Consistency in sentencing:

Is the current guidance in England and Wales adequate?

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ABSTRACT

Consistency in sentencing is widely considered to be an essential component of a fair sentencing system; but what is consistency? This thesis argues that it incorporates both procedural and substantive elements, focussing upon the proper application of principle. In doing so, the notion of comparing 'like' cases is rejected as simplistic, impractical and unprincipled. It is argued that a more principled approach reconciles the tension between consistency and individualised justice which has been argued to exist. In the face of clear and consistent empirical evidence – from multiple jurisdictions – of inconsistency in the face of an absence of structure, it is vital that sentencers' powers are structured in a way which encourages sentences to be imposed in accordance with the principles underpinning the scheme while maintaining the ability to individualise sentences. This thesis focuses upon England and Wales and therefore the concept of consistency concerns the application of the principles underpinning the largely retributive scheme in operation in that jurisdiction. Parliament, the Court of Appeal (Criminal Division) and the Sentencing Council all provide structure as a means of promoting consistency. The methods employed by these institutions are critically examined to establish the combined efficacy of the structure in place in England and Wales. This thesis concludes that they provide an adequate degree of structure as means of promoting consistency, though more could be done. In particular, the Sentencing Council's guidelines represent the most promising means of structuring discretion. Guidelines provide a clear approach to the assessment of the key factors driving the determination of sentence, namely culpability and harm, which must be followed. In particular the 'ranking' of factors relevant to this assessment strongly encourages consistency of approach which, it is argued, is highly likely to produce greater consistency of outcome. This structure is adequate, though improvements could be made to achieve greater consistency without unduly restricting sentencers' powers.

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BAME	Black and minority ethnic
CACD	Court of Appeal (Criminal Division)
SC	Sentencing Council

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Chapter 1: Introduction

[T]he severity of the sentence imposed should reflect the seriousness of the offence committed.[1]

Introduction

This thesis explores the concept of consistency in sentencing as it applies in England and Wales. Beginning with an exploration of the sentencing scheme in this jurisdiction (Chapter 1), the thesis goes on to consider consistency, challenging current accounts of the concept and advocating a more principled approach its pursuit (Chapter 2). Thereafter, the empirical literature regarding consistency in sentence is considered, evaluating the extent to which inconsistency can be said to present a problem in theory and in practice (Chapter 3). The definition of consistency advocated in Chapter 2 is then considered alongside the concept of individualised justice (Chapter 4). Having concluded in Chapter 3 that an effective response to inconsistency is to structure the discretion given to sentencing courts, the thesis then seeks to define what, for the purposes of this research, a discretionary sentencing decision is (Chapter 5). The thesis then moves on to consider the measures employed in this jurisdiction to structure discretion as a means of achieving consistency. The three predominant institutions performing this task are considered: parliament (Chapter 6), the Court of Appeal (Criminal Division) (Chapter 7) and the Sentencing Council (Chapter 8). Finally, the thesis concludes by drawing the threads together to arrive at an evaluation of the efficacy of the combined efforts to achieve consistency in England and Wales (Chapter 9).

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[1] Home Office, Making Sentencing Clearer: A consultation and report of a review by the Home Secretary (Home Office 2006), 3.

It is necessary to begin with a summary of the sentencing scheme in England and Wales which serves to provide context to the later enquiry into consistency in sentencing. While consistency could be achieved – and measured – in numerous ways, the extent to which a system can be said to be consistent depends upon the principle(s) to which it seeks to conform. For instance, a regime which required sentences of 10 years' imprisonment to be imposed for all violent offences would, on some measure, be consistent. However, in a regime which sought to reflect the harm caused by an offence, it would be inconsistent as it would result in the same sentence being imposed for offences which involved disparate levels of harm. Similarly, a regime which sought to sentence by reference to risk of future offences could be considered to be consistent if it sentenced on the basis of the offender's culpability, but it could not be said to be consistent with its consequentialist aims.

The concept of consistency is therefore agnostic to the principle(s) which are sought to be realised; it can be present in a regime which pursues any principle(s), whether they might be regarded as flawed, unjust or even barbaric. A regime which amputated the hands of all thieves, for instance, might properly be considered to be barbarous, yet it certainly could be said that the punishment was – on one view – consistent. Moreover, it could be ordinally (though perhaps not cardinally) proportionate. That is not to legitimise such means of punishment, but merely to recognise that as a critical tool, consistency remains silent as to the merits or otherwise of a particular scheme. By way of analogy, a speed camera is a tool used to measure the velocity at which vehicles travel, intended to detect those which exceed the prescribed limit for the purposes of punishment. The speed camera makes no comment as to the propriety of the 70 miles per hour limit applicable to a motorway. It would perform its same function if the speed limit were 70, 140 or 210 miles per hour. Although the speed camera has other aims – such as facilitating the punishment of those who have transgressed – it serves as

a tool to analyse the extent to which a speed limit is observed. Consistency, as a critical tool, may therefore be deployed to evaluate the extent to which a regime is consistent with its aims.[2] What is important to note, however, is that the speed camera is nothing without a speed limit. As a means of influencing drivers' behaviour, it is the combination of the camera and rule (i.e. the limit) which impacts upon drivers' decisions. So too is the case with consistency. Absent any underlying principles, it is empty; only when paired with principles does it become a substantive concept.

This thesis concerns itself with consistency in sentencing in England and Wales and the extent to which the regime promotes the pursuit of a largely retributive scheme in a more consistent fashion. However, there is a distinction to be drawn between the conceptual framework and the applied discussion in this thesis. While the conceptual framework may be agnostic as regards to sentencing principles, the applied discussion as to the application of the concept of consistency to England and Wales regards the limiting retributivist scheme in operation in this jurisdiction is not.

The overarching principle

Retributivism, most notably advocated by von Hirsch, mandates that a sentence addresses "*…offenders as moral agents, as having the capacity to assess and to respond to an*

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[2] This conception of principles is recognised in Gardner's essay in Ashworth's festschrift, where Gardner draws a distinction between principles which are "*reason-giving*" only if they are "*good*" principles and those which are treated as "*good*" principles merely because they are adhered to. See John Gardener, 'Ashworth on Principles' in Lucia Zedner and Julian V Roberts, *Principles and Values in Criminal Law and Criminal Justice: Essays in Honour of Andrew Ashworth*, (OUP 2012), 4-5.

official evaluation of their conduct."[3] It is founded upon the "*intuitive*" link between desert and punishment to censure transgressive behaviour, achieved by the imposition of a proportionate punishment designed to respect the rule of law values of certainty and predictability while operating as a deterrent.[4] While there are competing accounts of retributivism, the scheme in England and Wales is insufficiently precise to confidently discern between various accounts.

The sentencing scheme makes reference to the seriousness of the offence which is, in turn, assessed by reference to the culpability of the offender and the harm caused or risked. Parliament legislated this approach in the Criminal Justice Act 1991 ("*the 1991 Act*"), though the origins of this approach pre-date that enactment, the courts having sentenced by reference to the severity of the crime in at least the late 1800s.[5] Ashworth and Player criticised the 1991 Act's failure to clearly declare that proportionality was the principle by which sentencing should be conducted, though this was clear from the White Paper preceding the Act.[6]

Section 1(2)(a) of the 1991 Act made reference to the seriousness of the offence and placed limitations on the court's ability to impose custodial and community sentences by reference to offence seriousness. Section 1(2)(b) operated as an exception to this approach in circumstances where considerations of public protection required such a sentence. It is evident, therefore, that the 1991 Act brought about, more clearly than before, a form of limiting retributivism in sentencing in England and Wales. Sentences were therefore determined

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[3] Andrew Ashworth, *Sentencing and Criminal Justice* (6th ed) (CUP 2015), 94.

[4] Ashworth (n 3).

[5] Julian V Roberts and Andrew Ashworth, 'The Evolution of Sentencing Policy and Practice in England and Wales, 2003–2015' (2016) 45(1) *Crime and Justice* 307, 308.

[6] Andrew Ashworth and Elaine Player, 'Criminal Justice Act 2003: The Sentencing Provisions' (2005) 68(5) MLR 822, 822.

principally by the seriousness of the offence, but with other considerations capable of influencing the decision.

The principle of proportionality may be sub-divided into ordinal and cardinal proportionality. The former concerns the relative seriousness of one offence to another, for instance, an assault causing a bruise is less serious than an assault causing a fractured jaw. The latter "*relates the ordinal ranking to a scale of punishments*".[7] Notably, upon the enactment of the 1991 Act, the maximum sentences for criminal offences remained untouched. There was, therefore, no determined recalibration of ordinal or cardinal proportionality, though prison numbers almost doubled in the supervening years.[8] The absence of significant change in prison numbers in the years that followed speaks to the continuation (and formalisation) of desert as the guiding principle at sentencing.

The Criminal Justice Act 2003 "*reaffirmed a number of existing sentencing provisions and introduced a raft of changes*."[9] Proportionality remained the guiding principle, however, the scheme now contained a legislative provision as to the objects of sentencing: section 142 of the 2003 Act listed for the first time the purposes of sentencing which comprised a mixture of retributive and consequentialist concerns.[10]

These purposes listed – in the case of those aged 18 or over when convicted only – are:

(a) the punishment of offenders,

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[7] Ashworth (n 3), 94.

[8] Ministry of Justice, *Offender Management Statistics Quarterly: Prison Population: 30 September 2015* (Ministry of Justice 2015) cited in Roberts and Ashworth (n 5), 314.

[9] Roberts and Ashworth (n 5), 308.

[10] There is a fuller discussion of this provision in Chapter 6.

(b) the reduction of crime (including its reduction by deterrence),

(c) the reform and rehabilitation of offenders,

(d) the protection of the public, and

(e) the making of reparation by offenders to persons affected by their offences.[11]

Ashworth criticised the lack of clarity stemming from a list of competing purposes of sentencing with no clear hierarchy or guidance as to how one should discern the correct approach in a given case.[12] Yet this is capable of justification and rationalisation if one conceives of retributivism as an imprecise concept and of the task of a sentencer to be two distinct, sequential, steps: first, to determine the proportionate range by reference to desert; and second to rely upon the statutory purposes of sentencing to determine where in the proportionate range a sentence ought to fall. This encapsulates the essence of Norval Morris' theory of limiting retributivism: a sentence must not be undeserved, but desert is imprecise, like cases should be treated alike unless there are utilitarian reasons to the contrary. Perhaps most importantly for the present enquiry, unequal penalties can still be just.[13]

While the scheme in England and Wales may not subscribe overtly to the latter doctrine, the essence of Morris' limiting retributivism is captured by the requirement that the sentence to be imposed is to be driven by the seriousness of the offence but with other, non-retributive, considerations capable of impacting upon the nature and severity of the sentence.[14]

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[11] Criminal Justice Act 2003 s.142(1) and (2)(a).

[12] Ashworth (n 3), 82.

[13] Norval Morris, *Madness and the criminal law* (University of Chicago Press 1982), 192, 198, cited in Richard S Frase 'Norval Morris's Contributions to Sentencing Structures, Theory, and Practice' (2009) 21(4) *Federal Sentencing Reporter*, 254-260, 255.

[14] There were also widespread reforms as to the sentences which a court could impose upon an offender, providing courts with greater choice as to the way in which it could respond to crime. These reforms operated within the overarching scheme driven by retributivism, however.

By way of illustration, consider an offence of dwelling burglary. Suppose the proportionate range is 18 months to three years' imprisonment. Within that range of proportionate sentences, the purposes of sentencing may influence the sentence to be imposed. If a sentence prioritising rehabilitation is considered to be appropriate, then something towards the lower end of that proportionate scale is perhaps to be expected; conversely, a sentence prioritising punishment or deterrence may result in a sentence towards the top of that range. At no point is a disproportionate punishment permitted; the purposes cannot legitimise a sentence beyond the proportionate range.

While that might reconcile the approach adopted in England and Wales with an established and accepted theoretical framework, it does not deal with the obvious extension to Ashworth's point; while unequal sentences may be just, based on the differing considerations between cases, could different sentences be justified in the same case? Put another way, continuing with the example in the previous paragraph, could a sentence of 18 months and a sentence of three years be justified, if different judges took different views as to the appropriate disposal in the same case on the same facts? The following chapters consider this point, but it suffices to say that at present, there is ambiguity in the England and Wales scheme.

Additionally, the principle of parsimony is a clear feature of the scheme; parliament has legislated that sentences must be of a length that is the shortest period which is commensurate with the seriousness of the offence.[15] Again, this is subject to other, non-retributive considerations. Given the lack of precision around the principle of desert, this provision perhaps has less impact than was intended.

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[15] Criminal Justice Act 2003 s.153(2).

And so it is these principles to which sentencers are required to adhere. In so doing, consistency is a latent aim. Inconsistency as to the application of these principles may result in the principles not being realised to the extent that the scheme desires.

The tension between principles and the 'real world'

While regard to principles is important – for it produces a more coherent and theoretically satisfying account – the relevance of the real-world practice cannot be ignored. While principles may be neutral to factors such as social class, gender, race, religion or political persuasion, it is important to be cognisant of the practicalities of how these factors impact sentencing practice.

For instance, the principle of proportionality, encompassing considerations of culpability and harm, pays no regard to the gender of the offender. The legislation providing for this approach is drafted in gender neutral language, as are the sentencing guidelines; yet gender has a role to play in the consideration of the application of sentencing principles. It must be recognised that female offenders are more likely to be involved with crime through domestic abuse, coercion and controlling behaviour, which is likely to have a deflationary effect in the consideration of their culpability.[16]

Similarly, it is accepted that on a retributive account, a guilty plea reduces the severity of the sentence and that this is a perfectly proper consideration which in the principle of proportionality is neutral to race (and other non-legally relevant factors). However, in practice

[16] Ministry of Justice, *Female Offenders Strategy* (Cm 9642, 2018), 11.

several studies have demonstrated that black and minority ethnic ("*BAME*") defendants are more likely to plead not guilty than white defendants. This element of a reduction in sentence (and the application of the principle of proportionality) is therefore a less significant feature in the sentencing of BAME offenders than is the case for white offenders.

