man. Similarly, the next day Streatfeild J's dictum meant a male driver who had killed a motorcyclist escaped without disqualification ironically due to the effect such a sanction would have on D's livelihood, and a £50 fine. If only the same careful consideration had been paid to the harm D's dangerous driving had caused V, perhaps the female D wouldn't have considered herself so lucky. Indeed, she 'quite expected to go to prison'[899] she admitted, having walked free.

Dismissal of the harm caused, even death, when it was unintended remained the touchstone for decades as the leading case of *Coleman*[900] illustrates at the start of the 1990s, but by the time Lord Phillips CJ (who had been an admiralty silk when at the Bar) tried to sustain the notion in *Furby,*[901] it proved a bridge too far as we saw in the previous chapter.

Lord Judge CJ's explicit recognition of s.143 marks a triumph for Parliamentary Sovereignty. Together with the SAP, the SGC had distorted s.143. The SGC's definitive guideline published shortly after the CJA03 had been passed explicitly acknowledges s.143(1), appreciating the provision 'makes clear that the assessment of the seriousness of any individual offence must take account *not only* of any harm

[899] 80 LQR 18, 19

[900] (1992) 13 Cr App R (S) 508

[901] [2006] 2 Cr App R (S) 8

actually caused by the offence, *but also of any harm that was intended to be caused or might forseeably be caused by the offence*'.[902] The clause appears to be inclusionary in that harm caused but not intended is brought within the language of s.143. The principle here- and there is one- is that harm matters. It is central even to culpability. After all, culpability would be high where harm was intended but not occasioned to the same degree, and low where not intended or foreseen but caused. Either way, the harm component is evidently to be taken at its highest level; it is immaterial whether that is through the mens rea or the actus reus. Indeed the repeated references to harm would if anything suggest a focus on harm rather than culpability, and harm avoidance, due to the objective tenor of 'foreseeably'. It attempts to dissuade people from behaving in a way that risks harm by holding them blameworthy even if the full danger does not transpire.

Yet the SGC guideline goes on to make a declaration to the opposite effect, asserting 'harm must always be judged in the light of culpability'.[903] The summary principle it advances is that 'culpability…should be the initial factor in determining the seriousness of an offence'.[904] This means that if much more harm was caused than intended or foresaw then culpability may be regarded as being more important in the determination of offence seriousness than harm, and vice versa.[905] Thus it dilutes the rule in s.143(1) by sidelining high levels of harm caused when culpability was low by affording supremacy to the latter.

[902] SGC (n 895) [1.15] (emphasis added)

[903] SGC (n 895) [1.17]

[904] SGC (n 895) [1.19]

[905] SGC (n 895) [1.19]

That the SAP commenced a review of the Overarching Principles just four years after the original definitive guideline, resulting in a 91 page report despite no legislation altering the substantive provisions in the CJA03 on seriousness is curious. The tone adopted in the SAP's final advice to the SGC is somewhat more deferential to the importance of harm than in the SGC's 2004 guideline. It appreciates the fundamental centrality of harm to the statutory sentencing maxima.[906] Most saliently however, it goes onto recognise how 'the significance of the actual harm caused continues to increase.'[907] Nevertheless, its solution is to recommend a more detailed list of factors for consideration to determine the crime's gravity where there is 'an imbalance between culpability and harm.'[908] This approach seems to be underpinned by the same notion as the correspondence principle, that most crimes are (or should be) a perfect correlation of intentional cause and outcome as envisaged by D. Plainly though, that is not what the statutory provision embodies.

Indeed, it goes hand in hand with the ascendancy of risk. Risk is inherently linked to the occurrence of harm. The importance of preventing that harm from coming about, because that harm is so undesired that strenuous steps must be taken to guard against its happening is what has fed the risk-culture that has come to typify early 21st century crime control discourse. That individuals have a responsibility[909] for their conduct and its consequences was the rhetoric that epitomised New Labour in the mid-to-late 90s, setting themselves up as the party of law and order. As Garland finds, 'this desire…for the management of risk and the taming of chance…has become a more

[906] SAP, *Overarching principles of sentencing* (SAP 2010) [85]

[907] (n 906) [86]

[908] (n 906) [92-93]

[909] (n 124) 99; D Garland, 'The limits of the sovereign state' (1996) 36(4) Brit J Crim 445, 451

dominant' theme in Britain and American in recent years.[910] Even in prisons, the doctrine has 'transformed' regulation of inmates[911] and is reconcilable with schools of thought as left as feminism,[912] despite arguably having its roots in Oakeshottian conservative values.[913]

To this extent, s.143(1) isn't an accidental volte-face eschewing decades if not centuries of accepted legal principle. It constitutes part of a broader societal trend towards caring about consequences and ascribing, or perhaps restoring, responsibility to individuals to consider their actions; to ensure they aren't harmful to others. Holding people responsible for the prohibited consequences of their actions incentivises citizens to be wary of causing harm, thereby helping to minimise its occurrence. Regardless of much of the negative academic literature on this trend, it reinforces the fact that such was likely the intention of Parliament, hence making Lord Judge CJ's interpretation of the meaning and effect of pertinent provisions in the CJA03 correct. Parliamentary Sovereignty is the bedrock of our constitution as noted in Chapter 1. Opposition to such policies must be made before it is law, or with a view to changing primary legislation through the only medium that can do so. Avoiding the law through wilful blindness or surreptitious circumvention is simply not compatible with the rule of law. In interpreting key statutory provisions, it can be queried whether that was the consequence (ironically whether intended or not) of senior judges in cases such as *Furby* or the SAP/SGC through their guidelines on

[910] (n 124) 194

[911] K Hannah-Moffat, 'Neo-liberal governance in Canadian women's prisons' (2000) 40 Brit J Crim 510, 524

[912] ibid

[913] P Knepper, 'Oakeshott and the new crime prevention' (2003) 36(3) Australian and New Zealand Journal of Criminology 338

overarching principles. Due emphasis on the actual meaning of s.143 and its repercussions resulted in Lord Judge CJ refuting the old orthodoxy that determining offence seriousness was a matter predominantly of culpability:

> Death is the consequence of every murder… However the very fact that a series of paragraphs offer starting points for the minimal custodial sentences—whole life, 30 years, and 15 years, with equally specific provisions for offenders aged under 18 years—demonstrates what every judge knows, that in murder cases although the *result* —the death of the victim—is identical, the gravity of each individual offence is not. Accordingly we disagree that the assessment of the seriousness of an offence of manslaughter on the grounds of diminished responsibility must be focused exclusively on the defendant's culpability.[914]

This makes a similar point to that argued earlier in this thesis, viz. that the basis of any manslaughter, not least voluntary manslaughters, provides no good reason for objecting to a relationship between the two which can incorporate common features such as the valuation on the harm of death and gauge starting points for manslaughter proportionately lower than those for murder according to the difference in culpability. What cannot be escaped is that diminished responsibility, like its sibling partial defence provocation/loss of control, requires exactly the same actus reus *and* mens rea as murder.

> There is no express statutory link between the guidance in Schedule 21 to the 2003 Act and the principles to be applied to sentencing decisions in diminished responsibility manslaughter. Where diminished responsibility is established it serves to reduce the defendant's culpability for his actions when doing the killing, but the remaining circumstances of the homicide are unchanged. Specific features of the seriousness of the homicide, for example a double rather than a single killing, or the sadistic killing of a child may be common both to murder and diminished responsibility manslaughter. At the same time the mitigating features expressly identified in Schedule 21 extend to what may approximate but not amount to the defence of diminished

[914] *Wood* [14]

> responsibility and provide an additional connection between the Schedule and the defence. Finally, the culpability of the defendant in diminished responsibility manslaughter may sometimes be reduced almost to extinction, while in others, it may remain very high. Accordingly when the sentencing court is assessing the seriousness of the offence with a view to fixing the minimum term, we can discern no logical reason why, subject to the specific element of reduced culpability inherent in the defence, the assessment of the seriousness of the instant offence of diminished responsibility manslaughter should ignore the guidance. Indeed we suggest that the link is plain.[915]

For the first time, purely for the proximity between the offence of murder and voluntary manslaughter, the Court of Appeal has approved the use of Schedule 21 in determining an appropriate sentence for the latter. Any notion that murder is a fundamentally unique crime whose sentencing system cannot even be countenanced as being of relevance to other homicide offences is banished. This differs to the conclusions of the SAP/SGC again, this time vis-à-vis the sister partial defence of provocation. It also calls into question those (ex) judges in the House of Lords who in Parliamentary debates insisted this analysis would apply, yet had never followed it or seen it applied themselves when the starting point for murder was increased from 12 to 14 years by Lord Bingham in 1997. What we would have expected is there to be an uprating in manslaughter sentences consequently, and other homicides. Yet this change is not mentioned *once* in *any* reported appeal against manslaughter sentence.[916] Patently no notice of its impact on the sentencing of other homicides was

[915] *Wood*, 6

[916] *Blakemore* [1997] 2 Cr App R (S) 255; *A-G's Ref 68 and 69 of 1996* [1997] 2 Cr App R (S) 280; *Cutlan* [1998] 1 Cr App R (S) 1; *Howell* [1998] 1 Cr App R (S) 229; *Pitt* [1998] 1 Cr App R (S) 58; *A-G's Ref 2 of 1997* [1998] 1 Cr App R (S) 27; *A-G's Ref 51 of 1997* [1998] 2 Cr App R (S) 313; *Archer* [1998] 2 Cr App R (S) 76; *McLean* [1998] 2 Cr App R (S) 250; *H* [1999] 1 Cr App R (S) 187; *A-G's Refs 57, 58, and 59 of 1997* [1999] 1 Cr App R (S) 31; *Caswell* [1999] 1 Cr App R (S) 467; *A-G's Ref 44 of 1998* [1999] 1 Cr App R (S) 458; *Pigott* [1999] 1 Cr App R (S) 392; *Elton* [1999] 2 Cr App R (S) 58; *Butler* [1999] 2 Cr App R (S) 339; *Jackson* [1999] 2 Cr App R (S) 77; *A-G's Ref 3 of 1999* [1999] 2 Cr App R (S) 433; *Henry* [1999] 2 Cr App R (S) 412; *Devine* [1999] 2 Cr App R (S) 409; *Jeans* [1999] 2 Cr App R (S) 257; *Hills* [1999] 2 Cr App R (S) 157; *Kime* [1999] 2 Cr App R (S) 3; *A-G's Ref 16 of 1999* [2000] 1 Cr App R (S) 524; *A-G's Ref 19 of 1999* [2000] 1 Cr App R (S) 287; *Sexton* [2000] 2 Cr App R (S) 94; *Wade* [2000] 2 Cr App R (S) 445. These are the earliest reported cases dating from after Lord Bingham's letter detailing the new 14 year starting point for murder.

taken by the leadership of the judiciary. No wonder Lady Scotland replied that there was no evidence that increasing the sentence for murder affected sentencing for other crimes to suggestions it did by leading members of the then bench.[917] The very judges claiming it should, had never in fact overseen any such increases when they were responsible for doing so. Moreover, they appeared reticent to succumb to their own principled reasoning as to why increasing murder sentencing levels would have to result in heightened sentencing levels for other homicides, instead voicing concerns about the impact on the prison population.[918] Is this what inhibited them and their former colleagues from delivering proportionate sentences by referring to the increased murder starting point when sentencing for manslaughter, either in the late 1990s post Lord Bingham CJ's shift to a 14 year starting point or after Schedule 21? It's certainly not clear what did, as Lord Woolf CJ's judgment in *Sullivan* contradicts everything he argued in the debates on Schedule 21 in the Upper House.[919] One must query the extent to which some judges are independent of ideological allegiances as we think. In turn, this renders more plausible the notion that there was a conspiracy of sorts to avoid implementing Parliament's holistic intention on the increased gravity and therefore punishment of causing death, post Schedule 21, CDDD increases, the creation of RSA06 offences, and other more punitive sentencing steps for those who kill.