While a principle may be in theory neutral to legally irrelevant factors, in practice the position may be very different. The consideration of consistency in sentencing – and methods of promoting more consistency in the determination of sentence – must therefore be cognisant of this disconnect between the theory and practice of sentencing. Consideration of the methods which are utilised in England and Wales to promote greater consistency must evaluate their relative efficacy against the background of the empirically evidenced divergence between practice and theory.

Conclusion

The consideration of the concept of consistency in sentencing in this thesis concerns sentencing and England and Wales. This jurisdiction subscribes to a sentencing scheme prioritising retributive proportionality, encapsulating an assessment of offender's culpability and the harm present in the offence. This produces a range of permissible sentences which may be legitimately imposed in accordance with the principle. The eventual sentence is informed by other factors, assisting the sentencer in selecting a sentence within the permissible range. The consideration of consistency is therefore a consideration of the extent to which sentencing in England and Wales is consistent with these principles to which the scheme subscribes, and the forthcoming examination concerns measures in place to promote sentencing practice which

is consistent with these principles. These principles, and their application, will be addressed more fully in subsequent chapters.

Chapter 2: Conceptualising consistency in sentencing

Consistency in punishment - a reflection of the notion of equal justice – is a fundamental element in any rational and fair system of criminal justice…[17]

Introduction

The need for, and importance of, consistency in sentencing

Consistency is a fundamental property of a fair sentencing system. It is a familiar concept; put crudely, it embodies the notion that like cases should be treated alike. However, that overly-simplistic description belies the reality of what is in fact a complex concept lacking clarity. While most Anglo-Saxon jurisdictions place emphasis on the need for consistency in sentencing,[18] continental European jurisdictions tend to favour individualised justice over the desire to be consistent.[19]

This thesis considers England and Wales, a jurisdiction in which three key institutions exist to promote consistency in sentencing: parliament, the Court of Appeal (Criminal Division) ("*CACD*") and the Sentencing Council ("*SC*"). This chapter focuses upon the

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[17] *Lowe v The Queen* (1984) 154 CLR 606.

[18] See for example, The Sentencing Commission for Scotland, *The Scope to Improve Consistency in Sentencing – Report 2006* (The Sentencing Commission for Scotland, 2006), para.6.3; Coroners and Justice Act 2009 s.120(11)(b); *R. v Blackshaw* [2011] EWCA Crim 2312; [2012] 1 Cr. App. R. (S.) 114 at [14]; Lord Justice Leveson when stressing the importance of consistency in sentencing during his evidence to the House of Commons Justice Committee on The Annual Report of the Sentencing Council, 13 January 2012, (2010-2012) HC 1711 I; *R. v McC* [2014] EWCA Crim 909 at [23]; Jose Pina-Sanchez and Robin Linacre, 'Refining the measurement of consistency in sentencing: A methodological review' (2016) 44 International Journal of Law, Crime and Justice 68.

[19] For example, article 132-1 of the French Criminal Code requires that any sentence must be individualized; section 80 of the Danish Penal Code requires a consideration of the offence but also of the offender's "*general personal and social characteristics, his situation before and after the crime as well as his motivations for the crime*" (a translation from Rasmus H Wandall, 'Resisting risk assessment? Pre-sentence reports and individualized sentencing in Denmark' (2010) 12(3) Punishment & Society 329). Chapter 4 addresses this contrast in more depth.

theoretical aspects of the concept of consistency and the following discussion, though general in nature, should be considered against the background of the sentencing scheme prevailing in England and Wales, as set out in Chapter 1.

For those jurisdictions explicitly placing an emphasis on consistency, the benefits are well-known; more consistent sentencing practice results in more accurate provision of legal advice, increased transparency and legitimacy, and greater efficiency.[20] The core theoretical justification for the need for consistency in sentencing concerns fairness and equality. This finds its origins in the rule of law, and the common law norm of equal justice.[21] With wide-ranging benefits and strong normative arguments for the reduction of inconsistency in sentencing[22] it is no surprise that consistency has attracted interest in many jurisdictions. This chapter seeks to bring some clarity to the concept of consistency through the pursuit of a more principled approach.

The basic concept

When asked to explain the concept of consistency in sentencing, academics, judges and practitioners will often resort to something resembling the following: like cases should be treated alike.[23] This neatly encapsulates the basic idea, that similarly situated offences and

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[20] See for example The Sentencing Commission for Scotland (n 18), para.6.3 and *R. v Caley* [2012] EWCA Crim 2821; [2013] 2 Cr.App.R. (S.) 47 at [28] and [29].

[21] Mirko Bagaric and Athula Pathinayake, 'The paradox of parity in sentencing in Australia: the pursuit of equal justice that highlights the futility of consistency in sentencing' (2013) 77(5) Journal of Criminal Law 399, 400.

[22] Patricia L Brantingham, 'Sentencing Disparity: An Analysis of Judicial Consistency' (1985) 1(3) Journal of Quantitative Criminology 281, 282.

[23] See for example Michael Tonry, 'Punishment policies and patterns in Western countries' in Michael Tonry and Richard S Frase (eds), *Sentencing and Sanctions in Western Countries* (OUP 2001), 6; Brantingham (n 22) 282; Andrew Ashworth, 'Disentangling disparity' in Donald C Pennington and

offenders should receive similar treatment. Ashworth suggests that this basic description – treating like cases alike – should be accompanied by the converse, namely treating different cases differently.[24] This general description however leaves many issues unresolved; the two most important of which are perhaps what constitutes 'like' treatment and how to determine a 'like' case. Without an answer to those questions and questions like them, the concept has little use as a critical tool.[25]

Most accounts of consistency concern differences in sentencing decisions and the extent to which they are objectionable or justifiable, with the focus predominantly upon the sentencing outcome. This is often performed by a comparison with previously determined cases. Some accounts focus solely on the approach to sentencing, reflecting the strong value placed in the discretion traditionally afforded to sentencers.[26] Some consider that the concept has the status of a principle of sentencing, though many do not go so far.[27] There is, however, widespread agreement that some form of consistency in sentencing is necessary.[28] The

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Sally Lloyd-Bostock (eds), *The Psychology of Sentencing: Approaches to consistency and disparity* (Centre for Socio-Legal Studies 1987), 24.

[24] Andrew Ashworth, 'Structuring sentencing discretion' in Andrew von Hirsch, Andrew Ashworth and Julian V Roberts (eds), *Principled Sentencing: Readings on Theory and Policy* (3rd edn) (Hart 2009), 253.

[25] Ashworth (n 23) 24.

[26] Sir Brian Leveson, 'The Parmoor Lecture: Achieving consistency in sentencing' (24 October 2013) <https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Speeches/leveson-parmoor-lecture-20131031.pdf> accessed 14 June 2019.

[27] For example, Etienne takes the view that parity is a "first principle" of sentencing, see Margareth Etienne, 'Parity, Disparity and Adversariality: First Principles of Sentencing' (2005-2006) 58 Stan L Rev 309, 310. However, this thesis adopts the view that consistency is not a principle of sentencing, attaining the same status as proportionality or parsimony, but instead, considers consistency to be a concept concerned with the application of sentencing principle.

[28] Jose Pina-Sanchez and Robin Linacre, 'Sentencing Consistency in England and Wales: Evidence from the Crown Court Sentencing Survey' (2013) 53(6) British Journal of Criminology 1118 and Jose Pina-Sanchez and Robin Linacre, 'Enhancing Consistency in Sentencing: Exploring the Effects of Guidelines in England and Wales' (2014) 30(4) Journal of Quantitative Criminology 731.

principal disagreement with which this chapter is concerned comes in the form of what constitutes an inconsistency or disparity, and how it may be identified.

Notwithstanding the widespread agreement on its importance and value within the Anglosphere, there is disagreement as to what the term actually means and it is widely accepted that the concept is complex and confused. Some attribute the confusion – at least in part – to the fact that "*the concept of disparity is far from clear…the simple term 'equality' or 'disparity' hides a variety of complex conceptual problems*".[29] Whereas many guidelines bodies and legislatures place great emphasis upon the importance of consistency – and moreover, many regard it as a critical feature of fair sentencing[30] – those jurisdictions routinely fail to provide a definition for the concept. This is problematic; as Krasnostein and Freiberg asked in the title of their paper on consistency in an individualistic sentencing framework: "If you know where you're going, how do you know when you've got there?"[31] In the context of this enquiry, the "where are we going?" is a retributively proportionate sentence (informed by other, consequentialist, considerations), as discussed in Chapter 1.

[29] Petrus C Van Duyne, 'Backgrounds of disparity in the administration of criminal law', in European Committee on Crime Problems, *Disparities in Sentencing: Causes and Solutions* (Council of Europe 1989), 67.

[30] See for example, in relation to England and Wales, Coroners and Justice Act 2009 s.120(11)(b); Lord Justice Leveson when stressing the importance of consistency in sentencing during his evidence to the House of Commons Justice Committee on The Annual Report of the Sentencing Council, 13 January 2012, (2010-2012) HC 1711 I; *R. v Bond* [2013] EWCA Crim 2713; [2014] 2 Cr App R (S) 3 [14]; *R. v McC* [2014] EWCA Crim 909; Pina-Sanchez and Linacre (n 18). In relation to Scotland, see Sentencing Commission for Scotland (n 18), Foreword.

[31] Sarah Krasnostein and Arie Freiberg, 'Pursuing consistency in an individualistic sentencing framework: If you know where you're going, how do you know when you've got there?' (2013) 76 Law and Contemporary Problems 265.

The structure of this chapter

This chapter will examine what is meant by the term 'consistency' in sentencing, exploring the role it has to play in the sentencing system in England and Wales which places an emphasis upon the need for like cases to be treated alike. In doing so, the chapter will consider concepts which are integral to the notion of consistency, and critique different accounts of consistency, including one from a prominent English judge and quondam Chairman of the Sentencing Council of England and Wales.

The first part of the chapter explores to what extent the concept of consistency overlaps with that of disparity, critically examining the two in an attempt to reconcile any differences in the terms. Thereafter, the chapter explores in-depth the notion of treating like cases alike, unpacking different interpretations of the phrase. Next, I consider two key debates concerning consistency in sentencing; consistency of approach versus consistency of outcome, and the closely related issue of whether consistency is best viewed as a substantive concept, a procedural device, or an amalgam of the two. The chapter will then conclude by drawing the threads together in an attempt to construct a credible account of consistency in sentencing which may be employed as a critical tool to assess the success of the pursuit of consistency in the sentencing system in England and Wales.

Having explored the complex issues concerning consistency in sentencing, this chapter will argue that it is possible to simplify matters, and suggest that:

a) inconsistency and disparity refer to the same concept;

b) in order to use consistency in sentencing as a critical tool to assess the propriety of sentencing decisions, the concept has to feature both procedural and substantive elements, incorporating both consistency of approach and consistency of outcome;
c) consistency should not be overtly pursued as an aim of a sentencing system; and
d) instead, the pursuit of principled sentencing results in consistency as the proper application of principle would result in an appropriate sentence being imposed.

I conclude with the view that while consistency is a beneficial element to a sentencing system, as an aim in itself it is unprincipled. It must be tied to a legitimate substantive principle (or principles) which underpins the sentencing scheme in question in order to be an effective device. Without a legitimate principle at its heart, it is agnostic to the substantive foundations of the sentencing scheme and becomes merely a tool by which any scheme could be assessed.

The scope of the basic concept

Are consistency and disparity interchangeable terms?

There is – rather ironically – a degree of inconsistency in the way in which the concept of treating similar cases similarly is described. For example, Krasnostein and Freiberg consider that "*[d]isparity [is] the converse of consistency…*"[32] and therefore use the terms synonymously, whereas others use the terms in conjunction and therefore appear to regard them as (perhaps discretely) different concepts.[33] The predominant view however is that

[32] Krasnostein and Freiberg (n 31), 265.

[33] See e.g. Brantingham (n 22) and Cyrus Tata and Neil Hutton, 'What 'Rules' in Sentencing? Consistency and Disparity in the Absence of 'Rules' 1998 (26) International Journal of the Sociology of Law 339, 339.

consistency and disparity are two sides of the same coin[34] representing a concept concerned with fairness and justice in the imposition of sentences following a criminal conviction.

'Disparity' is a term which appears in the literature to be broadly used in one of two ways: first, to describe a sentencing decision which is unjustifiably different to cases which are like it or unjustly similar to cases which are different to it; and second, to describe a sentencing decision which is different or similar to other sentencing decisions, with no value judgement as to the propriety of that difference or similarity. The term 'inconsistency' appears to be commonly used in the literature to describe the former, requiring an analysis of the sentencing decision at hand, not simply a bare comparison between the outcomes.

Accounts of disparity that require a bare comparison between sentencing decisions are in the minority, notwithstanding the fact that such an interpretation would be more in line with the dictionary definition of the term. Spohn states that "*[d]isparity is a difference in treatment or outcome that does not necessarily result from intentional bias or prejudice*" and "*[s]entencing disparities reflect differences in the sentences imposed on similarly situated offenders by judges in different jurisdictions, by judges in the same jurisdiction, or by individual judges.*"[35] Such accounts can be dismissed as incomplete. In absence of a secondary stage analysing the difference (or similarity) identified, such accounts are of no utility as a

[34] However, it is correct to note that in numerous discussions where the terms are used together, it is not always clear whether that is to differentiate them or for the avoidance of doubt as to what is being discussed. For example, in discussing the discretionary decision making process, Tata appears to use the two terms as synonyms, see Cyrus Tata, 'Sentencing as Craftwork and the Binary Epistemologies of the Discretionary Decision Process' (2007) 16(2) Social and Legal Studies 425-447, 438, whereas Spigelman CJ uses the terms in conjunction with one another, thereby implying they are different concepts, see James J Spigelman, 'Consistency and sentencing' (2008) 82 Australian Law Journal 450.

[35] Cassia Spohn, *How Do Judges Decide? The Search for Fairness and Justice in Punishment* (Sage 2009), 129, 166. It is worth noting that Spohn's definition appears to be rather narrow, focusing upon treating like cases alike but not on treating different cases differently.

critical tool; the application of the definition of disparity would not yield any information as to the propriety of the sentencing decision under scrutiny. The term disparity is therefore often accompanied by a qualification such as 'unwarranted' or 'unjustified'. This however serves only to bring the definition into line with the dominant account of the concept and accordingly it can be dismissed. It can therefore be concluded that disparity (and consistency) must import a value judgement as to the propriety of the decision under scrutiny if it is to have any utility as a critical tool.

Other accounts are in broad agreement as to the meaning of the concept and merely differ on the label given to the concept: disparity versus inconsistency. The majority view is perhaps best characterised by Ashworth's account, and requires both a simple comparison between the result of the sentencing decision and an assessment of the underlying reasoning. Ashworth suggests that disparity "*…is a word which calls attention to a form of injustice, to decisions which have resulted in an unfair distribution of burdens and benefits*",[36] therefore linking disparity with unfairness, although the concept of fairness is not explored in this context. Developing the idea, Ashworth calls upon the 'principle' which "*…seems to express the core of parity against which various practices and decisions are measured…the widely held precept of formal justice: treat like cases alike.*"[37] This was echoed in his later writing on the topic, where he stated that "*[d]isparity in sentencing occurs when similar cases are dealt with differently, and where different cases are treated without reference to those differences.*"[38] This therefore calls attention to the imposition of the appropriate sentence in a particular case; cases which do not conform to this ideal risk being treated differently to similar cases or

[36] Ashworth (n 23), 24. This focus upon injustice is repeated in later work, e.g. Ashworth (n 24), 253.

[37] Ashworth (n 23), 24.

[38] Ashworth (n 24), 253.

similarly to different cases. One interpretation of this account is that the sentencing decision in question is compared with an actual case or cases said to be 'like' it in order to establish whether or not disparity exists. The precise methodology remains somewhat unclear. This will be addressed later in the chapter where a precise methodology will be proposed.

Having eliminated the definition requiring only a bare comparison between sentencing outcome, henceforth, parity and disparity will be used synonymously with consistency and inconsistency. Consistency will be taken to express the concept that like cases are treated alike and different cases are treated differently, where for that purpose, a difference (or similarity) is identified and then analysed to establish whether or not it is justified; an unjustified difference (or similarity) will be inconsistent.

Permissible range of sentences and the pursuit of principled sentencing

Having established that consistency involves a comparative exercise, it is necessary to establish the subject of the comparison. This is my point of departure with many established accounts of consistency. Whereas those accounts involve a comparison with other cases, the account of consistency advocated in this thesis relies upon a consideration of the appropriate sentence by reference to established sentencing principle(s). The question is therefore not whether a particular decision is sufficiently 'like' others which are deemed to be sufficiently 'like' it, but whether a particular decision can be considered to be an appropriate application of the principle(s), thereby producing an appropriate sentence.

It is therefore necessary to establish what would be 'appropriate' for a particular offence in accordance with the relevant principle(s). As discussed in Chapter 1, in England and Wales,

this is determined by a principally retributive scheme; proportionality determines an acceptable range of sentences within which other, consequentialist, considerations determine the sentence.

In desert theory, it is generally accepted that there is no single *correct* sentence for any given criminal offence. By the application of established sentencing principles, it is possible to establish a range of "*not wrong*" sentences. This echoes Morris' "*not undeserved*" range of sentences in which he conceived of the concept of desert as a limiting rather than a defining principle. He argued that retributivism set the upper (and sometimes lower) limits for punishment and within that range of "*not undeserved*" sentences, consequentialist considerations could legitimately determine the sentence to be visited upon the offender.[39] Where a sentence falls within this range, the sentence can be said to be consistent (with sentencing principles) and therefore appropriate. This is notwithstanding the fact that sentences could be disparate within that range.[40]

This concept will be explored more fully in Chapter 4 where the role that consistency has to play in sentencing systems placing emphasis on individualisation is examined. For the purposes of this chapter however, it suffices to describe the concept of a range of 'permissible sentences' within which a sentencing decision can be said to be consistent.

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39 For a discussion see Richard S Frase, 'Limiting Retributivism' in von Hirsch et al (n 24), 135.

40 Frase (n 39), 137.

Treating like cases alike

The interpretation of the term 'treating' represents one of the major divergences of opinion as to the role and extent of consistency in sentencing. It is an issue which is at the heart of consistency.

Perhaps the most obvious interpretation is that the treatment referred to is the sentencing outcome, i.e. the nature and/or length of the sentence imposed. For example, where two cases receive sentences of one and 10 years respectively, the sentences are different and therefore the cases have not been treated alike. This appears to be the way in which the basic concept is interpreted by the majority,[41] constructing a concept concerned with the variability that remains having accounted for legally relevant factors.[42] As will be seen however, a version of consistency only concerned with sentencing outcome is theoretically flawed.

An alternative interpretation is that "*treating like cases alike*" refers to the way in which the sentencing decision is arrived at. This concerns the procedural mechanisms applied in order to determine the sentence. Where two cases of common assault are sentenced, one by reference to a guideline applicable to assault offences, and the other by reference only to the sentencer's intuition, the two cases have been decided by different procedures and therefore have not been treated alike.[43] This interpretation has limitations however as it naturally lends itself to a definition of consistency restricted to consistency of approach.

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[41] See for example Lisa Stolzenberg and Stewart J D'Alessio, 'Sentencing and unwarranted disparity: An empirical assessment of the long-term impact sentencing guidelines in Minnesota' (1994) 32(2) Criminology 301; Tonry (n 23); Frase (n 39) and Richard S Frase, 'Theories of Proportionality and Desert' in Joan Petersilia and Kevin R Reitz (eds), *The Oxford Handbook of Sentencing and Corrections* (OUP 2012).

[42] Stolzenberg and D'Alessio (n 41), 301.

[43] See for example Leveson (n 26).

A third interpretation is that the treatment referred to is the impact of the outcome of the sentence on the individual defendant. This is sometimes referred to as 'equity'. It requires a comparison between sentence outcomes, as in the first interpretation, but also an assessment of the severity of the sentence in relation to the individual. This proceeds on the basis that it is incorrect to assume that each unit of punishment (e.g. one month's imprisonment or each £10 of a fine) has an objectively quantified punitive impact.[44] For example, it is generally accepted that imprisonment impacts more greatly on a person in their old age, than a person in their youth, or on a person of ill health as compared to a person of good health, and as such an adjustment in the sentence imposed may follow. Many regard equity to be a separate consideration, falling outside of the definition of consistency;[45] by contrast, others would consider that a comparison of sentencing outcomes for the purpose of a determination of consistency must account for individual differences pertaining to the offender which affect the impact of a sentence on the individual (e.g. *Lowe v The Queen*[46]). Easton describes such an approach as "*sailing in dangerous waters*" and questions whether it can be properly defended on retributive grounds.[47] Similarly, Piper considers "*that there is no clearly-articulated penal justification for allowing [impact] mitigation to have effect*".[48] Ashworth and Player justify such an approach on grounds of fairness, but recognize practical difficulties in doing so within

[44] Andrew Ashworth and Elaine Player, 'Sentencing, Equal Treatment and the Impact of Sanctions' in Andrew Ashworth and Martin Wasik (eds), *Fundamentals of Sentencing Theory* (OUP 1998), 255.

[45] See for example John W. Raine and Eileen Dunstan, 'How Well do Sentencing Guidelines Work?: Equity, Proportionality and Consistency in the Determination of Fine Levels in the Magistrates' Courts of England and Wales' (2009) 48(1) The Howard Journal 13.

[46] (1984) 154 CLR 606.

[47] Susan Easton, 'Dangerous waters: taking account of impact in sentencing' [2008] Crim LR 105.

[48] Christine Piper, 'Should impact constitute mitigation?: Structured discretion versus mercy' [2007] Crim LR 141.

a proportionality based sentencing system.[49] Interpreting 'treatment' in this way is more comfortable within a system which places emphasis upon individualised sentencing. As briefly mentioned at the outset of this chapter, this thesis will argue that individualised justice and consistency are not (necessarily) at odds. However, permitting a reduction in sentence to account for the relative impact of a sentence on a particular offender arguably undermines the principle in whose name it is justified. By requiring such a reduction, although one might argue that such a sentence is in fact consistent (by reference to the relative punitive 'bite') the message communicated to the victim and society[50] is likely one of inconsistency.

Proponents of equity would regard equality of treatment as an overly simplistic approach guaranteed to ensure inconsistency on the basis that equality of treatment fails to account for inherent differences capable of affecting the relative severity of the sentence. For example, a flat £1,000 fine for speeding would constitute equal treatment but not equitable treatment as it would impact upon a rich person less than a poor person. This unfairness is derived by the reference to a narrow class of factors (e.g. offence only) as opposed to a wider class, producing a more nuanced, individualised, outcome. The criticism that equality over equity ensures inconsistency (and is therefore unfair) is therefore well founded.

As will be seen, I suggest that the appropriate interpretation of 'treatment' is a combination of the first and second, namely that treatment refers to both outcome and approach. So what of equity? I argue that consistency is concerned with principled sentencing,

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[49] Ashworth and Player (n 44).

[50] Ashworth and Player would justify excluding the offender from this point on the basis that sentencing theories of censure and communication assume that offenders with sufficient autonomy to understand why a punishment has been imposed upon them and respond accordingly are similarly capable of understanding why a co-defendant with a similar criminal history receives a discounted sentence on the basis that he suffers from a life-threatening illness. See Ashworth and Player (n 44), 271.

and therefore considerations of equity would be encompassed within the determination of sentence, not the consideration of consistency of sentencing. Depending on the view one takes as to the way in which sentences should be determined, equity could be considered to be encompassed within a definition of proportionality, or as a separate consideration. For example, where offence seriousness is regarded as encompassing a consideration of both offence and offender, equity could be considered to fall within the definition of proportionality. Alternatively, where offence seriousness is viewed as restricted to the offence itself, matters of personal mitigation would be considered separate to the application of the principle of proportionality. My position is therefore that there is a role for impact to play, but that it does not weigh-in on considerations of consistency.

The nature of consistency in sentencing

A consistent approach or a consistent outcome?

A closely related issue about which there is disagreement is whether or not consistency should be seeking to achieve a consistent approach to sentencing, or consistent sentencing outcomes. As established, consistency requires that similar cases are treated similarly (and different cases are treated differently). Consistency of approach interprets ‘treatment’ to refer to the mechanism by which a sentencing outcome is arrived at, whereas consistency of outcome interprets ‘treatment’ to refer to the substantive effect of the sentencing decision. These two versions of consistency are sometimes posited as being in conflict, however I suggest that such a view is not sustainable.

That consistency of approach is a pre-requisite for a sentencing system placing some value – even on theoretical grounds alone – in consistent sentencing practice would appear to

be uncontroversial. Ashworth described the current situation in England and Wales in relation to the purposes of sentencing, where no single purpose is given primacy, as "*the worst of pick-and-mix sentencing*". He commented that the fact that individual sentencers are permitted (or even required) to follow their own penal philosophies seemed to invite inconsistency.[51] Quoting a study by Hogarth, Ashworth noted that it was "*fairly well established*" that different penal philosophies of judges was a major cause of disparity.[52] As will be seen, consistency of approach not only impacts upon sentencing procedure, but also sentencing outcomes.

Consistency of approach in England and Wales takes numerous different forms. For example, parliament has required courts to impose sentences that are proportionate to offence seriousness,[53] parsimonious[54] and by reference to prescribed aims of sentencing[55]. Other procedural mechanisms, such as guidelines or guidance issued by appellate courts, take different forms with different levels of prescription. These would likely operate in a less prescriptive manner: compare for example the statutory requirement to determine sentence by reference to offence seriousness[56] and the approach taken by sentencing guidelines issued by the SC.[57] In England and Wales these mechanisms co-exist and largely work in harmony.[58] The

[51] Ashworth (n 3), 82.

[52] Ashworth (n 3), 81.

[53] Criminal Justice Act 2003 s.152.

[54] Criminal Justice Act 2003 s.153.

[55] Criminal Justice Act 2003 s.142.

[56] Criminal Justice Act 2003 s.153 requires a sentence to be commensurate with the seriousness of the offence. Criminal Justice Act 2003 s.143 states that offence seriousness is assessed by reference to the offender's culpability and harm caused, intended or which might have been foreseen.

[57] The sentencing guidelines issued by the Sentencing Council at Step One require a court to consider an exhaustive list of factors in order to determine the harm and culpability present in the offence for the purposes of arriving at a starting point.

[58] For example, the Court of Appeal (Criminal Division) have interpreted guidelines (e.g. *R. v Henning* [2015] EWCA Crim 879; [2015] 2 Cr.App.R. (S.) 37) and statutory provisions (e.g. *Attorney General's Reference (No.27 of 2013) (R. v Burinskas)* [2014] EWCA Crim 334; [2014] 2 Cr.App.R. (S.) 45, and

combined effect of these mechanisms is considered in detail in Chapter 9. At this juncture, it suffices to note that consistency of approach is frequently multi-layered, with principles of sentencing operating alongside purer mechanisms of ensuring consistency such as sentencing guidelines.