On the facts themselves Lord Judge CJ found ‘that the appellant's culpability was diminished, but it was very far from extinguished…the level of his responsibility was

[917] HL Deb 15 October 2003, vol 653, col 1047

[918] HL Deb 6 October 2003, vol 653, col 31 (Lord Ackner)

[919] See critique in Chapter 2

just, but only just sufficiently diminished for the purposes of s.2 of the Homicide Act. As in *Chambers*, a very substantial element of mental responsibility remained.'[920] Such deep analyses of the facts daring to make the finding that actually D was still culpable to a high degree for their offending are rare[921] as the usually narrow band of 3-6 year sentences recognises. The emphasis of this aspect is another victory for ordinal proportionality which relies upon accurate and nuanced variations. So too is contemplation of the exact level of mens rea,[922] an influential facet of determining seriousness for any crime but which strangely seems to be forgotten about in diminished responsibility cases.

With this in mind, he exposes the gulf between murder tariffs which amount to determinate sentences of at least 30 years, and those for manslaughter, something which he is right to say is not 'fully appreciated.'[923] My case law review has shown that a handful of judges sitting in the Crown Court have adverted to this and hitherto largely been struck down by the Court of Appeal for trying to address it, deaf to the cogency of the reasons now expounded by the head of its Criminal Division. He implored that state of affairs

> 'cannot be ignored, and a vast disproportion between sentences for murder and the sentences for offences of manslaughter which can sometimes come very close to murder would be inimical to the administration of justice. At the lowest, this means that the actual sentences imposed in cases of diminished responsibility manslaughter decided before the 2003 Act came into effect

[920] *Wood* [19]

[921] *Chambers* (1983) 5 Cr App R (S) 190 and *Bryan* appear to be isolated examples. On the contrary, where the degree of mental impairment is great, particular care and thought is given to the appropriate sentence, eg *Morris* [1961] 2 QB 237

[922] *Wood* [10]

[923] *Wood* [22]

> should be treated with utmost caution. The decisions may helpfully point to relevant broad considerations, but the actual sentences themselves no longer provide an accurate guide to the level of minimum term sentences to be imposed now.'[924]

That recommendation is best expanded also to post-Schedule 21 cases decided before *Wood*, since this thesis has found no change in sentencing levels after the applicability of Schedule 21. Above all he appreciated

> 'the stark reality that the legislature has concluded, dealing with it generally, that the punitive element in sentences for murder should be increased. This coincides with increased levels of sentence for offences resulting in death, such as causing death by dangerous driving and causing death by careless driving. *Parliament's intention seems clear: crimes which result in death should be treated more seriously and dealt with more severely than before*.'[925]

It is that *increased valuation upon the harm of death* which the changes to murder sentencing represented by Schedule 21 and developments in motor homicides manifest that is the root cause of the necessity for sentencing concerning other related offences to adjust accordingly in order to maintain, or indeed introduce, ordinal proportionality. Excavating the reasons behind the fresh disparity created between murder and manslaughter sentences by Schedule 21 produces a more thorough analysis of why that disparity has arisen and on what grounds it might be closed. To simply assert 'the logic of the need for proportionality is irresistible and needs no additional justification'[926] is superficial and in no way indicates what offences might or might not be affected by the tariff increases of Schedule 21. Nor does it appreciate

[924] *Wood* [22]

[925] *Wood* [23] emphasis added

[926] Jeremy (n 675) 607

that the judiciary had found it anything but irresistible in the five years leading up to *Wood* since Schedule 21 came into force.

Lord Judge CJ's dictum reveals at least two discrete processes or reasons why sentencing levels here need to rise. Careful examination of those mechanisms to derive the implications of Schedule 21 for the sentencing of other offences is essential. The first is the degree to which the amount of harm features in the equation as a proportion compared to culpability. The second concerns the assessment of the amount of harm. There is even potentially a third; how the assessment of the harm in question affects the computation of culpability. That is, if the seriousness of causing death has increased, then the degree of culpability inherent in an intention to cause death has increased too, because that is more heinous an intention than previously due to the higher valuation on the harm of death. Once we can understand the intricacies of gravity computation, we can make better observations as to how changes in the equation should affect the sentencing of other offences, and indeed ask how far have those changes been effected when analysing the sources of sentencing practice.

It did not take long for the remit of these developments in the context of voluntary manslaughter to be expanded to involuntary manslaughter as was logical and proper. Despite involuntary manslaughter in its many guises not sharing a mens rea identical to that of murder, the fact that murder and therefore its sentencing guidelines incorporate an intention to cause less than death (GBH), the same observations made as to the usefulness of the Schedule to voluntary manslaughter apply to involuntary. The harm level remains the same, whilst the fault level is lower and can be adjusted from the figures set down in it.

APPLEBY

Attorney General's References 60, 62 and 63 of 2009

Lord Judge CJ once again presided over this co-joined Reference and appeal against sentence (more commonly known as *Appleby*[927]). Its perspective differed slightly from that in *Wood* which pointed to the nexus between diminished responsibility manslaughter and murder and their ingredients. In *Appleby* however the increased valuation upon the harm of death, mentioned at the end of *Wood*, took centre stage.

One of the cases was likened to a "one-punch" manslaughter. Lord Judge CJ began by placing *Coleman* in its context as an authority nigh on twenty years old from a 'a time when there was less public disquiet about violent behaviour and death in town and city centres and residential streets than there is now.'[928] Crucially, unlike his predecessor Lord Woolf in *Sullivan*, he made no distinction between different murders when stating 'the assessment of the tariff to represent the punitive and deterrent element following conviction for murder (now the minimum term) was lower than it is now.'[929] In other words, Lord Judge CJ found Schedule 21 to have increased sentencing levels across all types of murder, not just for cases that would fall within paras 4 or 5 of the Schedule. *Sullivan*, of course, postulated there had been

[927] [2010] 2 Cr App R (S) 46

[928] *Appleby* [7]

[929] *Appleby* [7]

no increase in sentencing levels for "unexceptional" murders, despite the move from a 12 to a 15 year starting point in Schedule 21 for such cases.

Lord Judge CJ repeated the contention from *Wood* that consequences of a crime were relevant in sentencing too. This betrays a tendency evinced in both case law and from the SAP and SGC that culpability should predominate over the harm done where the harm intended or foreseen by D does not match the harm level inflicted. This must be why the Lord Chief Justice cited the full provision including 'any harm which the offence caused, was intended to cause or might foreseeably have caused'. Lord Judge CJ however invents no caveat to the plain meaning of s.143(1), or shrinks from its natural implications: 'in manslaughter culpability may be relatively low, but the harm caused is always at the highest level.'[930] However in describing s.143(1) from the CJA03 as 'new'[931] in 2009, he glides over the question that begs: why have none of his predecessors or colleagues on the bench appreciated this before, nor the SAP/SGC?

Supplementing this is the attendant provisions of the CJA03 and other contemporary legislative reform, viz. Schedule 21 as discussed in *Wood*, revision of CDDD penalty and creation of new death by driving offences. 'Taken altogether the recent changes in the legislative structures during the last few years lead to the inevitable conclusion'[932] in *Wood* and beyond 'so as to ensure that the increased focus on the fact that a victim has died in consequence of an unlawful act of violence, even where the conviction is

[930] *Appleby* [7]

[931] *Appleby* [14]

[932] *Appleby* [21]

for manslaughter, should, in accordance with the legislative intention, be given greater weight.'[933]

Sullying the clarity of Lord Judge CJ's approach and the matters at stake however are a number of lawyers apparently opposed to the legislation he is merely giving effect to. Recently one barrister in a published feature on *Wood* and *Appleby,* in spite of himself defining seriousness as 'the combination of culpability and harm done', claimed 'in cases causing death, however, the latter has come to outweigh the former.'[934] This simply fails to understand the relationship between the two. 'Neither consideration is paramount'[935] as Lord Judge CJ said in *Wood*. To say harm is outweighing culpability therefore is simply misleading. Harm is not outweighing culpability *as a factor* in the ratio of culpability:harm. Where the harm happens to be greater than the culpability, that is how the formula resolves, just as where the harm is less than the culpability. There were, oddly, no complaints about the latter scenario; cases where for instance D attempts an offence intending a substantial amount of harm but fails to inflict it, were not identified as in some way less serious due to this unjust imbalance- indeed quite the contrary. Judges positively endorse that crime as a very serious offence, in spite of the lack of harm, because of how high the culpability must be with a mens rea of intending death.[936] Lawyers complaining that affording equal weight to each factor 'puts emotion before logic'[937] evidently haven't thought

[933] *Appleby*[22]

[934] E Reid, 'Increased sentences for one-punch manslaughter deaths' (LNB News 13 January 2010)

[935] *Wood* [14]

[936] *Powell* [1998] 1 Cr App R (S) 84

[937] A Turner, who in 2010 was co-author of *Stone's Justices' Manual*, reported in E Reid (n 934)

through their rhetoric. Indeed, in limiting his remarks to 'cases causing death'[938] Turner also appears unaware of the universal application of s.143 to all crimes, and conversely unaware of the specific upgrading of the gravity of causing loss of life Schedule 21 embodies. Logically it is no different from the fact we now consider many acts or consequences less reprehensible than in previous times (and should punish them accordingly less so).[939] The only coherence demonstrated by these criticisms is betrayed by Davies' consideration that 'within the next 12 months there will be reports of further prison overcrowding'.[940] Anything that diminishes how long or how many people are in prison is the only unifying trait these often fallacious critiques of the decision in *Appleby* have.