Some consider that consistency refers only to consistency of approach. The SC has a statutory duty to have regard to the need to promote consistency in sentencing yet the statute provides no definition for that purpose.[59] Accordingly it falls to the Council to define it and at its first meeting in April 2010, the Council members agreed a statement of purpose, which included the following statement:

> *"The Sentencing Council for England and Wales will […] promote a clear, fair and consistent approach to sentencing […]"*[60]

Sir Brian Leveson, a Lord Justice of Appeal and then Chairman of the SC, said in a speech regarding the function and operation of the Council:

> *"I frequently put it that the guidelines define a common approach to sentencing, leaving the eventual outcome to the discretion of the judge based on the facts and circumstances of the case before him/her."*[61]

A stark example of this in practice would be in applying an SC guideline, it would be permissible for two judges to place the same offence/offender scenario into two different

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guidelines have interpreted and amplified statutory provisions, such as the assessment of offence seriousness (e.g. Sentencing Council, Assault Offences Definitive Guideline (Sentencing Council of England and Wales 2011).

[59] Coroners and Justice Act 2009 s.120(11)(b).

[60] Sentencing Council of England and Wales, *Minutes of Meeting: April 2010* (Sentencing Council of England and Wales 2016), 7.

[61] Leveson (n 26) 5.

categories (producing different starting points and likely different eventual sentences) while remaining faithful to the notion of consistency subscribed to by the Council. Such flexibility risks (or perhaps invites) inconsistency as the application of the procedural device is left to the individual sentencer, with inevitably different results produced.[62] In such a circumstance, the procedural mechanism is unable to assist the sentencer in any substantive way in arriving at the appropriate conclusion. Of course, a more rigid mechanism of ensuring consistency of approach would reduce the flexibility and therefore limit the risk of such inconsistency. However, such a measure would fetter judicial discretion which would be a retrograde step for a sentencing system employing a wide definition of the principle of proportionality encompassing many non-retributive factors.[63] The wider the definition of proportionality the greater the discretion afforded to sentencers must be if they are to be able to "*do justice in an individual case*".[64] Accordingly, any reduction in discretion would impinge upon the principle of individualisation.[65]

Proponents of a version of consistency limited to consistency of approach rely upon the need to do justice in a particular case[66] and trumpet the flexibility inherent in such an account

[62] See John Hogarth, *Sentencing as a Human Process* (University of Toronto Press 1971), 91 as to the differences in penal philosophies, effectiveness of different kinds of sentence and the importance of each of the purposes of sentencing among judges, evidenced by his study of Canadian magistrates. The variation evident in his study when viewed in an English and Welsh context of a range of purposes of sentences, none of which have been given priority by Parliament and an absence of data from the Sentencing Council as to the relative effectiveness of different types of sentence despite the mandate to do so results in the inevitable conclusion that such variation in sentencing decisions in England and Wales is a product of a system affording sentencers with a wide discretion. von Hirsch, referencing Marvin Frankel, described how "*wide-open discretion*" permits disparity, see Andrew von Hirsch, *Doing Justice* (Hill and Wang 1976), 29.

[63] Julian V Roberts and Lyndon Harris, 'Reconceptualising the Custody Threshold in England and Wales' (2017) 28(3) Criminal Law Forum, 477.

[64] See for example *R. v Taylor* [2012] EWCA Crim 630; [2012] 2 Cr.App.R. (S.) 98 at [13].

[65] This will be explored in further detail in Chapter 3.

[66] This is a function that the Lord Chief Justice and the Court of Appeal (Criminal Division) has repeatedly placed emphasis on: see Criminal Practice Directions [2015] EWCA Crim 1567 para.M.3;

of consistent sentencing. Consistency of approach, it is said, still delivers the benefits associated with consistency such as greater legitimacy through increased public understanding and confidence in the system, as well as the rule of law values of clarity and certainty, without unduly constraining judicial discretion.[67]

A related criticism is that consistency of approach places itself at the mercy of the substantive law to which it applies. As a procedural device it is an empty vehicle, requiring compliance with any mechanism, principled or otherwise, in order to achieve the desired goal of treating offenders in the same way by a common process of determining sentence. As such, its utility in producing appropriate sentences, or more principled sentencing, hinges almost entirely upon the substantive law to which it applies. For example, a procedure requiring the determination of sentence to be based on an assessment of the harm caused, to the exclusion of an assessment of culpability, would serve the aim of consistency of approach but would result in disproportionate sentences in, for example, cases of mercy killing. An extreme example would be a procedure that applied to offenders who had brown hair, and another procedure for offenders without brown hair. While the aim of consistency would be in one respect achieved, the procedural device delivers sentencing decisions which are unjust and made in reference to legally irrelevant factors.

I suggest that consistency of approach inevitably has an impact upon sentencing outcomes, achieving greater consistency of outcome. For example, where all persons are sentenced on the basis of the principle of proportionality, *a priori*, there will be greater

R. v Blackshaw [2011] EWCA Crim 2312; [2012] 1 Cr.App.R. (S.) 114 at [14] and *R. v Erskine* [2009] EWCA Crim 1425; [2009] 2 Cr. App. R. 29 at [3] as examples.

67 Sarah Krasnostein, 'Pursuing Consistency: The effect of different reforms on unjustified disparity in individualised sentencing frameworks' (PhD thesis, Monash University 2015), 77.

consistency of outcome than if there was no common approach to sentencing: a common approach narrows the scope for unwanted or unjustified variability in, for example, the assessment of offence seriousness, with the inevitable result that sentencing outcomes in similar cases are more closely aligned. But of course, this is relies upon the principle(s) being adequately defined.

Turning to consider consistency of outcome, there is more than one way in which it can be achieved, providing a range of results dependent upon the extent to which the system wishes to be prescriptive. Perhaps the most commonly recognised mechanism for achieving consistency of outcome – at least in England and Wales – is a statutory requirement to impose a particular sentence (type or length) on a particular class of offender.[68] Other methods of achieving a consistent outcome may include guidance from appellate courts, for example indicating the appropriate range for a certain type of offence,[69] or from sentencing guidelines[70].

Some consider that consistency of outcome is concerned with uniformity of outcome.[71] This has the potential to mislead however; consistency of outcome operates on a scale, from uniformity (i.e. identical sentencing outcomes) to broad similarity (i.e. differences between sentences are within an acceptable margin). A sentencing guideline may afford the sentencer sufficient discretion to reflect the individual features of a case, thereby seeking to achieve greater consistency of outcome but without pursuing uniformity of outcome. Conversely, a

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[68] England and Wales have various minimum sentences which must be imposed where the conditions are met, subject to an 'escape clause' to avoid grossly disproportionate sentences.

[69] For an example see *R. v Turner* (1975) 61 Cr. App. R. 67, CA (Crim Div).

[70] The most obvious example is perhaps the Minnesota Grid, which based on a two-dimensional matrix assess offence severity and criminal history score to arrive at a presumptive sentence.

[71] Krasnostein, citing the Australian Law Reform Commission (n 67), 79.

statutory requirement to impose a particular sentence upon the conviction of a particular offence may achieve uniformity of outcome at the expense of individualisation.

A strong criticism of mechanisms for ensuring consistency of outcome is that they risk treating different cases as though they are similar.[72] Consider the following situation. A minimum sentence of three years exists for burglary in a sentencing system based on the principle of proportionality. The first offender's offence is 'worth' two years by reference to the principle of proportionality whereas the second offender's is worth three years. The minimum sentence requires a disproportionate sentence to be imposed in the first case but (by chance) the appropriate sentence in the second case. As a tool for ensuring consistency of outcome, it succeeds, as both offences of burglary receive sentences of three years. That result is however that a disproportionate sentence is imposed in one case, and therefore the minimum sentence requires different cases to be treated as though they are alike. This is often the result of minimum sentencing regimes which operate by reference to a small number of relevant factors such as offence type, or a combination of offence type and number of previous convictions.[73] The preference given to these few 'headline' factors runs contrary to the (generally) accepted notion that legally relevant factors to sentence extend beyond simply offence type and criminal history.[74]

This criticism however depends entirely on the mechanism used to achieve consistency of outcome. For example, a system where an appellate court provides judgments with guidance

[72] Tonry (n 23), 20.

[73] For examples see the Powers of Criminal Courts (Sentencing) Act 2000 ss.110 and 111; Murder (Abolition of Death Penalty) Act 1965 s.1; and Firearms Act 1968 s.51A.

[74] Tonry (n 23), 20.

on the appropriate sentencing ranges for a type of offence, broken down by category with case examples, may allow sufficient discretion to enable the sentencer to ‘do justice in an individual case’[75] and appropriately reflect the individualities of an offence. Incidentally, a criticism of such an approach is that the extent to which outcomes are consistent is reduced by the wide (or at least wider) discretion afforded to the sentencer. Accordingly, consistency of outcome is best viewed as a sliding scale, from absolute uniformity of sentence to broadly similar sentences. It is capable of dealing quite adequately with the criticism that consistency of approach requires different cases to be treated similarly, however the extent to which that is the case depends entirely upon the mechanism employed.

Is consistency a procedural or substantive concept?

With the foregoing in mind, is consistency to be viewed as a substantive concept or merely a procedural device? Are they mutually exclusive? The competing views are thus: on the one hand, consistency is a procedural mechanism requiring that sentences are determined in the same manner. Consistency therefore merely operates as the vehicle by which one arrives at their destination. On this view, consistency is not concerned with substance, only that all persons in a relevant category are treated consistently. For example, consider that the mechanism for ensuring consistency is the application of the proportionality principle. In two identical cases sentenced by two different judges, where both apply the principle of proportionality, a difference in sentence, e.g. three years for the first offender and four years for the second, will not be regarded as inconsistent. The result is immaterial as consistency as a procedural mechanism (in this case, the principle of proportionality) is concerned only with formal equality; where the sentencing decision is taken in accordance with the pre-determined

[75] See for example *R. v Taylor* [2012] EWCA Crim 630; [2012] 2 Cr.App.R. (S.) 98 at [13].

mechanism, there is consistency in sentencing. Accordingly, consistency as a procedural mechanism is concerned with consistency of approach. That said, consistency of outcome will be (to some extent) a by-product, as argued in the previous section. Consistency as a procedural mechanism merely applies the substantive sentencing law, whether that be the duty to apply the principle of proportionality contained in primary legislation, sentencing guidelines, or the statutory provision requiring a mandatory sentence.

The alternate view is that consistency is a substantive concept – an end in itself. This relies upon the existence of an individual's 'right' to have a similar sentence imposed upon them to that imposed in similar cases. Yet this must exist without recourse to sentencing principles such as equity or proportionality, otherwise, the concept is a procedural device ensuring the application of such principle. It is difficult to conceive of many situations in which a complaint of inconsistency could exist without the complaint being that there was a procedural deficiency (e.g. a guideline was not applied or wrongly applied). Accordingly, the existence of consistency as a substantive concept is limited, occurring only where there is no procedural impropriety but where there is a legitimate claim to have a particular sentence imposed. Such would arise only in a multiple defendant scenario in which, *ceteris paribus*, two defendants receive different sentences in circumstances where each sentence is within the permissible range for that offence having been imposed in accordance with the requisite procedure. As it is not possible to justify the difference in sentences by reference to legally relevant factors, there exists an inconsistency thereby giving rise to a 'right' to an adjustment on grounds of fairness and justice.[76]

[76] This could of course conceivably operate where there was a sense of grievance at the unjustified similarity of treatment where, for example, a defendant had a worse criminal history.

I therefore suggest that consistency is predominantly a procedural mechanism for ensuring that sentences are imposed in accordance with the principles underpinning the regime. This necessarily imports a degree of substance to the concept; without consideration of the underlying principles, the concept would merely be an empty device which was blind to substance and could facilitate unprincipled sentences. There is also scope for consistency as a substantive concept to co-exist in limited circumstances where a sentence has been imposed in accordance with the appropriate procedure, yet there is still a complaint of inconsistency on grounds of unfairness.[77]

In summary, therefore, it has been argued that consistency as a procedural device concerns both consistency of approach (in requiring adherence to a common procedure) and consistency of outcome (in that a more consistent procedure will result in more consistent outcomes). Consistency as a substantive concept however operates solely in relation to consistency of outcome as it concerns a right to a particular outcome arising out of a completely separate consideration to whether or not the sentence was imposed in accordance with a common process.

A credible account of consistency

I have argued that consistency is best viewed as an amalgam of the various accounts of consistency currently theorised; it consists of both a procedural element and a substantive element, with a focus upon consistency of approach but incorporating a degree of consistency of outcome. I have also suggested that consistency represents the concept of treating like cases alike and different cases differently, where 'treating' refers both to the process by which the

[77] There is some support for this view, see e.g. Etienne (n 27).

sentencing decision is taken, and the outcome of that decision. It falls then to construct a credible, theoretically sound definition of consistency based on the foregoing discussion.

This version of consistency produces two routes to establishing whether or not a particular sentence can be said to be consistent:[78] a) the procedural route; and b) the substantive route. In both cases, there must be an improper sentencing outcome; a procedural impropriety absent an improper sentencing outcome will establish an inconsistency but will be insufficient to warrant an alteration to the sentence.[79] An improper sentencing outcome is one which falls outside of the permissible range of sentences for the offence in question.

The procedural route will arise most commonly. Consider a scenario where defendant X receives a sentence of four years for a robbery. In circumstances where it can be established (by reference to sentencing principles, sentencing guidelines or comparable cases) that four years is outside of the permissible range, the complaint will be that due to a procedural impropriety (e.g. non or improper application of a guideline or sentencing principle), the resultant sentence is improper on the basis that it is not capable of justification by reference to legally relevant factors; in essence, the sentencer has miscalculated the sentence. The deficiency in procedure has resulted in an improper sentencing outcome. There is of course a substantive element here: the procedure requires the proper application of the substantive principle and in that way, the concept is a hybrid of the two. It is not possible to divorce the

[78] Based on the foregoing discussion, 'consistent' means consistent with sentencing principles and having been imposed by an application of appropriate procedure.