Thomas points out 'the comments in this case reflect those made in earlier decisions, such as *Attorney General's Reference (No.9 of 2004)*'.[941] Whilst that is true to an extent, it is worth noting firstly that not all the comments were made in *A-G's Ref (9 of 2004).*[942] There was no mention of Schedule 21, or indeed any other new or recent statutory provision. The sense in that case was more of the organic, underlying importance harm has come to mean lately amongst society. Furthermore, it is important to appreciate that Judge LJ's remarks largely slid under the radar and were not widely cited, even in similar cases of public aggression. The trend towards longer

[938] ibid

[939] For example abortion, suicide, and homosexual behaviour, all of which typically involve the exercise of autonomy, wheras unlawfully caused deaths are typified by (terminal) infringements of autonomy.

[940] Reported in (n 934)

[941] D Thomas, 'Attorney General's References No. 60, 62 and 63 of 2009): sentencing - unlawful act manslaughter- "single punch manslaughter"' [2010] Crim LR 325, 328

[942] [2005] 2 Cr App R (S) 105

sentences for one-punch manslaughters came later, immediately post-*Furby* paradoxically.

The purpose of this thesis is to assert that as a matter of law the increased valuation on the harm of death is irresistible for the reasons submitted in Chapter 1 and must be applied to all manslaughter sentencing in the light of Schedule 21 applying it to murder sentencing. Irrespective of his rationale on the harm of death, primarily founded upon Schedule 21, Lord Judge CJ denies 'there is or should be any direct arithmetical connection between the sentences for murder addressed in Schedule 21 and the terms imposed for manslaughter. On the contrary, Parliament has clearly preserved the vital distinction between murder and manslaughter.'[943] The latter may be so, and rightly militates against sentencing manslaughter as if it were murder according to Schedule 21. It doesn't necessarily follow though that there should be no mathematical link between the sentencing levels for murder and those for manslaughter, much less some other identifiable albeit less formulaic relationship. That there is a connection between murder and both voluntary manslaughter (as Lord Judge CJ convincingly detailed in *Wood* and reiterated in *Appleby*[944]) and indeed involuntary manslaughter (it is a homicide of less fault) means an identifiable connection between the sentences for murder and those for manslaughter would make sense. Failing to orientate manslaughter sentences around Schedule 21 misses the opportunity to introduce some genuine structural ordinal proportionality to the relationship between murder and manslaughter. Schedule 21 should be the premise for the Sentencing Council were they to be asked to draw up guidelines for sentencing

[943] *Appleby* [16]

[944] *Appleby* [15]

manslaughter. It would be no easy task,[945] but that does not mean it should not be undertaken.

There may still be a need. Implementing the increased role for the harm of death is essential but doing so merely ensures the old "relationship" between murder and manslaughter is maintained; any disparity that existed prior to Schedule 21 will still exist after unless manslaughter sentences are deliberately orientated around the levels stipulated by it. It is clear by Lord Judge CJ's own admission regarding *Appleby* that a 'problem of…disparity'[946] exists between the respective sentences for murder and manslaughter. Is the Court's answer to the disparity emanating from a manslaughter sentence less than one seventh of a murder arising out of the same facts that it was 'the harsh reality'[947] of Ds' convictions for different crimes good enough?

As the Attorney General who made the reference, Lady Scotland may not have felt that the 'disproportionate disparity between the sentencing ranges for murder and one-punch manslaughter'[948] had the prospect of being sufficiently closed following the decision. Though the Court was not at liberty to interfere with the manslaughter sentence on this occasion, is the Lord Chief Justice's attitude, along the lines of Hughes LJ's previously noted, now an obstacle rather than a conduit to ameliorating the inequity further?

[945] Wasik (n 677) 184

[946] *Appleby* [16]

[947] Appleby [41]

[948] (n 934)

Problems are also posed by the lack of 'any general guidance in terms of specific lengths of sentence'.[949] This leaves it a mystery the degree of increase upon prior sentencing levels necessitated by the increased valuation upon the harm of death. Worryingly, reporting in the Law Society Gazette utterly missed the point, dealing with the definition of one-punch manslaughter rather than sentencing levels.[950] Given its ubiquitous presence amongst homicides, uniformity of approach would be especially wise for the purposes of consistency. Without this, a wave of new authorities will likely emerge, each indicating possibly disproportionate new sentencing levels across the raft of circumstances that manslaughter can encompass. Again, these troubles would be minimised by clearly basing the guidance on Schedule 21.

R v Holtom

The final step was to apply the effect in the remaining species of manslaughter, gross negligence, ostensibly the category most far removed from murder by virtue of its mens rea. The Court presided over by Lord Judge CJ held the 'greater emphasis to be placed on the fatal consequences of a criminal act…applies to cases of manslaughter by gross negligence'[951] as it does to other homicides.

In *Appleby* the Court of Appeal gave much fuller force to the sections, schedules, and spirit of the CJA03. This was long overdue since involuntary manslaughter sentencing

[949] [2010] Crim LR 325, 328

[950] A Edward, 'Sentencing council guidelines' (2010) 9 Dec LS Gaz 16(1)

[951] *Holtom* [2011] 1 Cr App R (S) 18, [19] (David Clarke J)

had hitherto 'remained to be resolved by reference to case law guidance, much of long-standing and not necessarily in tune with contemporary concerns and statutory developments.'[952] *Wood, Appleby,* and *Holtom* have provided the express platform and legal precedent for Schedule 21's logical repercussions to be applied throughout manslaughter sentencing. The next phase is to examine how thoroughly the Lord Chief Justice's judgments have been followed since to learn about Schedule 21's actual impact on sentencing in manslaughter cases now its founding motivations have been held to apply equally to manslaughter too.

WHAT HAS BEEN THE EFFECT OF THESE PRECEDENTS?

Despite *Wood*, *Appleby*, and *Holtom* heralding a new approach, the sentences Lord Judge CJ approved evinced only minor increases on prior practice established from the case law review conducted in the last chapter.

In *Bryan and Roberts* heard as part of *Appleby*, Lord Judge CJ distinguished the case from the classic one punch scenario, not merely on the ground there were two punches but they were 'ferocious blows administered from behind without warning, so ferocious that…[D] was unconscious before he hit the ground'.[953] The term of imprisonment was increased to five years for the principal Bryan who made the assault. This incorporated a reduced guilty plea discount and double jeopardy, meaning the starting point must have been around 6 ½ to 7 years. Given a bad case of

[952] 'Fatal assault: culpability and harm', Probation Journal (2010) 57(3) 351, 351

[953] *Appleby* [57]

a true one punch manslaughter had begun to merit starting points of almost 5 years prior to *Appleby,*[954] the increase here afforded to the greater weight of death is probably about a year, taking into account the aggravating factor that this wasn't properly a one punch manslaughter. Such a minor rise is justifiable on the grounds that one punch cases were one of the few categories to be subject to an increased tariff in the years after Schedule 21. This thesis is satisfied from close scrutiny of judgments that the greater appreciation of the harm of death was a motivation behind those rises.

Penalties of seven and seven and a half years including partial guilty plea discounts were upheld for the appellants Tom and Ben Cowles, one of the co-joined appeals decided in *Appleby*, but patently not a one-punch case. Ds set upon an innocent group that had tried to prevent Ds beating up a random passer-by on the street. They unleashed a barrage of violence with countless forceful punches to various members of V's group, including Tom Cowles who punched V at least six times to the face whilst he held him in a headlock. 'The degree of force applied around the neck'[955] most likely caused the mortal injury. The Lord Chief Justice deemed the sentences to 'reflect the overall criminality'.[956] Seven and a half years however appears too propinquitous to the five year term awarded to Bryan in the same case. The culpability here was 'high' and the sentences supposedly 'at the top of the bracket'.[957] Yet manslaughter by physical assault cases decided shortly before this one had

[954] A few examples might include *A-G's Ref 9 of 05* [2005] 2 Cr App R (S) 105; *Frazer* [2007] 1 Cr App R (S) 69; *A-G's Ref 78 of 06* [2007] 1 Cr App R (S) 114; *Gosling* [2009] 1 Cr App R (S) 10. In some instances the length of sentence was not even being challenged.

[955] *Appleby* [78]

[956] *Appleby* [85]

[957] *Appleby* [83]

already pushed the top of the bracket up from Wasik's eight years to nearer ten or above,[958] though other cases appeared unaware of that also.[959] It is tough discerning what the increase in harm valuation is in these sentences without breaching ordinal proportionality and reflects that greater increases need to be made in this area and others to achieve ordinal proportionality in the wake of Schedule 21.

Hypothesis

What we can be clear about first is what is expected of courts sentencing manslaughter since *Appleby* et al.[960] We know that is to treat the loss of life caused by any crime[961] as more serious than previously when determining the gravity of the offence. It would be reasonable to expect this requirement to be dealt with openly and explicitly in any manslaughter case for the next couple of years until a new jurisprudence has built up, replacing that of the pre-*Appleby* cases which in most categories were failing to incorporate any such increased valuation on the harm of death. Whilst this practice might dwindle once circuit judges became attuned to the updated matrix, it is likely to be a consideration for any bench of the Court of Appeal when inquiring whether a sentence was or was not manifestly excessive or unduly

[958] A similar brawl with a pack instinct merited nine years in *Fisher* [2008] 2 Cr App R (S) 34 and 12 in *Case* [2007] 1 Cr App R (S) 57

[959] Eg., notwithstanding their youth, *D and P* [2008] 2 Cr App R (S) 23

[960] *Appleby* will be used as a collective term for the decisions reached in *Wood*, *Appleby*, and *Holtom*, that the increased seriousness of the harm of death signalled by Schedule 21 should result in longer sentences for all forms of manslaughter.

[961] For which the punishment regime has not already been addressed by Parliament in 2003 or since.

lenient because of the pertinence *Appleby* has when evaluating the degree of harm in each homicide.

Disappointingly, uniformity has been lacking. Some courts have highlighted the cases and emphasized their impact. Some panels have flagged up the recent precedents, but left scant evidence in the form of the substance of their judgment- the upheld or varied sentence- to suggest an uplift was applied when compared to pre-*Appleby* sentencing levels. Some reported cases make no mention whatsoever of the transformations that have occurred in the homicide sentencing landscape lately.

Voluntary Manslaughter

Given it was a diminished responsibility case where Lord Judge CJ first set the precedent in *Wood* to update the manslaughter tariff, voluntary manslaughter cases are as sensible a place to begin.

Diminished Responsibility

Sentences appear to be tangibly higher in the wake of *Wood* et al, and Schedule 21 has increasingly become a pivot for deciding custodial terms. Although a minimum term of 3 years was increased to 6 in *Attorney General's Reference 83 of 2009,*[962] the gratuitous nature of the killing appears to place the case in the company of *McMilan*,

[962] *Attorney-General's Reference 83 of 09* [2010] 2 Cr App R (S) 26

Bryan, and *Wood*. In this respect, the six year minimum term handed down by the Court of Appeal is much shorter than the 13 year minimum term in *Wood* and the nine year minimum term in *McMilan*. The Court of Appeal found *Wood* to be very much graver, but does not refer to the other like cases, only *Kehoe*,[963] described as 'at the lowest level of seriousness'.[964] Taking only two cases at the extremities no doubt made locating where this case fell between them all the harder. As will be seen, this is a systemic failure of numerous Court of Appeal judgments post-*Appleby*, hampering coherency and consistency.

Nonetheless 12 year determinate sentences were practically unheard of for diminished responsibility before. Such a length is well out of Wasik's range based on 1990s cases and significantly longer than 9 years, the term upheld in *Attorney General's Reference 49 of 2005*,[965] the lengthiest of the terms for cases not in the *McMilan*, *Bryan* and *Wood* league (which are positively astronomical compared to all the other). It probably represents Lord Judge CJ's attempt to rectify the 'vast disproportion'[966] he referred to between murder and manslaughter sentences at the time; he emphasised the loss of life resulting from D's wrongdoing was 'a hugely significant feature'.[967]

The use of Schedule 21 itself has evolved since the early post-*Wood* days of *Attorney-General's Reference 83 of 2009* where it was only deployed as a way of identifying

[963] D was said to have been eligible for both partial defences of diminished responsibility and provocation, the latter dubiously so, and received a discount for her guilty plea of unmerited generosity. D also had an appalling record of using knives to attack people.

[964] *Attorney-General's Reference 83 of 09* [2010] 2 Cr App R (S) 26 [29]

[965] [2006] 2 Cr App R (S) 12

[966] *Attorney-General's Reference 83 of 09* [29]

[967] *Attorney-General's Reference 83 of 09* [29]

aggravating and mitigating factors.[968] In *Oakley*,[969] the first reported diminished responsibility appeal after *Appleby*, the Crown Court sentencer adopted Schedule 21 to determine the minimum term as if it had been a case of murder, right through from selecting a starting point (15 years there) and analysing the facts of the case to aggravate and then mitigate the sentence according to Schedule 21.[970] He reached the conclusion that 18 years was appropriate for murder in the circumstances, and took three years off this to reflect the diminished responsibility. The first instance judge's approach was affirmed as 'in principle appropriate'[971] and 'vouchsafed by the latter part of the judgment in *Wood*.'[972] Such an approach, not simply bearing in mind the motivations behind Schedule 21 but employing Schedule 21 and its starting points to reach a preliminary sentence before taking account of the reduced culpability, delivered a 12 year minimum term- equating to a 24 year determinate sentence. That sustains not merely the spirit of *Appleby* but the substance too. It has begun to entrench a whole new league of jail terms for diminished responsibility that were simply unheard at the time Wasik was writing. The length of a 12 year minimum term was not even challenged in *Welsh*[973] and an equivalent sentence, 24 years determinate, was upheld by Lord Judge CJ in *Brown*.[974] There the trial judge had 'recognised that this Court has made clear that the increase in minimum terms following conviction for

[968] *Attorney-General's Reference 83 of 09* [23],[28]

[969] [2011] 1 Cr App R (S) 112

[970] *Oakley* [29]

[971] *Oakley* [50]

[972] *Oakley* [50]

[973] [2011] 2 Cr App R (S) 68

[974] [2012] 2 Cr App R (S) 27

murder should be reflected in homicide sentences.'[975] Indeed, he went further, basing his determination on the length of sentence had D been convicted of murder in the case. Doubt about such a direct mathematical relationship for manslaughter sentences, on the basis it was a separate criminal offence, was expressed in *Appleby* and scrutinised above. Three years on though, Lord Judge CJ considered those judgments he gave as mandating 'the necessary correlation or link between sentences for murder, now imposed in accordance with the provisions of Schedule 21 of the Criminal Justice Act 2003 and manslaughter, *in whatever circumstances manslaughter had taken place*.'[976] Thus we get a sense here that although *Brown* was a diminished responsibility case itself like *Wood*, the sentencing levels of Schedule 21 are equally significant in determining sentence lengths for involuntary manslaughter.

Part and parcel of this epiphany has been Lord Judge CJ's emphasis that the amount one's responsibility for their criminal conduct was diminished might vary on the individual circumstances. The Court of Appeal now appear alive to the possibility that whilst offenders' culpability has been 'substantially'[977] reduced, some also retain a 'substantial'[978] level of culpability for the killing. The old range of jail terms, narrowly between 3-6 years, implied everyone's culpability was reduced by similarly enormous amounts. The new breadth of sentences should be welcomed as paying greater heed to both harm and the precise degree of blameworthiness.

[975] *Brown* [20]

[976] *Brown* [18] (emphasis added)

[977] Homicide Act 1957, s.2(1)(b)

[978] *Brown* [20]

In *Abuhamza*[979] imprisonment equating to 15 years was upheld for two Ds. The Lord Chief Justice was careful to gauge just how far each D's blameworthy behaviour had been caused by the abnormality of mind. He remarked 'this was not a case where the ill-treatment began consequent on the development of a substantial diminution in the responsibility of either appellant.'[980] He held that with regard to Abuhamza his diminished responsibility had a 'very small bearing indeed'[981] and similarly must be assumed of his fellow appellant given their equivalent commensurate sentences were not interfered with. Consequently, the case was approached more according to its facts and type, than as a homogenous "diminished responsibility" case. The length of sentence distinctly exceeds pre-Appleby authorities dealing with neglect and cruelty.[982] Using the factually alike categories of manslaughter to find the appropriate bracket, before shortening jail terms to take account of the diminished responsibility, permits the increased sentencing levels of Schedule 21 to be implemented proportionately across the different categories, whilst doing much greater justice to individual cases, as shown in *Webb.*[983] There the circumstances fell close to assisted suicide and were dealt with mercifully.

Provocation/Loss of Control

[979] [2011] 2 Cr App R (S) 92

[980] *Abuhamza* [31]

[981] *Abuhamza* [32]

[982] *Liu and Tan* [2007] 2 Cr App R (S) 12 -equivalent to 13.5 years after a trial

[983] [2011] 2 Cr App R (S) 61

Despite the link between Schedule 21 and diminished responsibility being 'plain'[984] to the Court of Appeal in *Wood*, it wasn't vis-a-vis provocation so patent to the Court of Appeal in *Calvert*.[985] In this, the first post-*Wood* provocation case, Hickinbottom J failed to advert to the new and salient approach to provocation's sister partial defence in *Wood* anywhere in his judgment, instead sticking closely to the sentencing guidelines based on the SAP's advice which had expressly ruled out any impact for Schedule 21 and thus the increased valuation on the harm of death it entailed. A provocation case was the first reported manslaughter appeal following *Appleby*. Yet there was no mention of *Appleby* either in *Kelly*,[986] a prophetic start it would prove.

Perhaps this is not surprising given the reluctance of judges to be informed as to the appropriate bracket through like precedents.[987] Asserting these matters were 'fact-sensitive'[988] regularly precludes the Court of Appeal's interest in precedents and any new, salient legal principles therein, freeing it to reach what can only be assumed to be instinctively correct lengths of sentence. Even where authorities were cited, bizarrely they failed to refer to *Wood*, let alone what the Court of Appeal there held as to the gravity of the loss of life. Indeed, it was business as usual in many provocation cases, as five years was increased to eight for a stabbing without the benefit of a guilty plea,[989] exactly within the range identified by Wasik based on 1990s

[984] *Wood* [21]

[985] [2010] 1 Cr App R (S) 50

[986] [2010] 2 Cr App R (S) 66

[987] *Hynds* [2010] 1 Cr App R (S) 64; *SP* [2010] 1 Cr App R (S) 30, the first reported appeal following *Wood*. Here Hallett LJ failed to cite a single case (again).

[988] *Celmins* [2010] 1 Cr App R (S) 77 [11]

[989] *A-G's Ref 5 of 2009* [2010] 1 Cr App R (S) 46; *Worsman* [2010] 1 Cr App R (S) 71 is also guilty of the same, although there an authority of significantly greater gravity seemed to be the Court of Appeal's

authorities. Not only do they demonstrate the lack of influence of *Wood* on voluntary manslaughters other than those by virtue of diminished responsibility, these shortcomings hardly bode well for the implementation of *Appleby* more generally. How can one apply an uplift to the pre-existing tariff to reflect an increased valuation on the harm of death if it's not even routine practice to state what the existing tariff is? It is clear Lord Judge CJ's long overdue recognition that 'Parliament's intention seems clear: crimes which result in death should be treated more seriously and dealt with more severely than before'[990] has gone largely unheeded.[991]

Cases such as *Yemoh*[992], highlight the disparity that exists between murder and manslaughter sentences following Schedule 21 if its rationale is not applied to manslaughter as well. Convictions for both can arise out of the same events, throwing into relief the gulf between the prison terms. *Yemoh* demonstrates how other principles and clauses of Schedule 21 can readily be applied to manslaughter cases, not least the list of aggravating and mitigating factors. What is left is Schedule 21 only partly being applied; the spirit and motives behind its higher starting points unappreciated. For instance, 15 year minimum terms were given to those convicted of murder, yet nine year determinate sentences or less were sanctioned by the Court of Appeal for the manslaughters. Is a 21 year gap (in equivalent determinate sentences) a fair reflection of the difference in culpability here?

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principal guide despite another less serious case having much more in common with the facts. On one analysis this makes it an even more egregious example.