[79] Certainly in current practice, the CACD are concerned with the sentencing outcome, and less concerned with procedural impropriety. However, it is acknowledged that a procedural deficiency, e.g. a failure to apply a guideline, will create a technical inconsistency of approach, even though no inconsistency of outcome exists just by virtue of the failure to apply the guideline. In such a scenario, there is no requirement to make an adjustment to the sentence as despite the procedural impropriety, the resultant sentence can still be said to be 'appropriate' as it falls within the permissible range of sentences.

procedural element from the substantive principle, as the former is the method by which the latter is realised. Notwithstanding this, I describe this as the 'procedural route'.

The substantive route will arise far less frequently. The complaint that the result is improper arises only in a multiple defendant scenario and exists where there is nothing objectionable about the sentence in isolation, i.e. there is no procedural impropriety and the sentence is within the permissible range. Consider the scenario where defendant X receives a sentence of four years for a robbery, and his co-defendant, Y, receives a sentence of three years in circumstances where all legally relevant factors are identical. Where both X and Y's sentences are within the permissible range, the claim is therefore not that X has a 'right' to a three-year sentence because it is the same as Y, but that three years is also an appropriate sentence for X's offence and there is no justification for the difference in treatment (i.e. three years for Y and four years for X). A reduction is justified because of a legitimate sense of grievance based on substantive unfairness.

Where however, X's sentence is within the permissible range but Y's sentence is outside of the permissible range, this would (first) be objectionable under the procedural route described above in relation to Y's sentence. But to reduce X's sentence simply because Y received a lesser sentence would be to require the substitution of a correct sentence (four years) with an incorrect sentence (three years); as a matter of principle, that cannot be. Yet, there is injustice between X and Y. Under the substantive and procedural route, there can be no legitimate sense of grievance held by X. The difference in treatment is capable of explanation on the basis that X's sentence is appropriate and there is no legitimate sense of grievance

created by an incorrect application of the principle(s) in Y's case. This notion is supported by case law from the Court of Appeal.[80]

While this focus upon outcome under the substantive route at first blush appears to be contrary to the emphasis this chapter has placed on approach, it is in fact entirely explicable. In constructing an account of consistency that is principally procedural with a subsidiary substantive element, the focus is predominantly upon achieving consistent sentencing outcomes through a consistent approach by the proper application of sentencing principle(s). However, whereas a procedural impropriety will result in a technical inconsistency (i.e. the sentence has not been determined in accordance with established sentencing principles or procedure), absent an improper result, the practical effect is nil. The presence of an improper sentencing outcome demonstrates an impropriety which (in practice) needs to be addressed. Therefore, the focus upon an "improper result" is the best indicator that there has been an inconsistency resulting in an unfairness.[81]

On this account of consistency, the concept is predominantly a procedural mechanism, operating as a vehicle to deliver the ultimate aim: principled sentencing. Developed sentencing systems subscribe to one or more principles. In England and Wales, the principle of proportionality governs the general approach to sentencing; sentencing guidelines narrow the variability in the application of that principle, as does guidance from the appellate courts and consideration of comparable cases. Adherence to the procedure should produce an appropriate result; if it does not, the procedure has not been correctly followed. Additionally, in a multiple

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[80] See e.g. *R. v Butcher* (1989) 11 Cr.App.R. (S.) 104, CA (Crim Div), *R. v Rugg* [1997] 2 Cr.App.R. (S.) 350, CA (Crim Div), and *R. v Bailey* [2011] EWCA Crim 1585.

[81] This works for both 'routes' as described above but is most likely to occur in relation to the 'procedural route'.

defendant case, consistency has a further role to play in isolation as a substantive concept where there exists a legitimate grievance in the difference in sentencing outcomes imposed. As such, consistency – save for the rare multiple defendant scenario described in the previous paragraph – is properly conceived of as being concerned with the pursuit of principled sentencing as opposed to the predominant focus being on a consistent outcome.

This places consistency on a more solid theoretical footing but raises the question as to whether or not the pursuit of consistency is a red herring. Should we seek to impose consistent sentences, or should we seek to impose principled sentences? I suggest that if every case is sentenced in accordance with established principle, adhering to any required procedure, there would be absolute consistency as there would be no sentence imposed which falls outside of the permissible range of sentences for a given offence. Taking the robbery case used above as an example, defendant X ought to receive four years' custody not because other offences committed by similarly situated offenders received four years, but because four years is an appropriate sentence in that individual case; to sentence otherwise would be unprincipled.

Accordingly, consistency is therefore to sentence in accordance with established sentencing principles and in adherence to established sentencing procedure. It should not be actively pursued but should rather be the by-product of the correct application of sentencing principles. A sentence that is inconsistent with other sentences imposed upon similarly situated offenders for similar offences is objectionable not because it is out of line with comparable cases but may be objectionable because something has gone awry in the determination of sentence and the resultant sentence is unprincipled. This indicates that a sentence might be inconsistent, but it cannot be relied upon. In the multiple defendant scenario described above,

an adjustment in sentence is required on grounds of fairness and to avoid an arbitrary difference in sentences.

Conclusion

A revised definition

At the beginning of this chapter, I began with a working definition of consistency: like cases should be treated alike and different cases should be treated differently. I established that consistency and disparity refer to the same concept, discounting definitions which did not require an analysis of the sentencing decision (operating on a bare comparison between sentencing outcomes). I then argued that 'treatment' predominantly refers to the manner in which the sentencing decision is made, encompassing an element of substantive consistency limited to the underlying principles of the sentencing scheme. Additionally, I suggested that in a multiple defendant scenario, 'treatment' also refers to the sentencing outcome as an aim in isolation. This was on the basis that consistency ought to be primarily concerned with the application of sentencing principle or procedure (i.e. consistency as a procedural mechanism) which results in more consistent outcomes, and only when a multiple defendant scenario arises, should it actively concern itself with consistency of outcome (i.e. consistency as a substantive concept). It is now possible to revise the definition discussed at the outset of the chapter.

I suggest the following as a revised definition:

Achieving consistency in sentencing requires sentences to be determined only by the application of established principles, only having regard to legally relevant factors, in a manner which follows an established fair procedure.

In a principally retributive framework, this entails the production of a range of sentences proportionate to the seriousness of the offence.[82] *A particular sentence within the range can then be chosen with reference to other established principles, secondary to proportionality, and imposed following an established fair procedure.*

In a multiple defendant scenario in which the sentences are within the permissible range, any residual variation in sentence not capable of justification by reference to legally relevant factors will constitute an inconsistency.

Applying that definition involves a court taking following steps:

1. Identify the procedural mechanism(s)[83] used to ensure consistency of approach and consistency of outcome;

2. Determine whether or not there has been a deficiency in the application of the mechanism or mechanisms;

    Determine whether or not the outcome falls outside of the permissible range of sentences;

    If it does not, and there is no co-defendant, the outcome is justified and the sentence is not inconsistent;

    If it does, go to step 3;

3. Determine the correct sentencing outcome by virtue of the appropriate application of the mechanism(s) in question; the resultant sentence is a consistent sentence in line with like cases;

[82] It is important to recall that the seriousness of the offence encompasses the harm caused or risked and the culpability of the offender.

[83] I use the term 'procedural mechanism' in the broad sense, i.e. to encapsulate sentencing principles, guidelines and statutory provisions.

If there is a co-defendant go to step 4;

If there is no co-defendant, there are no further steps.

4. Where there is a difference or similarity between the sentences imposed on co-defendants where the defendant's and the co-defendant's sentences are within the permissible range, assess whether or not that difference or similarity is justified by reference to legally relevant factors;

   If the difference or similarity is justified, the defendant’s sentence is not inconsistent;

   If the difference or similarity is not justified, the defendant’s sentence is unjustified and therefore inconsistent; the judge should then adjust the defendant’s sentence accordingly.

This chapter has attempted to clarify the concept of consistency, reconciling differences among the competing accounts and deriving from the discussion a step-by-step process. It has been argued that this presents a more theoretically sound account of consistency in which the emphasis is placed upon principled sentencing as opposed to consistent sentencing for the sake of being consistent. The revised definition comprises a predominantly procedural approach but recognises the need for recourse to consistency as a substantive concept to (a) ensure outcomes are principled and (b) to alleviate any residual variation which is unjustifiable. This represents an amalgam of procedural and substantive law, incorporating both consistency of approach and consistency of outcome to enable the concept of consistency in sentencing to act as a critical tool in assessing whether or not a particular sentence is justified. This conception of

consistency will be utilised as a critical tool later in this thesis to assess the extent to which the sentencing scheme in England and Wales achieves consistency.

Chapter 3: Dangers of discretion: Empirical evidence of inconsistency

Discretion allows decision makers more easily to consult illegitimate considerations and does nothing to stop them making mistakes…[84]

Introduction

The account proffered in Chapter 2, with its focus upon principles, will produce a normatively sound and conceptually clear approach to the assessment of consistency in sentencing. However, the realities of sentencing practice cannot be overlooked. For instance, while retributive proportionality is neutral to factors such as age, social class, race, gender and religion, empirical evidence demonstrating that in practice, the principle is undermined by an inconsistent application according to legally irrelevant factors must be confronted. It would be easy (but remiss) to simply say that this is a theoretical consideration and that as the principles are neutral to factors such as race and gender, it is unnecessary to consider the extent to which legally irrelevant factors impact the application of the principles, simply because they *ought* not to.

This thesis undertakes an assessment of the extent to which current measures for promoting consistency achieve their stated aim; such an assessment that was wilfully blind to the realities of practice – notwithstanding the theory – would be incomplete and of limited utility. Accordingly, this chapter considers the empirical evidence of inconsistency in sentencing both in relation to the inability of sentencers to accurately apply the relevant principles in determining sentence, but also in relation to the effect of legally irrelevant factors

[84] Carl E Schneider, 'Discretion and Rules' in Keith Hawkins (ed) *The Uses of Discretion*, (OUP 1992), 68.

which may or may not affect the determination of sentence. This will inform the later discussion as to the relative effectiveness of the measures employed in England and Wales.

In 1977, Frankel considered the "*lawlessness*" present in sentencing, noting a lack of guidance as to factors which should be weighed in moving the sentence towards one or other end of the range permitted by legislation gave sentencers extremely wide discretion but risked inconsistency.[85] He stated:

> *"It might be supposed by some stranger arrived in our midst that the criteria for measuring a particular sentence would be discoverable outside the narrow limits of the statutes and would be known to the judicial experts rendering the judgments. But the supposition would lack substantial foundation."* [86]

Is this borne out by the empirical literature? Have matters improved since Frankel's work? This chapter endeavours to answer those questions.

Discretion at sentencing can polarise opinion. One view is that discretion is vital to the fair disposal of a criminal case, allowing the judge to do justice to the individualities of the offence and the offender before the court; the other is that discretion is equivalent to lawlessness and chaos[87] and ought to be constrained. Perhaps there is some truth in both propositions. This chapter examines the empirical literature in relation to inconsistencies in sentencing. Many of the studies occur in jurisdictions where discretion at sentencing is subject to limited structure and it is thought that the much of the inconsistency flows from the existence and exercise of discretion in the absence of effective structure. It is this absence of robust

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[85] Marvin E Frankel, 'Lawlessness in Sentencing' (1972) 41 University of Cincinnati Law Review, 4. See also Marvin E Frankel, *Criminal Sentences: Law Without Order* (Hill and Wang 1973).

[86] Frankel, 1972, (n 85), 4.

[87] See for example, Frankel (n 85), 1.

structure to which Schneider was referring in the quotation at the head of this chapter. It is submitted that as a general proposition, the statement is true. Unregulated discretion carries dangers which can result in inconsistent sentences.

With that firmly in mind, this chapter seeks to establish two main propositions. First, that there is inconsistency[88] in sentencing; and secondly that such inconsistency cannot be explained by legitimate factors such as crime rate or offence seriousness. Therefore, we need to structure judicial discretion.

The critical framework

This chapter uses the definition of consistency arrived at in Chapter 2 as a critical tool to analyse the empirical literature on consistency in sentencing. It is convenient then, to briefly revisit the definition. It will be recalled that while the definition is not jurisdiction-specific, i.e. limited to England and Wales, it does focus upon the principally retributive scheme used in this jurisdiction. Its focus on principles is therefore a focus on proportionality in the retributive sense, though as described in Chapter 2, other factors may be relevant.

The definition used is therefore as follows:

> *Achieving consistency in sentencing requires sentences to be determined only by the application of established principles, having regard to legally relevant factors, in a manner which follows an established fair procedure.*
>
> *In a principally retributive framework, this entails the production of a range of sentences proportionate to the seriousness of the offence. A particular sentence within*

[88] In this chapter, the term 'consistency' refers to the definition proposed in Chapter 2 and the term 'inconsistency' should be read accordingly.

the range can then be chosen with reference to other established principles, secondary to proportionality, and imposed following an established fair procedure.

The chapter adopts two premises. First, the accepted normative position that a degree of consistency in sentencing is desirable. Secondly, that consistency should not seek comparisons between two (or more) 'similar' cases and rather focus upon an application of sentencing principles relevant to the determination of sentence.[89]

This chapter therefore analyses the empirical literature regarding structured discretion and consistency from jurisdictions operating a form of retributivism. This will identify the extent to which the current system achieves consistency as defined in this thesis; this will necessarily inform the issue of whether the structure provided by sentencing scheme is adequate. This chapter seeks to demonstrate the compelling case for the proposition that there exists unexplained and objectionable disparity in sentencing within retributive schemes and to lay the groundwork for the claim, made later in this thesis, that to promote consistency in sentencing, judicial discretion must be robustly structured.