[990] *Wood* [23]

[991] *Rainford* [2011] 2 Cr App R (S) 15

[992] [2010] 1 Cr App R (S) 97

It took until Lord Judge CJ sat himself in one of these cases for Schedule 21's materiality to be noted by the Court of Appeal in a provocation case. In *Thornley*[993] an outstandingly thorough and erudite judgment of the trial judge detailed all the sentencing developments in recent years relevant to determining the sentence in an instance of manslaughter upon provocation. Amongst Calvert-Smith J's observations was Schedule 21, the 2005 SGC definitive guideline, and the new 25 year starting point inserted into Schedule 21 subsequently, salient here as this was a stabbing.[994]

The Court of Appeal, presided over by the Lord Chief Justice, rejected submissions made by D's counsel that changes in the sentencing landscape such as Schedule 21 should be excluded from the sentencing process rending definitive guidelines of the SGC/SC the sole authority when determining sentence. 'The "interests of justice"', Lord Judge CJ declared, 'undoubtedly involves consideration of the subsequent thinking of this Court and of the legislature on sentencing issues which may impact on every original definitive guidance.'[995] Glossing over the conundrum as to why both the SAP/SGC and courts themselves had not realised much sooner the pertinence of Schedule 21, he held those judgments that had now (*Appleby* etc) must be adhered to since 'the weight to be attached to decisions of this Court on sentencing issues or policy is, in our judgment, undiminished by the issue of guidelines'.[996] That included recognition of the 'excessive'[997] distance between manslaughter and murder sentences

[993] [2011] 2 Cr App R (S) 62

[994] *Thornley* [11]

[995] *Thornley* [13]

[996] *Thornley* [14]

[997] *Thornley* [13]

that had emerged as a consequence of Schedule 21, stemming of course from the punishment of the former omitting to place the same, heightened value on the loss of life as punishment for the latter. Indeed, in giving effect to the implications of the only set of statutory guidelines, there can be little doubt that courts merely *are* following guidelines when implementing the greater valuation on the harm of death Schedule 21 represents. The irony is that the decision, expressly made by the SAP not to incorporate any of the implications of Schedule 21 into their then proposed sentencing guidelines for manslaughter upon provocation, and embraced by the definitive guideline issued by the SGC, depended upon disregarding guidelines (Schedule 21) in the first place.

The Lord Chief Justice went further though and held that since the Court of Appeal had addressed the issue of knife crime by encouraging deterrent sentences where necessary, and the new 25 year starting point, 'that the use of a knife, even in cases of manslaughter by provocation shall now be regarded as a more significant feature of aggravation than it was when the guideline was published.'[998]

Notwithstanding all of the above, it's hard to avoid drawing a comparison with where Calvert-Smith J began his timeline of evolution- with *Latham*. We know *Latham* laid down a starting point of 10-12 years for a stabbing, even under provocation, where the knife had been brought to the scene. Similarly, the SGC guidelines for manslaughter upon provocation indicated a bracket of 10 years to life imprisonment when the provocation was categorised as low. The Court of Appeal implicitly endorsed the trial judge's finding that the provocation in *Thornley* should be placed in the 'low' band. So

[998] *Thornley* [15]

what in real terms has moved on? Is the fact courts are now actually willing to use the *Latham* range contrary to the reticence uncovered in Chapter 3, really progress?

Certainly it's arguable that although D armed himself with a knife and went after V on the first occasion, when the killing actually occurred was later. On this second occasion, D had grabbed the knife from his kitchen and stepped out his back door where V was in his garden. That of course is not the scenario that was referred to by Mr Calvert-Smith QC (as he then was) appearing as counsel on behalf of the Attorney General in *Latham,* or to which the recent 25 year starting point in Schedule 21 would apply. Rather both concerned offenders carrying knives on them in public as a matter of course, should they wish to avail themselves of such implements for use as weapons. Nevertheless, a good argument can be made that those toughening of tariffs have a broader but lesser influence on the gravity of using a knife to attack someone in any context.

Perhaps chiefly the answer lies with the amount of credit afforded to D for his guilty plea. If D was given full credit then the sentence upon conviction by a jury would have surely have been 18 years, based on the prison term Lord Judge CJ approved. That would manifest a concrete climb in sentencing levels from *Latham*, not least given that the levels in *Latham* were rarely reached in practice. Even if it does, the confusion likely to be encountered on interpreting the judgment potentially means it may not have the effect on sentencing levels it should. Such problems would, naturally, require the Lord Chief Justice's dicta to be referred to in the first place

though. This was the first provocation appeal to do so.[999] Otherwise, the SGC guideline will remain the first and likely only port of call for sentencers. Numerous provocation cases subsequent to *Thornley* have failed to make any mention of it or the cases like *Appleby* that underpin it.[1000] The trend has been haphazard in a discipline where treating like cases alike is the cornerstone of legal methodology. There is a failing of *stare decisis* without cognizance of such precedents. We are left with the lamentable situation by lawyers themselves where the de jure position is not always the de facto one.

The decision in *Attorney-General's Reference 8 of 2011*[1001] reiterated *Thornley*, viz. that *Wood* and *Appleby* applied to manslaughter upon provocation sentencing. Once again, finding the provocation was low but endured over an extended period of time, Leveson LJ giving the judgment of a Court presided over by the Lord Chief Justice declared the shortest term commensurate with the seriousness of this 'ferocious'[1002] knifing was 10 years.[1003] Confusingly, this is at the bottom of the range stipulated by the sentencing guidelines which Leveson LJ realised were subject to the uplift in terms required by *Wood* and *Appleby*. He cites Lord Judge CJ opining that the existing range of 10 years to life imprisonment within the guidelines for this category should accommodate the necessary increases in sentencing levels to better recognise the seriousness of causing death. One imagines that is because there is much latitude

[999] Had the trial judge not done his research or Lord Judge CJ heard the appeal, it seems unlikely there was any guarantee of *Wood* and *Appleby* being considered.

[1000] *Tyler* [2011] 2 Cr App R (S) 90

[1001] [2012] 1 Cr App R (S) 53

[1002] *A-G's Ref 8 of 2011* [5]

[1003] *A-G's Ref 8 of 2011* [17]

to move *up* within that range; remaining glued to the bottom of the bracket is probably not what was being envisaged. Only affording substantial weight to the fact that the new partial defence of loss of control, as D was conviced under, demands a higher threshold than the old law of provocation, can begin to justify sentences suggesting lower gravity. Whilst that per se is not in doubt, whether this particular case is affected, given it has been classified as of 'low' provocation, ie still a major degree of responsibility remaining, is much more in doubt. The uncertainty in the wake of both *Appleby* holding that the harm of death must be treated more seriously than before owing to Schedule 21, and the reformulation in a material way of the partial defence which the SGC provocation guidelines were originally conceived on the basis of, make a compelling case for the SC to revisit the topic urgently.

Unlawful and Dangerous Act Manslaughter

One-Punch

As noted earlier, this was one area which had seen some upward movement in sentencing levels responding to an increased valuation on the harm of death before *Appleby*. To what extent that is recognised or taken account of by the Court of Appeal post-*Appleby* is particularly interesting. *Church*[1004] saw three and a half years for one-punch manslaughter of some guise or another. That is hard to reconcile with Bryan's sentence in *Appleby*. Although Bryan punched V twice, it was still V's head striking the ground from the consequential fall that was the cause of death as opposed to the

[1004] *Attorney General's Reference 112 of 2009* [2010] 2 Cr App R (S) 79

punch itself in *Church.* Although D in *Church* was young he also had previous experience of inflicting substantial harm- breaking a victim's jaw in two places- from a single punch,[1005] putting him on notice as to the danger inherent in thumps to the head (something usually assumed to be "unforeseeable" by an attacker). Treating the two cases as roughly alike, the gap of eighteen months appears to render the sentence in *Church* on the generous side. Certainly what component of the term constitutes the greater gravity of causing death is imperceptible, particularly when compared to pre-*Appleby* sentences of three years on a guilty plea.[1006] If this is designed to appreciate the likelihood that some degree of increase had already been implemented in one punch cases as found by this thesis, Lord Judge CJ omitted to explain so. The ambiguity here and in the following cases is likely due, in part at least, to the fact that '*Appleby* did not provide guidance on the extent to which sentences for manslaughter were too low.'[1007] Ergo, the quantum of increase necessary is unclear, even when the bench considers the need to treat the causing of death more seriously following *Appleby*.

Although the length of the three year prison stint was not in issue in *Gore,*[1008] it is hardly surprising. Three years on a guilty plea was where the tariff had evolved to before *Appleby* as the original sentencer was aware, grounding the sentence on the authorities of *Warwood* and *Attorney General's Reference 64 of 2008* (both are

[1005] *Church* [5], [16]

[1006] Indeed that was the sentence D, just 15 and pleading guilty, received in *Attorney-General's Reference 113 of 2006*. Cf. Jeremy, (n 675) 594, who assumes the first instance sentence of 20 months in *Church* is the pre-*Appleby* level. The research conducted in the last chapter shows it was considerably higher.

[1007] (n 675) 594

[1008] [2010] 2 Cr App R (S) 93 [60]

covered earlier in the thesis).[1009] This brings into focus the question of the pre-*Appleby* tariff: why was it what is was. Unless judges from the Crown Court to Criminal Division of the Court of Appeal were or indeed are now aware that sentences had risen for one punch manslaughters after Schedule 21, and seemingly for some of the same reasons *behind* Schedule 21, we might expect them to be applying *Appleby* increases to one punch sentences like all others.

The appellate case law would suggest they are not. Is this because the bench is aware of the pre-*Appleby* increases to one punch sentence lengths and the overlapping reasons behind those and Schedule 21, given force by *Appleby*? Excepting *Harvey* from this inquiry,[1010] the sentence in *Robinson*[1011] amounts to three and a half years punishment for his actions and their consequences, and *Folkes*[1012] upheld a three year sentence passed for a crime committed after judgment in *Appleby* was handed down. There *Appleby* was at the forefront of both counsel and the Court of Appeal's mind, the latter quoting from Lord Judge CJ's dictum making it clear pre-*Appleby* cases did not incorporate an increased valuation upon the harm of death based upon Schedule 21.[1013] We don't know if D's counsel brought it to the first instance sentencer's attention (the Crown was unrepresented), but given the jail term passed one can only think not. It would appear the original sentencer omitted to appraise himself of some salient legal authorities on this occasion. D here hit V with 'everything' he had, in his

[1009] *Gore* [24]

[1010] [2011] 1 Cr App R (S) 42. Whilst throwing a remote control in the direction of V, which happened to hit her in a place of unique vulnerability, killing her outright, is best grouped with the 'one punch' manslaughter cases, it is easily distinguishable in key features from the classic *Coleman* scenario the rest conform to.