Empirical literature on consistency in sentencing

Introduction

As discussed in Chapter 1, the sentencing system in England and Wales operates on a principally, though not exclusively, retributive basis. Sentence is therefore predominantly driven by the sentencer's assessment of the harm and culpability present in the offence. In a scheme that involves a case by case judgement as to the seriousness of retributively significant

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[89] This second proposition is disputed in some of the disparity literature which, as discussed in Chapter 2, proceeds on the basis of 'like with like' comparisons.

case characteristics, there is bound to be a degree of variability. Judge 1 might consider case A to score 7/10 on a scale of seriousness or be 'worth' a sentence of six years' imprisonment, whereas judge 2 might consider it to score 8/10 or six years, six months.[90] It is suggested that such 'inconsistency' – in the literal sense of the term – is normatively acceptable.[91] Indeed, we know that retributivism is an imprecise concept and therefore a degree of variance must be accepted. A strict mathematical approach to sentencing is to be resisted, not least because it is difficult to adopt such a precise approach to a concept which is recognised to be imprecise. Having said that, there clearly comes a point beyond which the variability in sentence would be normatively impermissible.[92]

As discussed in Chapter 2, the application of the principle produces a range within which a sentence will not be inconsistent. This requires the identification of a particular figure beyond which a sentence will be said to be inconsistent which of course, risks arbitrary results: an example of why such a strict mathematical approach is said to be inappropriate. However, it is possible to say, in certain circumstances, that a sentence is inconsistent with the principle. For instance, a variability of say, 100%, e.g. an offence which, if sentenced by judge 1 received a sentence of four years, but if sentenced by judge 2 received a sentence of eight years, would clearly not be retributively proportionate and normatively inconsistent: proportionality may be imprecise but it is not that imprecise. But that is an obvious case. This thesis does not seek to identify a figure beyond which a sentence would be regarded as inconsistent. Such an exercise

[90] The issue is further complicated because not only might the judges disagree as to the seriousness of the offence, i.e. its 'score' on a scale of 1-10, but they may also disagree on how to translate that into a sentence, i.e. one might consider a 6/10 is six years whereas the other might consider it is eight years.

[91] As will be discussed, this does not mean that the sentence is absent of any inconsistency; if the reason for the slight (but acceptable) variation was due to race, this would be inconsistent.

[92] Andreas von Hirsch, *Deserved Criminal Sentences* (Hart 2017), 22, 58 and in particular, 104.

would require extensive empirical research such as a study of appellate sentencing decisions or qualitative research with judges, lawyers or the public, for instance.

Instead, it suffices to note three points for the purposes of reviewing the studies in this chapter. First, that some studies may identify such a wide range of sentences that it is possible to say with some confidence that *unjustified inconsistency* exists; naturally the limits of that range will be subject to debate.[93] Conversely, some studies will identify variability which may fall within the proportionate range which will not, *prima facie*, evidence inconsistency. Secondly, that sentences within the proportionate range may contain unjustified inconsistency. If there is no legally relevant reason for distinguishing between two offenders, then such inconsistency may be unjustified. This will of course depend on the extent to which the study is able to control for case characteristics in order to isolate the factor of interest to the study. Thirdly, in spite of this, that all sentences within the proportionate range will be presumed be justifiable unless there is data which accurately evidences that any differential treatment is legitimate[94] ("*justified inconsistency*") or illegitimate[95] ("*unjustified inconsistency*").

It is notable that much of the literature considered in this chapter either does not engage with the discussion as to a 'correct' definition of consistency, nor does it suggest an appropriate (even approximate) figure of tolerable disparity; it merely considers the extent to which sentences differ and seeks to draw conclusions as to whether such differences are justifiable.

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[93] It is interesting to note that von Hirsch suggests 10-15% would be permissible but 20-30% would not, see von Hirsch (n 92), 104.

[94] This may be where one sentencer relies upon a particular principle, say deterrence, to determine the sentence within the permissible range, but it would have been justifiable to choose another principle, resulting in a different sentence with the range.

[95] For instance this may be where the choice of principle, say deterrence, is not justifiable owing to the particular circumstances, where too much or little weight is placed on a particular factor, or where reference is made to non-legal factors.

This divergence of opinion as to the definition of consistency (and potential to 'over-interpret' data) does not undercut the principal aim of this chapter, however, namely to demonstrate that there is unexplained and objectionable disparity in sentencing.

Methodological challenges

For accurate data on consistency within a retributively proportionate scheme, detailed case data is essential. It will be, of course, necessary to isolate factors which are relevant to the assessment of seriousness in order to obtain meaningful data as to the extent to which sentences and sentencers are consistent. A bare comparison between groups, say by reference to gender, geographical location, or age will no doubt provide data that suggests inconsistency, either by virtue of a wide range (indicative that the principle of proportionality is being misapplied) or by virtue of a higher or lower average sentence for a particular group. Such "gross" results – i.e. those without taking appropriate account of case characteristics – provide little assistance. Instead, it is the "net" results – i.e. those which have (so far as is possible) controlled for the various characteristics affecting the assessment of seriousness – which are most informative. For example, if considering gender, it is necessary to control for the fact that men are typically sentenced for more serious offences than women.[96] This presents methodological challenges which are not new and it is accepted that multi-variate analyses are superior when seeking to conduct this type of research as such an approach better enables researchers to control for case characteristics affecting offence seriousness.[97] Once such controls are conducted, it is far easier to confidently assess the state of play viz. inconsistency and potential discrimination.

[96] Ministry of Justice, Statistics on Women and the Criminal Justice System 2017: A Ministry of Justice publication under Section 95 of the Criminal Justice Act 1991, (Ministry of Justice 2018), 67.

[97] Jose Pina-Sanchez, Julian Roberts and Dimitrios Sferopoulos, 'Does the Crown Court Discriminate Against Muslim-Named Offenders? A Novel Investigation Based on Text Mining Techniques' (2019) 59(3) Brit J Criminol, 718, 720.

Methods are continually advancing and so one must be cautious when considering the extent to which controls for offence seriousness were conducted in older studies. For instance, a 1980s Canadian study analysed cases from two municipalities one urban and one suburban, finding intra-judge consistency but inter-judge disparity.[98] Variations in sentence lengths were analysed after consideration of differences in case facts, offender characteristics, system factors, and judge characteristics. The analysis demonstrated that 65% of variation regarding sentence type and 67% of the variation in sentence length could be explained.[99] The residual 30-35% variation is, on any view, significant. However, caution must be exercised as the method of control employed was somewhat approximate; for instance the study gave a '+1' score to each aggravating factor (and the converse to each mitigating factor). This is of course blind to the readily accepted notion that factors are not of equal weight and therefore the control can limit, not eradicate, the effect of case seriousness on the results.[100] For example, the absence of previous convictions will vary depending upon the context, including the conviction offence and the age of the offender. Reliance on such data must be appropriately weighted, therefore.

There is much to be said for using both 'real' cases, i.e. analysing real sentencing decisions in court or those handed down on paper, but also hypothetical cases, i.e. simulated scenarios. In the case of the former, another Canadian study (described later in this chapter) critiqued the methodological limitations in studies seeking to analyse past sentencing decisions as, it was posited, such studies required an assumption that each variable was identical save for

[98] Brantingham (n 22), 299.

[99] Brantingham (n 22), 303.

[100] See, for example, Julian V Roberts 'Punishing, More or Less: Exploring Aggravation and Mitigation at Sentencing' in Julian V Roberts (ed) *Mitigation and Aggravation at Sentencing* (CUP 2011), 13.

the variable of interest.[101] In the case of the latter, one judge participating in a hypothetical case study commented "*The trouble with these sentencing exercises is that you tend to be paper tigers. You sentence hard. It's a different thing when you're actually doing it yourself.*"[102] This underlines the value of sentencing disparity studies encompassing both "*real cases*" (to avoid the results being affected by the hypothetical nature of the exercise) and hypothetical cases (to avoid the assumptions referred to which would affect the overall analysis).

Additional methodological challenges are presented in obtaining data already collected. First, large state-collected data sets such as the Crown Court Sentencing Survey in England and Wales did not record data on the ethnicity of the defendant. Further, traditionally, Ministry of Justice data was aggregated which precluded regression techniques.[103] Some data sets do not contain data on case characteristics or aggravating and mitigating features. In some cases, current data is not available; the recent decision to cease the Crown Court Sentencing Survey provides one such example.

Finally, there are challenges in the way in which multiple offence cases are recorded and analysed. This is because despite there being general principles in relation to the way in which such cases ought to be dealt with (in England and Wales at least[104]) sentencers take different approaches. For instance, a sentencer required to sentence a single offender for three offences may (a) impose a sentence for the most serious count, increasing the sentence beyond

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[101] Ted S Palys and Stan Divorski, 'Explaining Sentence Disparity' (1986) 28 Canadian Journal of Criminology, 347, 348.

[102] Malcolm Davies and Jane Tyrer, '"Filling in the gaps" - a study of judicial culture: views of judges in England and Wales on sentencing domestic burglars contrasted with the recommendations of the Sentencing Advisory panel and the Court of Appeal guidelines' [2003] Crim LR 243, 255.

[103] Pina-Sanchez et al (n 97), 720.

[104] Sentencing Council of England and Wales, *Offences Taken into Consideration and Totality Guideline*, (Sentencing Council of England and Wales 2012).

that which is proportionate to reflect the other offences, and impose sentences on those to run concurrently (or impose no separate penalty); (b) impose consecutive sentences on each count, reducing one or more to account for the principle of totality; or (c) impose a proportionate sentence on the most serious count, and a mixture of consecutive and concurrent sentences on the other counts to achieve a total sentence which accords with the principle of totality. This causes problems for the assessment of consistency as comparisons often proceed on the assumption that the sentences imposed are proportionate and not artificially increased or reduced to account for the existence of other offences. Similarly, offences taken into consideration[105] cause potential problems as the sentence for the conviction offence will be increased to take account of other offences which have not been charged and for which there is no conviction. For instance, there could be a conviction for one burglary for which sentence is imposed for 10 burglaries. This causes obvious problems for any assessment of consistency and at present, it appears that it is not possible to control for such problems when using large data sets such as the Crown Court Sentencing Survey or the Ministry of Justice data.

With those cautionary words firmly in mind, the chapter proceeds to consider the relevant literature and establish the extent to which it can be said that sentencing in retributively proportionate schemes satisfies the definition of consistency proposed in Chapter 2.

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[105] The process whereby an offender can admit other offences and be sentenced for all the offences, but the sentence will be limited by the maximum sentence for the conviction offence. This procedure provides a convenient way for an offender to guarantee being released from prison with a ‘clean slate’ (in the sense that he/she does not need to fear prosecution for offences committed prior to the imposition of their sentence).

Geographical differences and "local justice"

It is accepted that inconsistencies attributable to geographical differences exist and may be justifiable. Geographical inconsistency is not limited to sentencing, however: it has been demonstrated that there is a statistically significant variance in inter-court practices extending to court procedure, the decision regarding bail, and the determination of venue for trial.[106] An obvious justification for such inconsistency in sentencing would be disparate caseloads. For instance, more serious crime (or more crime of a particular type) may be committed in Greater London than in Cornwall. The inconsistency may therefore be justified on the basis that by the application of the principle of retributive proportionality, the areas in which more serious cases are dealt with quite properly have a greater custody rate or longer average custodial sentence length.

It is not the case that geographical inconsistencies can always be justified, however and there is a range of empirical evidence that certain 'local practices' exist in sentencing. A particularly stark example comes from anecdotal evidence that until comparatively recently, the City of Westminster Magistrates' Court in effect operated its own sentencing guideline (separate to the guideline issued by the Sentencing Guidelines Council which applied nationwide) in relation to offences of 'pick-pocket' theft, on grounds of prevalence.[107] This was of doubtful legality. Not all geographic variation stems from such orchestrated local practices however. The following paragraphs consider international studies evidencing "local justice" and geographical inconsistency.

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106 Andrew Herbert, 'Mode of Trial and the Influence of Local Justice' (2004) 43(1) The Howard Journal, 65, 65.

107 'Sentences' (*The Defence Brief*, 6 February 2013) <http://defencebrief.blogspot.com/2013/02/sentences.html> accessed 7 November 2018.

The Halliday Report – a review of the sentencing framework in England and Wales published in 2001 – considered the "case for change" in sentencing in this jurisdiction. The report referred to significant disparity in the percentage of defendants sentenced to immediate custody in magistrates' courts in 1998 and 1999. Taking the offence of dwelling burglary as an example, the lowest recorded value was 5.9% in 1998 and 12.8% in 1999 as compared with the highest recorded value of 69.6% in 1998 and 50.0% in 1999.[108] Even allowing for local variance on the basis of differing rates of crime, crime seriousness and a different 'type' of offender,[109] this disparity appears to be so significant that justification on the basis of geographical differences (and other, legally relevant, factors) seems highly unlikely. A custody rate of 6 – 70% in 1998 can be taken as *prima facie* evidence that unjustified inconsistency exists, though its precise extent may be unclear from this data. The report concluded that there was widespread inconsistency by reference to geographical area which was "*difficult to explain or justify*" notwithstanding the lack of precision with which such assessments of seriousness suffer. Reference to "*local prevalence*" was made, citing this as a significant factor in geographical differences – in essence, the local practices referred to above. As will be considered in Chapter 7, the Court of Appeal (Criminal Division) has sought to provide guidance on this issue to avoid such inconsistency. The evidence remains, however, that there is geographical variation which is not explained and not justified, tending towards a conclusion that some sentencing principles, in particular the principle of proportionality, are being mis- or dis-applied.

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108 John Halliday, Making Punishments Work: Report of a Review of the Sentencing Framework for England and Wales, (Home Office 2001) Appendix 2, Table 6.