[1011] [2011] 1 Cr App R (S) 127

[1012] [2011] 2 Cr App R (S) 76

[1013] *Folkes* [17], quoting *Appleby* [22]

own words, whereas most blows are described as 'moderate'[1014] in this class of case. Neither did D have the benefit of youth. Hence it could be contended this was a lenient punishment **pre**-*Appleby*. But the Court of Appeal in *Folkes* seems unaware of the longer sentences that evolved post-Schedule 21 and prior to *Appleby* uniquely in one punch cases judging by their reiteration of Lord Judge CJ's assessment in *Appleby*. In which case an uplift due to the increased valuation on the harm of death stemming from Schedule 21 should be applied to post-Schedule 21, pre-*Appleby* sentencing levels. A well-informed and nuanced analysis would favour a sentence aggravated from the 4 1/2 year levels established by the time of *Appleby* on grounds that this was simply a worse case than many of those, where Ds were young and used only moderate force. Evidently that isn't occurring though as the stagnation in terms of imprisonment revealed in this chapter illustrate.

It could be argued that the bench has happened upon a broadly appropriate tenor by not increasing sentencing further from pre-*Appleby* levels. If that is the case however, it's not an achievement the Court of Appeal could exactly claim credit for. Once again, we come back to the use (or lack) of precedent as part of judicial reasoning to reach punishments not just correct in law, but transparent and understandable in their justifications for the purpose of the present case, and future cases, as is the nature of a system based on the doctrine of precedent.

Assaults

[1014] *Folkes* [11] cf. [10]

Awareness of *Appleby* and thus Schedule 21's repercussions was patchy amongst these cases, contributing to an emerging trend. At the lower end, cases such as *Rowell*[1015] pose confusion as to the extent of Schedule 21's more punitive schema being felt. Shaving a year off the original seven year jail term, the Court of Appeal observed 'it is clear that this case falls in the upper level of sentencing for such a case of manslaughter.'[1016] Assuming that is the one punch manslaughter bracket, then six years after a trial would certainly be *above* the top of that based on regular three and occasional three and a half year sentences on a guilty plea established before *Appleby*. There are two possible explanations: the earlier punch was a 'significant aggravating factor'[1017], and *Appleby*, which HH Judge Rook QC for the Court of Appeal understood perfectly.[1018] However, if as the Court of Appeal suggest[1019] it is more accurately not classed as a one-punch case, then compared to like cases such as Bryan, one of the co-joined appeals constituting *Appleby*, it appears on the short side. There D got 5 years on an early guilty plea for a similar double punch, equating to at least seven and a half years in a contested matter when the double jeopardy discount he was afforded is borne in mind. That leaves the sentence of seven years at first instance for *Rowell* in fairly good stead, but the Court of Appeal's revision to six, less so.

[1015] *Rowell* [2011] 1 Cr App R (S) 116

[1016] *Rowell* [22]

[1017] *Rowell* [20]

[1018] *Rowell* [17]

[1019] Rowell [22]

Other sentences for manslaughters following assaults suggest a depressing pattern. There was no complaint about the length of the sentence in *Birt*[1020] where D received no credit for her offer to plead guilty, a decision upheld by the Court of Appeal. The nine year sentence for D's role in a 'horrific'[1021] attack which earned her co-Ds murder convictions and minimum terms of 23 years each is 37 years shorter than their equivalent determinate sentences. Whilst she herself did not beat V unconscious as her boyfriend and an accomplice did, she did help paint his body with gloss paint in an action that is reminiscent of the spine-chilling scene in James Bond film *Goldfinger*. She then encouraged her co-Ds to repeatedly ram a mop handle deep up V's rectum, and filmed the act, even zooming in to capture the awful detail.[1022] Though not the protagonist of the attack, D clearly joined fully in the spirit of the savagery. V's body was then dumped in a wheelie bin. This length of sentence should have been a travesty even before Schedule 21 and the implementation of its ramifications for manslaughter in *Appleby*. That trial judges as distinguished as Henriques J. thought nine years after a trial for a manslaughter of the utmost gravity highlights the urgency of the need to apply *Appleby*. Doing so of course merely restores the old disparity between murder and manslaughter sentences, and does nothing to close the disproportionate distance between the two tariffs before Schedule 21 was born. Compounding matters, the sentences in *Glowacki*[1023] are wholly consistent with Wasik's summary of sentencing levels in this class prior to Schedule 21.

[1020] [2011] 2 Cr App R (S) 14

[1021] *Birt* [3]

[1022] *Birt* [3]

[1023] [2011] 2 Cr App R (S) 82

Shreds of hope are offered by *Lunkulu,*[1024] where relevant pre-*Appleby* authorities were considered to ascertain sentencing levels before an uplift due to *Appleby* was factored in.[1025] Although this aspect of the approach is commendable, sentence lengths in more recent yet significantly less serious cases would suggest an incongruence in determining a sentence that accurately reflects the ordinal proportionality of cases of different gravity. Culpability here was very high, as it was in *Attorney-General's Reference 72 and 73 of 2005,*[1026] the authority the Court of Appeal founded its assessment of the appropriate sentencing level on.[1027] Both cases come exceedingly close to the borderline with murder. Contemplation of sentencing levels in Schedule 21 would therefore also assist the quest for ordinal proportionality.

Property and drug smuggling offences

As has been detailed in previous chapters, there existed well before Schedule 21, something of a disproportionate relationship between the tariff for serious offences against the person, and property crimes, including drug violations. Sentences where Ds have killed unlawfully in the process of committing these other crimes have often been exponentially higher than homicides in and of themselves. The above case of *Lunkulu* where the starting point was approved as 12 years by the Court of Appeal for the gravity of the wrongdoing is obviously partly due to the kidnapping (an infringement of bodily autonomy) which the killing was bound up with.

[1024] [2011] 2 Cr App R (S) 119

[1025] *Lunkulu* [16]

[1026] [2006] 1 Cr App R (S) 112

[1027] *Lunkulu* [16], [18]

Yet compared with killings in the course of property crimes, an intrinsic under-valuation of breaches of personal safety is revealed. In *Jumah*[1028] Lord Judge CJ extended a sentence of 14 years to 18 where a fatal stabbing had occurred in the course of a planned robbery of a shop.[1029] The sentence for the conspiracy to rob remained 12 years, placing some appreciable distance between it and the increased manslaughter sentence. The only difficulty is that manslaughter sentence was meant to take into account the totality of the offending since the sentences were concurrent.[1030] It cannot be said therefore with the same degree of certainty that the 18 years entirely accounts for the manslaughter, whereas the 12 years does the conspiracy to rob. *Appleby* was firmly on the agenda, yet both it and *Jumah* escaped without mention in *Newman,*[1031] where a death resulted from D's reckless drug smuggling. Silber J upheld a twenty year sentence on the grounds that the drug smuggling was worth 12 years, and 'in our view there would have been nothing wrong with a consecutive sentence of eight years for the manslaughter'.[1032] Why the manslaughter was worth eight years we are not told. No legal sources are cited.

When manslaughters have been committed in the course of other crimes, then the sentence should reflect the totality of the offending.[1033] That some of these sentences, like those prior to *Wood* and *Appleby*, treat property or drug crimes as equally or more

[1028] [2011] 2 Cr App R (S) 32

[1029] *Jumah* [21]

[1030] *Jumah* [21]

[1031] [2011] 2 Cr App R (S) 86

[1032] *Newman* [11]

[1033] Sentencing Council, *Offences taken into consideration and totality: definitive guideline* (SC 2012) 5

serious than the offence against the person that was committed in the process, suggests that much more needs to be done to rebalance this relationship.

In this field, once again, the failure of Courts to 'to take account of the statutory guidance provided for sentencing in cases of murder enacted in Schedule 21' suggests the 'now well established...re-appraised'[1034] schema for sentencing manslaughter is not being implemented due to judges' ignorance- unwitting or deliberate- of *Appleby*.

Babies

The same inconsistency is ubiquitous. In *Burridge*[1035] the increase explicitly applied by Leveson LJ was conspicuous given pre-*Appleby* levels of five to seven years for that class of case. The judgment was impressive also for its recognition of the extreme vulnerability of infant victims, an aggravating factor ostensibly passed over in older cases judging by their parity with assaults on adults. Albeit *obiter*, the judgment also points out how the increased valuation on the harm of death was 'not considered'[1036] in the preparation of the provocation sentencing guidelines.

Contrariwise, the *Appleby* uplift was anonymous in the subsequent infant case- despite *Appleby* being openly acknowledged and supposedly enforced. The Lord Chief Justice was clear and emphatic when confronted with the reality that *Appleby*

[1034] *Jumah* [20]

[1035] [2011] 2 Cr App R (S) 27

[1036] *Burridge* [140]

was essentially being distinguished on its facts in other cases. Between *Appleby* and the instant case 'there are huge factual differences; but the approach suggested in *Wood* and *Appleby* , and summarised in *Burridge*, is common to all cases of manslaughter, however they may arise and whatever their factual circumstances.'[1037] The requirement to treat the harm of death as more serious than before in the light of Schedule 21 meant 'the earlier decisions which he [the trial judge] considered have been deprived of any significant continuing weight.'[1038] They were the likes of *Yates* with their old 5-7 year bracket. And yet Lord Judge CJ himself increased the three and a half year jail term to merely five years, stuck firmly in the old range. There may have been grounds for assessing this case as less grave than *Burridge*, but by two and a half years if this D had not benefited from an inexplicable full guilty plea discount?

The case substantiates concerns about what exactly is the appropriate factor by which to increase sentences in the wake of *Appleby*. The prospect of regular failures to even refer to *Appleby*, coupled with variable uplifts applied to give effect to its ratio on the valuation of the harm of death is exasperating. Greater reference to authorities, coupled with laying down in a(nother) guideline case what the exact quantum of inflation should be, would be a start in the quest to enhance consistency, to treat like cases alike. As it stands, there is a long way to go, and no prospect of the Sentencing Council taking up the gauntlet of devising a definitive guideline for manslaughter.

Personal drug use

[1037] *Attorney-General's Reference 125 of 2010* [2011] 2 Cr App R (S) 97 [34]

[1038] ibid [34]

Whilst *Kennedy (No.2)*[1039] consigned personal injury liability for suppliers of drugs for immediate self-administration to the scrapheap, circumstances such as those in *Finn*[1040] were classic cases of administering a noxious thing to another. Yet was there any regard for *Appleby* and its associated rationale when it came to sentencing? Not a word. Indeed, a pre-*Appleby* authority stipulating a starting point of 5 years after a trial for death arising out of drug supply was taken as the Court of Appeal's touchstone. This is problematic for a number of reasons. *Wilson*[1041] propagated archaic sentencing levels by digesting numerous 1990s cases, and therefore can claim no increase in the sentencing levels for this class of manslaughter on pre-2003 levels unlike in the one-punch domain. Furthermore, *Wilson* itself dealt with liability dependent upon D's supply of a controlled substance, and V's self-administration, facts that would not give rise to liability for unlawful and dangerous act manslaughter today following *Kennedy No.2*. That flags up a meaningful difference in culpability and thus gravity between *Wilson*-esque drug supply manslaughter cases, and *Finn*-esque drug administration manslaughter cases: the latter merit more condign punishment than the former. Moreover, despite taking a 2007 pre-*Appleby* authority itself firmly rooted in 1990s standards as precedent for a 5 year starting point after a trial, no amplification is applied in the wake of *Appleby*. *Appleby* isn't mentioned by name, and can't be said to be represented in substance either as the 3 year sentence represents a full guilty plea discount and some further mitigation in the form of D's full and frank confessions without which a prosecution would have been impossible,

[1039] [2008] 1 AC 269

[1040] [2011] 1 Cr App R (S) 70

[1041] [2008] 1 Cr App R (S) 75

and the pressure he came under from V to carry out the injection after she herself had been unsuccessful. Once again, Schedule 21 and its underpinning principle fails to be applied to other homicides as *Appleby* fails to make it onto the radar of another Court of Appeal bench.

Gross negligence manslaughter

Here we are concerned to see whether the harm of death has been treated more seriously by way of higher sentences since the Court of Appeal laid down that it should in *Appleby*. *Holtom* confirmed that the ramifications of Schedule 21 recognised in Appleby, in the context of an unlawful and dangerous act manslaughter, applied also to gross negligence manslaughter. Yet again, we find that scarce reference to precedent results in scarce consistency.

Oughton[1042] evinces no increase upon the 12 months levels seen for comparable cases[1043] shortly before the chain of cases beginning with *Wood*. The convictions both related to deficient upkeep of vehicles. The dangerous driving aspect of *Oughton*, prosecuted as CDDD, was met with a 5 1/4 year custodial sanction. On the very similar facts of *Attorney-General's Reference 134 of 2004,*[1044] the Court of Appeal stated the offence of gross negligence manslaughter was 'indistinguishable'[1045] from CDDD. Yet the sentence for the grossly negligent manslaughter conviction was

[1042] [2011] 1 Cr App R (S) 62

[1043] *Roys* [2009] 1 Cr App R (S) 91

[1044] [2005] 2 Cr App R (S) 47.

[1045] *A-G's Ref 134 of 2004* [2]

appropriate at 12 months Judge LJ found there. It is quite probable that both sentences were fair for the tariff respective to each offence, laying bare the extent of disparity between sentencing levels for the two. CDDD has of course been subject to numerous statutory intensifications of its punishment regime. The disparity here highlights then the importance of applying the same rationale behind the CDDD increases as Schedule 21 to manslaughter in order to ameliorate the ordinal disproportionality. One could argue that the gap has been closed somewhat on the basis that the later terms around the 12 month mark were for poor maintenance of a vehicle, not the bad driving of it, like the 5 1/4 year CDDD sentence in *Oughton* was.

Though in *Brown*[1046] the trial judge felt there were no similar cases, let alone guidelines to assist,[1047] a sentiment which the Court of Appeal concurred with,[1048] *Graham*[1049] could have been of some use in principle. Four years was approved by the Court of Appeal in both, by coincidence it would seem. Again, the justifications offered by the Court of Appeal in *Brown* are elusive. The best we get is the insight that D's gross negligence 'deserves condemnation and punishment'.[1050] That was not in doubt though, it was whether the punishment was manifestly excessive. Unsurprisingly, there is no indication from the judgment of Openshaw J that *Appleby* has had any bearing on their musings.

[1046] [2011] 2 Cr App R (S) 11

[1047] *Brown* [12]

[1048] *Brown* [14]

[1049] [2006] 2 Cr App R (S) 86

[1050] *Brown* [14]

Other, generally later cases suggest *Appleby* is, eventually, catching on. In *Barrass*[1051] the Court of Appeal re-affirmed *Holtom*'s applicability, and upheld a sentence beyond the pre-*Appleby* range. Rix LJ's excellent methodology echoed that adopted by this thesis, establishing what the range for the class of case before *Appleby* was (2-2 1/2 years it was said), then taking account of the need for 'proper consideration of...the fatal consequences of the offence'.[1052] Duly, the Court upheld 2 years and 8 months as not manifestly excessive. In *Reeves*[1053] Treacy LJ for the appellate panel emphasised placing greater weight on the harm of death when determining the length of sentence was 'beyond argument',[1054] and expressly stated the existing range of custodial terms no longer applied. Imprisonment equating to 5 years after a trial was upheld for a parent leaving their baby unsupervised in the bath for 45 minutes when the child tragically drowned.

CONCLUSION

The binding authority now exists for sentencers in the Crown Court to implement the higher valuation upon the harm of death in assessing the gravity and thus commensurate sentence for homicides. Where the tariff rises prior to *Wood*/*Appleby* were to an extent influenced by the new emphasis on the loss of life, for instance in motor manslaughter cases and one punch manslaughter, this must be taken into

[1051] [2012] 1 Cr App R (S) 80

[1052] *Barrass* [15]

[1053] [2013] 2 Cr App R (S) 21

[1054] *Reeves* [13]

account when applying the effects of *Appleby*. Whilst awareness and heed of *Appleby* by the Court of Appeal has increased with time, it has been a slow process, taking almost as long as it did for the Court of Appeal to recognise Schedule 21's repercussions for the sentencing of other homicides in the first place. In the meantime, a decade of inconsistency, unfairness, and injustice played out as the Court of Appeal neglected entirely or later intermittently to apply what is now clear to have been the law all along since 2003.

One must ask why it took so long for the Court of Appeal to make this realisation. Jeremy claims, with the benefit of hindsight, 'it was always obvious that the increase in starting points used for the calculation of minimum terms in murder cases that was provided for in Schedule 21 would render an increase in sentences for other crimes, particularly those including some of the ingredients of murder, inevitable.'[1055] Odd then that neither he nor any other published writer argued such in the five years preceding *Wood*, or criticised the failure of the Court of Appeal to implement what was little more than common sense as far as he is now concerned. Either it wasn't obvious, or there was a conscious decision to disregard the will of Parliament. He seems to allege something of the latter with regards to the Court of Appeal at least.[1056]

The danger borne out by post-*Appleby* cases is that the shortcomings in sentencing practice identified throughout this thesis, not least the frequent failure to refer to a substantial canon of authorities in building an *accurate, nuanced* picture of the established tariff, will continue to undermine the impact of *Appleby*. If courts are not

[1055] Jeremy (n 675) 594

[1056] (n 675) 599-601, 603

aware of what sentencing practice was for any particular type of case before *Appleby* recognised the influence of Schedule 21, then they have no foundation upon which to apply an increase to. Combined with the inherently ambiguous nature of the *Appleby* modifier to be applied individually at each sentencing judge's discretion, the present situation is a recipe for inconsistency. So far the degree of increases due to *Appleby* cannot be gauged with any reliability.

Despite the momentous decisions pioneered by Lord Judge CJ there remains a colossal gulf between murder and manslaughter sentences which far outstrips the difference in gravity between the two crimes, a view shared by Jeremy.[1057] Whilst *Appleby* may have ensured the developments in murder sentencing are now factors in the sentencing of manslaughter too, *before* Schedule 21 was enacted there was unjustifiable disparity between punishments for the two homicides.[1058] The quest for ordinal proportionality between them probably requires the SC's over-arching assistance. Without some form of guidelines for manslaughter proportionate to Schedule 21, reform will remain stuck at the current halfway house.

[1057] (n 675) 607

[1058] (n 675) 606, which contradicts his rose-tinted view of the past that Schedule 21 'distorted the delicate proportionality' (at 607) that presumably existed before.

CHAPTER 5

Conclusion

This thesis set out to examine the Court of Appeal's interpretation and application of Schedule 21, the statutory sentencing guidelines for murder. In order to do this, it investigated what the objectives of Parliament were in enacting Schedule 21 as part of an over-arching sentencing schema hinged on desert theory and other contemporaneous reforms in relation to sentencing offences involving the causing of death more heavily than before. This prompted, firstly, a thorough and nuanced analysis of the case law on Schedule 21's operation for sentencing murder, looking to draw out trends, consistencies, inconsistencies, problems, points of confusion, in the process establishing to what extent the guidelines can be said to have been faithfully implemented in accordance with Parliament's will. Secondly, stemming from the conclusions drawn in relation to the intention behind Schedule 21 and related Parliamentary reforms to homicide sentencing, whether Schedule 21 has influenced the sentencing of the other major homicide offence, manslaughter, and if so, how. The means of answering this research question were the same as in relation to murder itself, via a careful digest of the leading authorities dealing with manslaughter sentencing. What was concluded in answer to these research questions?

In Chapter 1 it was argued that Parliament's purpose in passing Schedule 21 was to remedy a broad sense that the harm of death was not adequately recognised or dealt with under the pre-existing sentencing regime for murder. This meant murder

minimum terms were disproportionately short to the gravity of culpably causing such great harm in killing. Thus Schedule 21 increased sentencing levels for murders of all seriousness.

In reaching this view and delineating its precise repercussions a wide range of sources were thoroughly scrutinised. Not merely were the statutory terms of the schedule analysed, but the debates both in the House of Commons and the House of Lords where the schedule was deliberated. This, in conjunction, with other contemporary legislation including the increased maximum sentence for causing death by dangerous driving (CDDD), the introduction of mandatory sentences for some knife and gun crimes, and the new offences of corporate manslaughter and those contained in the Road Safety Act 2006 (RSA06), shone valuable light on the context and motivations behind these legislative reforms. It is submitted that the evidence point to a holistic reweighting of the seriousness of causing death by Parliament.