109 For instance, a higher percentage of first-time offenders in a particular area.

A 2003 report found significant inconsistencies in the custody rate which were attributable to geographic location: in magistrates' courts in Merseyside, the custody rate for burglary was 25%, whereas in Staffordshire it was 45%, despite the incidence of burglaries being the same.[110] The report noted that although the discrepancy could reflect "*other differences*", the analysis of the data suggested that that was not the case and that the inconsistency was not wholly attributable to legitimate factors. From the gross inconsistency evidenced by this study we can infer unjustified inconsistency, on the basis that the extent of the inconsistency is such that it would fall outside of the permissible range of sentences, on a normative basis.[111] It therefore provides evidence that the principle of proportionality is not being correctly applied.

In the late 1970s, Roger Tarling conducted an analysis of sentencing practices in the magistrates' courts in relation to males aged 21 or over sentenced for indictable offences with data collected from 1975. The study used qualitative and quantitative methods, finding unexplained disparity among the 30 magistrates' courts which were studied.[112] Some 25 years later, Tarling revisited the study and repeated the analysis on data collected from 2000. The study found that there had been a significant increase in the rate of imprisonment (6.8% in 1975, 15.5% in 2000),[113] a range of 16% in 1975 and 19.1% in 2000 in the use of immediate imprisonment, but no material change in the use of fines.[114] The 2000 study found factors such as case and offender characteristics could not explain the entirety of the variation found. As a

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110 Patrick Carter, Managing Offenders, Reducing Crime: A New Approach (Home Office 2003), 20.

111 As to this, see von Hirsch (n 92), 104.

112 Roger Tarling, Sentencing Practice in Magistrates' Courts: A Home Office Research Unit Report, (Home Office 1979).

113 Roger Tarling, 'Sentencing Practice in Magistrates' Courts Revisited' (2006) 45(1) The Howard Journal, 29, 30.

114 The range was 30.1% and 29.6% in 1975 and 2000 respectively.

study which controlled for offence seriousness and other factors which might legitimately have impacted upon the sentencing decision, this study provides particularly strong evidence of unjustified inconsistency within the permissible range.

A 2007 Ministry of Justice study divided England and Wales into 42 criminal justice areas and assessed both magistrates' courts and the Crown Court. The study analysed data concerning the custody rate, custody length and (in the Crown Court only) the rate of imprisonment for public protection ("*IPP*") and life sentences.[115] The study found:

a) Custody rates ranged from 6 to 16% in the magistrates' courts and 45 to 68% in the Crown Court;
b) the average custodial sentence in months in the magistrates' court ranged from 2.4 to 3.6 and in the Crown Court from 19.5 to 25.3; and
c) the rate of IPP and life sentences ranged from 1.3 to 4.3%.[116]

The data was assessed and a number of hypotheses were tested, including that sentencing practice and local crime rates are related, and that severity of sentencing within a criminal justice area is related to the seriousness of offences being sentenced by the courts. Among the various findings, the study revealed that inter-criminal justice area variance in sentencing practice was "*not well explained*" by the data on crime and seriousness of offences

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115 Both the IPP and the life sentence are indeterminate sentences whereby a court imposes a minimum term which the offender must serve before release may be considered by the Parole Board. The minimum term is imposed by reference to the seriousness of the offence, whereas the continued detention (or release) is determined by considerations of public safety.

116 Thomas Mason, Nisha de Silva, Nalini Sharma, David Brown, Gemma Harper, *Local Variation in Sentencing in England and Wales* (Ministry of Justice 2007), 7.

sentenced;[117] and that in fact the seriousness of the offences provided only a partial explanation for the variation.[118] The absence of a significant relationship between differing geographical factors and the eventuating disparity in sentencing practice found by the Ministry of Justice study is supported by earlier research by Tarling and Herbert.[119] Again, the strong conclusion must be that the absence of an explanation for such variance supports the hypothesis that the principle of proportionality is not correctly applied and that sentencers are unable – at least with a sufficient degree of precision and consistency – to assess the seriousness of an offence and more importantly the appropriate and proportionate sanction. It is right to note, of course, that this was at a time when there were few sentencing guidelines in force in England and Wales; the general point remains, however, that sentencers struggle to accurately and consistently apply the principle of proportionality in the absence of sufficiently structured discretion.[120]

Disparity studies from other jurisdictions with a principally retributive scheme can also be instructive. A four-year study of four magistrates' courts locations in Victoria, Australia found variations in the custody rate for theft offences, with the range extending from 12.0% to

117 Mason et al (n 116), 13.

118 The methodology involved placing each of the offences to be sentenced into one of 10 categories according to its seriousness. This seriousness ranking was derived from previous practice. Although the report provides insufficient detail regarding this exercise, the reliance upon past practice tends towards the conclusion that the seriousness score concerns the offence for which the offender is convicted in the abstract, rather than a closer evaluation of the individual circumstances of an offence. For example, a manslaughter could be more or less serious than a robbery. The seriousness scale therefore presents potential problems concerning the accurate assessment of seriousness according to the proportionality and attendant inaccuracy in the results of this study.

119 Mason et al (n 116), 22 et seq.

120 Later in this thesis the effect of various methods of structuring discretion will be considered. Kaplow has considered the differences between 'balancing' as a form of decision-making (the example given is the negligence test in tort) and structured discretion procedures (the example given is proportionality in constitutional law) and prefers balancing. Although sentencing is not considered, the discussion is of interest as to the utility of structured discretion as a method.

40.3%. It found that in one of the courts, a fine was the most common penalty for theft offences, whereas it was imprisonment in the other three locations; and that there was an 18% difference in the average length of sentence imposed between the two courts with the highest and lowest average custodial sentence length.[121] The study concluded that the results suggested that sentencing in Victoria was affected by a considerable degree of variation in sentencing outcomes.[122] That said, this study provides a paradigm example of the need for caution when interpreting disparity studies. It is essential to understand the impact of two features, first that the study did not control for offence seriousness and secondly that the data provided is median and mean averages presenting an impression of the disparity between the courts as between rural, semi-rural and sub-urban court centres. It is possible that from such gross inconsistency one can infer unjustifiable inconsistency on the basis that a degree of the variation falls outside of the proportionate range (suggesting the consensually arrived at principles of sentencing are not being properly interpreted or applied); certainly, the custody rate of 12-40% would tend toward that conclusion on a normative definition of consistency. As a result of its methodological limitations, there is a danger of placing too much weight on this study.[123]

It is evident that the literature demonstrates inconsistency between different geographical areas exists. There is good evidence of gross disparity, with appropriate controls for case characteristics, providing strong evidence of unjustified disparity between different

[121] Clare Farmer, Ian Parsons and Mirko Bagaric, 'Inconsistencies in sentencing of theft offenders in Victoria: Implications for the 'instinctive synthesis' (2017) 44 Australian Bar Review 318, 330.

[122] Farmer et al (n 121), 336. The inconsistency is attributed to the 'instinctive synthesis' approach to sentencing adopted in Australia; the article concludes with a call for measures to bring greater consistency to sentencing in Australia.

[123] Further work would be needed to isolate the cause of the disparity and the extent to which it can be said to be objectionable. It would then be possible with a far higher degree of certainty to comment on the existence and extent of the unjustified inconsistency evidenced by this study.

geographical areas. Other studies provide, by inference, evidence of unjustified inconsistency arising from unexplained inconsistencies within the proportionate range. From this we may strongly infer sentencers' inability or unwillingness to apply the principles underpinning the sentencing scheme with a sufficient degree of precision.[124]

Drawing upon other research, Herbert attributed a significant proportion of sentencing inconsistency to the existence and perpetuation of local practices rather than differences between sentencers and their interpretation of the facts.[125] Yet, as we will see, there is strong evidence that the subjective interpretation of the facts and the application of the law to them is a source of unjustified inconsistency. It falls then, to consider the empirical evidence as to the impact of the "*human*" element of the sentencing process.

The "human" element

To what extent is unjustified inconsistency a product of an inability to be consistent, despite best efforts? Or, put another way, to what extent does the "*human*" element in sentencing result in unjustified inconsistency? The claim is that as the sentencing process relies heavily upon a subjective interpretation of the facts of the case and the law applicable to it, irrespective of a desire to be consistent, there are likely to be elements of inconsistency stemming from the fact that decision-makers are individuals. In addition to this, the subjective interpretation of facts (and to a lesser extent, the law) and its conversion into a sentence may be influenced by sentencers' own penal philosophies. This can manifest itself in different ways, for instance, a sentencer might consider that general sentencing policy is unduly or

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[124] In absence of evidence of a practice of wilfully disapplying the principles, it must be assumed that the inconsistency arises from imprecision.

[125] Herbert (n 106), 66.

insufficiently punitive, or that a particular genus of crime should be dealt with more severely or more leniently than accords with current practice. Such views, if permitted to influence the sentence imposed, may result in a degree of inconsistency. Although much of the literature concerning this issue considers the effect of the sentencers' individual views, it does not address the idea that within reason, such disparity may be acceptable. There is empirical evidence, of differing strengths, to evidence the human element in sentencing and its role in the existence of unjustified inconsistency.

The Halliday report, referred to above, concluded that in a scheme which retained a high degree of discretion, inconsistency of approach was inevitable and that while individuals were likely to agree as to the relative severity of an offence, they were less likely to agree as to the corresponding severity of sentence which ought to be imposed in response.[126] The report acknowledged that precision was "*elusive*" but observed that the variation identified by the research was "*difficult to justify*", providing further evidence of problems arising from the application of sentencing principles in the determination of sentence.

A more recent study in England and Wales involving five sample scenarios presented to 57 judges sitting at 11 court centres asked the judges to sentence the five fictional domestic burglary cases. By way of example, in one case, the mean sentence across the 11 court centres was 44.39 months with a range of a mean of 33 months in one court centre to 69 months in another.[127] Another of the cases revealed perhaps an equally fundamental disagreement as to the seriousness of the offence, where all but two judges opted for a non-custodial sentence. The

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[126] Halliday (n 108), 3 and 6.

[127] Davies and Tyrer (n 102), 255.

range of non-immediate custodial disposals extended from a conditional discharge to a suspended sentence with the most severe sentence being one of nine months' imprisonment (immediate).[128] As a hypothetical cases study, this has the benefit of an absolute control for case seriousness, isolating with a high degree of precision the "*human element*". As Morris and von Hirsch argue, a degree of justifiable disparity is expected as a result of the lack of precision with which a deserved sentence can be identified, yet there are of course limits to this imprecision. Accordingly, a sentencing range in one sample case in which the upper limit of the range was more than twice the lower limit demonstrates quite pronounced inconsistency. As argued earlier in this chapter, this would fall outside the range of permissible sentences on a normative conception of consistency, thereby evidencing unjustified inconsistency.

Such findings are numerous and manifest across the literature from many principally retributive sentencing systems around the world. An early USA study of real cases found that although judges maintained their relative positions on the scale of severity, with some consistently more severe than others, the judges often displayed idiosyncrasies with respect to certain offence types.[129] Despite this study's methodological limitations, with weak controls for case seriousness, the conclusion has been consistently supported by the later studies discussed in this section.

Perhaps of greatest importance is John Hogarth's major work on sentencing in which he interviewed magistrates in Ontario, Canada, to discern the differing perspectives which informed their sentencing decisions. He concluded that the human element of the sentencing

[128] Davies and Tyrer (n 102), 261.

[129] Frederick Joseph Gaudet, *Individual Differences in the Sentencing Tendencies of Judges* (Archives of Psychology 1938), 55.

process is undeniably influential on the sentence imposed. This is supported by numerous studies since Hogarth's seminal work, a number of which are referenced in this section. His study demonstrated that disparity existed by virtue of the difference between sentencers' beliefs and the inability to homogenously assimilate case information and the principles of sentencing, translating one into the other. Remaining with Canada, a later study conducted by Palys and Divorski involving five hypothetical cases sentenced by 206 judges, demonstrated significant disparity attributable to the judge imposing the sentence; one such case involving an armed robbery saw a range from a suspended sentence to immediate custody of 13 years.[130] Such would, self-evidently, fall outside the proportionate range of sentences and therefore provides *prima facie* evidence of unjustified inconsistency.

Research in Scotland conducted in relation to 'real cases' found similar results. Hutton and Tata studied 1,281 cases previously sentenced by 10 sheriffs and found that some sheriffs consistently imposed sentences longer or shorter than the overall mean.[131] The simultaneous finding of consistency and disparity appeals to logic – that some sentencers will be consistently tougher than others – but remains a concern, particularly when the mean length of sentence imposed among a small sample of sentencers varied to a significant extent. The finding that some were consistently more punitive than others would tend towards the conclusion that sentencers' personal penal philosophies impacted the determination of sentence. Different sentencers may have different cardinal bases attributable to their personal penal philosophy, or alternatively, an inaccurate conception of the principle of proportionality. Similarly, sentencers may have different conceptions of ordinal proportionality, again, attributable to personal penal

130 Palys and Divorski (n 101), 354.

131 Neil Hutton and Cyrus Tata, *Patterns of Custodial Sentencing in the Sheriff Court* (The Scottish Office Central Research Unit 1995).

philosophies. This study would appear to also support the hypothesis that sentencers struggle to accurately apply the principle of proportionality; notwithstanding that it is possible to be more consistently punitive or lenient, the study illustrates a residual degree of inconsistency. This raises two distinct issues: first that the lack of precision regarding the principles may require greater guidance; and secondly greater restriction upon sentencers' discretion may limit the effect of sentencers' personal philosophies. Both issues will be considered later in this thesis.

Returning to the USA, a study of real cases found that where a number of judges were tasked with imposing sentence in the same cases, although the majority of sentences imposed averaged in comparable severity, there was a tendency to very different opinions about which particular cases deserved more severe or more lenient punishment.[132] That is to say that the judges had different conceptions of ordinal proportionality.