The second prong of reasoning begun with the observation that the harm of death by definition comprises one of the elements of any homicide offence. Hence the seriousness of homicides unaddressed by primary legislation had also been affected by virtue of the re-calibration of the harm of death signalled by the aforementioned legislation of the time. The primacy of desert, that is a rationale of sentencing which determines the quantum of punishment proportionate to the seriousness of the crime, to English sentencing is plain and reinforced by statutory enactments accompanying Schedule 21, including but not limited to Schedule 21 itself. The language of desert, ie establishing offence seriousness and linking it to a length of sentence so that all sentences sit in ordinal proportionality to one another, is manifested throughout

Schedule 21 it was noted. Moreover, s.269 of the CJA03 in relation to murder itself, and s.153(2) as regards all other offences serious enough to be punished with a custodial sentence, are clear and unambiguous that any and all sentences of imprisonment must be for the shortest term commensurate with the seriousness of the offence.[1059] Whether a custodial sentence is appropriate, where the court is not compelled by law to impose it, hinges on whether the 'custody threshold' has been passed.[1060] Once again, this is determined by the seriousness of the offence.[1061] Ergo, sentencing dependent upon the seriousness of homicides should be adjusted in accordance with the principle behind Parliament's steps outlined above. The upshot is longer sentences for those homicide offences not the subject of express legislative provisions (as well as those that were).

Identical methodologies were adopted for both of these examinations, and in some sense identical findings have materialised. With respect to both offences, the Court of Appeal has acknowledged, sooner or later, what has changed and what needs to be done differently. Unfortunately however, these statements remain aspirational across a number of key areas. No good explanation for the delay at any stage has been forthcoming, and early precedents obfuscating Schedule 21's provisions and their ramifications were promulgated by the same people who had opposed the guidelines as they were going through Parliament on the very basis they then denied existed when it came to giving effect to Schedule 21 in the courts. In practice, the application

[1059] A frequently forgotten or ignored provision which should comprise part of the foundations of any sentencing guideline. Section 142 of the CJA03 is regularly referred to, but oddly not s.153(2) of the same Act. See, for eg, SC, *Assault Guideline: Professional Consultation* (SC 2010), Section 2 entitled 'Statutory requirements'.

[1060] s.152, CJA03

[1061] s.152(2)

and operation of the guidelines has been far from perfect. Even as expressly legislated for murder, the Court of Appeal has frequently overlooked or simply dismissed the plain terms of the schedule. This has been most commonplace in the context of the higher starting points, particularly para.5 and some of its subparas especially. Somewhat ironically, the Court has fiercely defended the prerogative of Parliament to enact sentencing laws in the context of para.4 when confronted by interference from the Strasbourg tribunal, yet overlooked this very tenet time and again in the context of other paragraphs. Paragraph 6 has been implemented as well as any other, and is arguably where the Schedule's tariff increase has been most keenly felt, given these are the most commonplace murders too. These inconsistencies evince problems not just in relation to adherence to Parliament's will, but present new ones through the warping of ordinal proportionality. The Court of Appeal appears to have settled into a groove in respect to a number of these issues, and hopefully this research has highlighted where and how, so that remedial action can begun to be taken.

With respect to manslaughter, whilst the Court of Appeal appears to be increasingly aware of *Appleby* et al, there remains a long way to go in order to cement the ratio of that case as a ubiquitous consideration when deciding appeals. The progress made thus far has been slow because of the scarce resort made to precedent in general, and thus *Appleby* specifically. However, even routine reference to *Appleby* only takes us so far. The degree of uplift necessary depends across the various types of manslaughter according to how much of a greater emphasis was placed on the harm of death before *Appleby*. Moreover, accounting for that, the degree of uplift in any particular area needs to be agreed and declared by the Court of Appeal, so any appellate panel, and Crown Court sentencers, know how much of an uplift to apply.

Otherwise, the scope for variation and idiosyncrasy is large and as many new problems of disparity are created if this is not done in a concerted fashion. Guidelines would be the optimum solution, especially if distilled from Schedule 21's format and figures, as difficult as that might be. Even if they are loose, and heavily draw on authorities to try and cover the wide factual matrices of manslaughter, they will at least provide common ground for judges to work from, and are as good as way as any to entrench a new set of sentencing levels for the differing types of manslaughter. Care would have to be taken however, that the thrust of *Appleby* and Schedule 21 is not diluted in their preparation.

A new set of guidelines as proposed by Mitchell would not solve the chief problems identified in this thesis, which are predominantly matters only the courts can address through their own interpretation and operation of the Schedule. What is 'desirable so that the courts can provide a consistent and fair system of punishment for murder'[1062] is greater adherence to the guidelines that do exist, and much more rigorous and thorough reference to precedents. Moreover, Mitchell's and others' complaints are ultimately about the increased sentence lengths, yet he proposes to 'adopt the same starting points as in Schedule 21'[1063] for a revised schema. Consequently it's hard to see what his revisions would substantively change.

Future research should do at least two things. Above all, it should continue to scrutinise the work of the Court of Appeal in operating Schedule 21 and/or its implications for murder and manslaughter, to ensure better compliance with the law is

[1062] Mitchell (n 2) 70

[1063] Mitchell (n 2) 60

achieved. Feet need holding to the fire since the binding force of an Act of Parliament seems insufficient in and of itself to incline genuine adherence to the Schedule. On the 800th anniversary of Magna Carta, that is a somewhat despondent discovery as to the integrity of the rule of law in this country. Secondarily, based on the findings regarding the increased seriousness of causing death adopted in the 2000s, the next steps for research beyond this thesis are exploring the justifications for Schedule 21 influencing the sentencing of other fatal offences against the person, homicide-related offences, and other serious, but non-fatal offences against the person. The final of these is the least obvious, but potentially of greatest magnitude, if such a case in principle exists, because of the sheer number of such crimes in comparison to fortunately rare homicides.

Contrary to the academic disparagement, the inflated tariff, in conjunction with other statutory innovations, has the potential to do much good in redressing the under-valuation the courts have previously placed on human life and bodily harm, via the demands of ordinal proportionality. Schedule 21's birth was undignified, its motivations doubted, its application still unsatisfactory, but its legacy of potentially great benefit to long-term valuations upon bodily harm, long underrated by the courts.

APPENDIX 1

Criminal Justice Act 2003

Schedule 21 DETERMINATION OF MINIMUM TERM IN RELATION TO MANDATORY LIFE SENTENCE (as amended)

Starting points

4 (1) If—

(a) the court considers that the seriousness of the offence (or the combination of the offence and one or more offences associated with it) is exceptionally high, and

(b) the offender was aged 21 or over when he committed the offence,

the appropriate starting point is a whole life order.

(2) Cases that would normally fall within sub-paragraph (1)(a) include—

(a) the murder of two or more persons, where each murder involves any of the following—

(i) a substantial degree of premeditation or planning,

(ii) the abduction of the victim, or

(iii) sexual or sadistic conduct,

(b) the murder of a child if involving the abduction of the child or sexual or sadistic motivation,

(c) a murder done for the purpose of advancing a political, religious [, racial]1 or ideological cause, or

(d) a murder by an offender previously convicted of murder.

5 (1) If—

(a) the case does not fall within paragraph 4(1) but the court considers that the seriousness of the offence (or the combination of the offence and one or more offences associated with it) is particularly high, and

(b) the offender was aged 18 or over when he committed the offence,

the appropriate starting point, in determining the minimum term, is 30 years.

(2) Cases that (if not falling within paragraph 4(1)) would normally fall within sub-paragraph (1)(a) include—

(a) the murder of a police officer or prison officer in the course of his duty,

(b) a murder involving the use of a firearm or explosive,

(c) a murder done for gain (such as a murder done in the course or furtherance of robbery or burglary, done for payment or done in the expectation of gain as a result of the death),

(d) a murder intended to obstruct or interfere with the course of justice,

(e) a murder involving sexual or sadistic conduct,

(f) the murder of two or more persons,

(g) a murder that is racially or religiously aggravated or aggravated by sexual orientation, or

(h) a murder falling within paragraph 4(2) committed by an offender who was aged under 21 when he committed the offence.

5A.— (1) If—

(a) the case does not fall within paragraph 4(1) or 5(1),

(b) the offence falls within sub-paragraph (2), and

(c) the offender was aged 18 or over when the offender committed the offence,

the offence is normally to be regarded as sufficiently serious for the appropriate starting point, in determining the minimum term, to be 25 years.

(2) The offence falls within this sub-paragraph if the offender took a knife or other weapon to the scene intending to—

(a) commit any offence, or

(b) have it available to use as a weapon,

and used that knife or other weapon in committing the murder.

6 If the offender was aged 18 or over when he committed the offence and the case does not fall [within paragraph 4(1), 5(1) or 5A(1)]1, the appropriate starting point, in determining the minimum term, is 15 years.

7 If the offender was aged under 18 when he committed the offence, the appropriate starting point, in determining the minimum term, is 12 years.

8 Having chosen a starting point, the court should take into account any aggravating or mitigating factors, to the extent that it has not allowed for them in its choice of starting point.

9 Detailed consideration of aggravating or mitigating factors may result in a minimum term of any length (whatever the starting point), or in the making of a whole life order.

10 Aggravating factors (additional to those mentioned in [paragraph 4(2), 5(2) and 5A(2)]1) that may be relevant to the offence of murder include—

(a) a significant degree of planning or premeditation,

(b) the fact that the victim was particularly vulnerable because of age or disability,

(c) mental or physical suffering inflicted on the victim before death,

(d) the abuse of a position of trust,

(e) the use of duress or threats against another person to facilitate the commission of the offence,

(f) the fact that the victim was providing a public service or performing a public duty, and

(g) concealment, destruction or dismemberment of the body

11 Mitigating factors that may be relevant to the offence of murder include—

(a) an intention to cause serious bodily harm rather than to kill,

(b) lack of premeditation,

(c) the fact that the offender suffered from any mental disorder or mental disability which (although not falling within section 2(1) of the Homicide Act 1957 (c. 11)), lowered his degree of culpability,

(d) the fact that the offender was provoked (for example, by prolonged stress) [...]1 ,

(e) the fact that the offender acted to any extent in self-defence [or in fear of violence]2 ,

(f) a belief by the offender that the murder was an act of mercy, and

(g) the age of the offender

12 Nothing in this Schedule restricts the application of—

(a) section 143(2) (previous convictions),

(b) section 143(3) (bail), or

(c) section 144 (guilty plea)

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