This snapshot of the literature is supported by meta-reviews conducted by national sentencing bodies. The Canadian Sentencing Commission conducted a meta-review of the literature concluding that, *inter alia*, the identity of the sentencing judge and their particular sentencing philosophy is closely associated with the sentencing outcome.[133] Notably, the Commission's report linked this inconsistency with an absence of sufficient guidance on the approach to sentencing. In particular, they found that the absence of an agreed approach to sentencing was only one part of the problem; the Commission concluded that additional

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132 Paul J Hofer, Kevin R Blackwell and R Barry Ruback, 'Effect of the Federal Sentencing Guidelines on Inter-judge Sentencing Disparity' (1999) 90(1) Journal of Criminal Law and Criminology 239, 250.

133 Canadian Sentencing Commission Sentencing Reform: A Canadian Approach, (Minister of Supply and Services Canada 1986), 77.

guidance was necessary as the concepts used to articulate a common theory of sentencing would result in different interpretations as to the principles.[134] The Sentencing Commission for Scotland conducted a similar review and found support for the view that the subjective element of the process resulted in inconsistency.[135]

The consensus is therefore that unjustified inconsistency exists in part as a result of the human element in the sentencing process. The literature, over decades, through real and hypothetical case studies demonstrates that the subjective element to sentencing, i.e. the individual assessment of case characteristics and offence seriousness, in addition to different penal philosophies impacts upon sentence determination and leads to inconsistencies, some of which are unjustified.

Gender

It is widely accepted that offenders should not receive different treatment solely as a result of their gender.[136] The simplicity of that agreed position belies the true complexity of the issue, however. There are legal factors which may correlate with a particular gender, such as primary caring responsibilities, lower (perceived) risk[137] and the commission of lower-

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134 Canadian Sentencing Commission (n 133), 107.

135 The Sentencing Commission for Scotland, *The Scope to Improving Consistency in Sentencing*, (Scottish Executive 2006), 19-21 and Annex B.

136 See for example Ashworth, (n 3), 257 and Baroness Jean Corston, A report by Baroness Jean Corston of A review of women with particular vulnerabilities in the Criminal Justice system (Home Office 2007), 23.

137 There is an extensive body of literature concerning risk assessment tools and the legitimacy or otherwise of taking account of certain factors when seeking a predictive assessment of how likely an offender is to recidivate. Space prevents further enquiry into this aspect of sentencing and consistency, however. For more information, see for example, Kelly Hannah-Moffat, 'Algorithmic risk governance: Big data analytics, race and information activism in criminal justice debates' (2018) Theoretical Criminology, 1-18 and Lori D Moore and Irene Padavic, 'Risk Assessment Tools and Racial/Ethnic Disparities in the Juvenile Justice System' (2011) 5(10) Sociology Compass 850.

seriousness offences. These factors may feed into the assessment of the seriousness of an offence or alter the resultant sentence on the grounds of what is described as 'personal' mitigation. Accordingly, evidence of gross inconsistency offers little to the consideration of the existence of unjustified inconsistency in this context as it may well be that such inconsistency is justified by the correlation with other, relevant factors. It is therefore necessary to consider the extent to which disparities are attributable solely to gender.

Some of the literature speaks of one or other position being "*generally accepted*"[138] yet there are broadly three theses. The existence and nature of gender disparities at sentencing have typically polarised opinions. One view is that female offenders receive disproportionately *lenient* sentences in comparison to their male counterparts. This is grounded in presumed leniency towards female offenders, often described as male or judicial chivalry.[139] The other is that female offenders receive disproportionately *severe* sentences in comparison to their male counterparts. This is grounded in the view that a female offender is "*doubly deviant*", with female offenders receiving harsher sentences as punishment for not conforming with societal expectations of femininity.[140] The third view, seemingly in the minority, combines the two; while gender results in disproportionate sentences, it is the offence (and context) which determine whether or not that manifests in an unduly severe or lenient sentence, and not gender *per se*.[141] While the weight of the literature supports the hypothesis that women are treated

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[138] For example, Frances Heidensohn and Marisa Silvestri, 'Gender and Crime' in Mike Maguire, Rod Morgan and Rob Reiner (eds) *The Oxford Handbook of Criminology* (5th ed) (OUP 2012), 352.

[139] Carly Lightowlers, 'Drunk and Doubly Deviant? The Role of Gender and Intoxication in Sentencing Assault Offences' (2018) Brit J Criminol, 693, 694.

[140] Lightowlers, (n 139), 694.

[141] Lightowlers notes that this manifests in the form of more lenient sentences for female offenders for property offences but more severe sentences for more serious and personal offences owing to the latter being seen as un-woman-like behaviour. See Lightowlers, (n 139).

more leniently than men, there is a minority view that female offenders are more likely to be sentenced to short custodial sentences and to be remanded in custody than male offenders.[142]

The chivalry theory has a solid evidence-base, at least in so far as female offenders benefit from more lenient sentences. In the 1990s, Steffensmeir et al reviewed the empirical literature concluding that "*a fairly persistent finding has been that adult female defendants are treated more leniently than adult male defendants*".[143] They identified various methodological limitations of past studies including weak controls for offence seriousness and previous criminal history, two legal factors which are known to impact upon sentence determination in a significant way.[144] They concluded that the research demonstrated fairly consistently that female offenders were treated more leniently than male offenders. The study following the literature review was, at the time, one of the most comprehensive and methodologically sound studies of its type.[145] Controlling for "*all other variables*"[146] the study found that male offenders were 1.77 times more likely to be incarcerated than female offenders. It was observed, perhaps unsurprisingly, that the effects of gender on the sentencing decision were weak when compared with criminal history or offence severity; that is perhaps expected, given gender is a non-legal factor and the two former factors are legitimate sentencing considerations. In relation to sentence length, gender contributed "*very little*" to the variation in sentence and failed to reach the standard of statistical significance in 16 of the 20 offence categories studied.

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[142] Carol Hedderman, 'Government policy on women offenders: Labour's legacy and the Coalition's challenge' (2010) 12(4) Punishment and Society 485, 494.

[143] Darrell Steffensmeir, John Kramer and Cathy Streifel, 'Gender and Imprisonment Decisions' (1993) 31(3) Criminology 411, 411.

[144] Steffensmeir et al (n 143), 412.

[145] Steffensmeir et al (n 143), 419.

[146] Steffensmeir et al (n 143), 423.

When testing for interactive effects, proportionate increases in offence severity tended to increase the length of a sentence more for males than females. The findings therefore may seem somewhat underwhelming; there is inconsistency (particularly in the 'in/out' decision) but it is moderate or, when it comes to sentence length, non-existent. In relation to the decision whether or not to imprison, a variance of 12% was found.[147] While this may provide evidence within that range of inconsistency, this study is inconclusive as to whether that inconsistency is justified.

A recent US review of the literature found that overall, female offenders received less severe sentences than male counterparts, but that more recent research suggested that there was greater parity than had been found previously.[148] It was noted that literature disagreed as to the basis for the chivalrous view that females are seen as less threatening and less culpable; some scholars have dismissed this as "*simplistic*" and limited only to those offenders or scenarios which fit a specific construction of femininity.[149] Drawing on other studies, Bontrager et al note that this judicial chivalry relies upon additional factors such as child caring responsibilities, increased cost of imprisoning women and the greater likelihood of rehabilitation. They describe these as extra-legal factors, tending towards the conclusion that if influential, there may be objectionable disparity. While there may be a justifiable objection to such stereotypes, it is right to recognise that such factors can legitimately influence the determination of sentence. Within a limiting retributivist scheme such as that in England and Wales, these considerations could (within reason) justify a different sentence imposed on a

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[147] Steffensmeir et al (n 143), 432.

[148] Stephanie Bontrager, Kelle Barrick and Elizabeth Stupi, 'Gender and Sentencing: A meta-analysis of contemporary research' (2013) 16(2) The Journal of Gender, Race, and Justice, 349.

[149] Christy A Visher, Gender, 'Police Arrest Decisions, and Notions of Chivalry' (1983) 21(1) Criminology 5.

male and female offender for otherwise identical offences as they are capable of being factors relevant to consequentialist aims of sentencing. The gender disparity therefore *may* be objectionable, but the existence of such difference is by no means conclusive.

Examination of data from the US Sentencing Commission found that female offenders were less likely to receive custodial sentences and typically received more lenient sentences than their male counterparts but that legal factors accounted for a considerable portion of the gender gap in sentencing.[150] In England and Wales, there is recent evidence to support the claim that if disparity exists, it is not as pronounced as many would claim; female offenders typically have fewer previous convictions,[151] commit less serious crime[152] and are more likely to be dealt with by the magistrates' courts[153] (which have limited sentencing powers compared with the Crown Court for comparable offences).

By contrast, the "*evil women*" theory considers that female offenders who deviate from social norms of femininity by committing, for example, violent crime, are disproportionately punished, in part due to the perception of heightened risk or danger. Again, while this may be objectionable, it is capable of justification as the factors referred to – need for public protection, amenability to rehabilitation, culpability and so on – are legal factors which may legitimately influence sentence. An important finding of Bontrager's study and meta-review of the literature was that the inclusion of important control variables undermines the level of support for the

150 Jill K Doerner and Stephen Demuth, 'Gender and Sentencing in the Federal Courts: Are Women Treated More Leniently?' (2014) Criminal Justice Policy Review, 242, 245-246.

151 In 2017, 11% of female offenders had 156 or more previous convictions whereas 89% of male offenders had 15 or more previous convictions, and of the 82% who had a "criminal history", 87% were male whereas 13% were female, Ministry of Justice (n 96), 36 and 101.

152 Ministry of Justice (n 96), 102 and 119.

153 Ministry of Justice (n 96), 40.

chivalry theory. The report concluded that over a significant period of time the literature demonstrated support for the chivalry theory, but that it declined over time. They further concluded that the research supported theories of greater leniency towards female offenders and that the studies "*clearly demonstrate that women have a sentencing advantage over males charged with similar crimes and with comparable offense histories*."[154] However, more recent data, from 2000-2006, demonstrated that the extent to which female offenders enjoyed preferential sentencing outcomes over male counterparts had dwindled such that it could no longer be said that female offenders received "*significantly shorter*" sentences or lower odds of incarceration. This meta-review of the empirical research strongly suggests that the extent of the objectionable disparity is less extensive than much of the literature had hitherto stated.

In relation to the mixed theory, Doerner and Demuth found that legally relevant factors had disparate effects for male and female offenders.[155] For example, previous convictions were more influential in the sentencing decision for female offenders. Their study also established that non-legal factors had disparate effects in correlation with gender, for example the presence of a high school education increased the severity of sentence for female but not male offenders. This provides support for the proposition that conceiving of gender and sentencing as one dimensional is overly simplistic and that the 'hybrid' theory is perhaps more credible. This is also supported by recent work by Lightowlers. Her study demonstrates that although male offenders receive more severe sentences than female counterparts, the legally relevant factor of intoxication adversely affects female offenders, resulting in *reduced* leniency.[156] This paints a rather more complex picture than the more simplistic chivalry vs 'evil women' debate. It

[154] Bontrager et al (n 148), 365.

[155] Doerner and Demuth (n 150), 261.

[156] Lightowlers, (n 139), 712.

suggests that there are elements of both theories at play, say where women who are intoxicated are disproportionately punished for being "*doubly deviant*", as Lightowlers suggests, but within an overarching chivalrous approach to sentencing female offenders.

In sum, the literature is generally consistent;[157] a degree of inconsistency attributable to gender exists but, taken as a whole, later work demonstrates that the issue is not as straightforward as the chivalry vs 'evil woman' literature suggests. Gender is a complex sentencing factor which manifests in different ways. Further work as to the interaction between gender and other legal factors is plainly necessary in order to identify more accurately the extent to which inconsistency linked to gender is unjustified. It is beyond the scope of this thesis to delve deeper into the issue; it suffices to note that it is empirically proven that gender disparities exist in sentencing, with the evidence largely supporting the chivalry theory rather than the evil women theory and hybrid theory suggesting that the position is more complex than the binary 'chivary' vs 'evil woman' debate. Even applying a flexible limiting retributivist scheme providing a sentencer with discretion to prioritise certain considerations thereby justifying differential treatment, there is legitimate concern as to the existence of unexplained disparity in sentencing attributable to gender. As a factor which is considered to be not legally relevant to the determination of sentence, the literature provides strong support for the view that gender inappropriately impacts upon the application of sentencing principles.

[157] Farrell et al observe that "*Decades of research confirm that women receive less-severe sanctions than men across all phases of the criminal justice system.*" Amy Farrell, Geoff Ward and Danielle Rousseau, 'Intersections of Gender and Race in Federal Sentencing: Examining Court Contexts and the Effects of Representative Court Authorities' (2010) 14 J Gender Race & Just 85, 85.

Race

Race presents an obvious challenge to the application of equality.[158] A large body of research has explored the question of whether racial and ethnic minority offenders have been sentenced differently from white offenders convicted of comparable offences. The overarching question is whether there is inconsistency present in sentencing which can be attributed to the race of the offender. This could take the form of general evidence of inconsistency, for example, members of a particular racial group receiving different treatment attributable to their race or that black offenders receive higher sentences than white offenders for comparable offences. Additionally (or alternatively), it might be the case that certain legal factors interact with race as a characteristic and produce different treatment for a particular racial group. For example, black offenders may be less likely to plead guilty to offences than white offenders and therefore receive higher sentences. Similarly, there may be non-legal factors which interact with race, for instance, if Asian offenders are more likely to have a university education than black offenders, a disparity may result from the latter factor which is correlative with race.

It should be noted from the outset that there appears to be little dispute that gross inconsistencies in relation to race exist, both within the criminal justice system more generally, but also within sentencing.[159] In such circumstances, we must ask whether such inconsistency is justified (within a scheme which depends on flexibility and discretion) or not.[160] While, continuing with the earlier example, it may not be satisfactory if black offenders are less likely

[158] Ashworth (n 3), 252.

[159] David Lammy MP, The Lammy Review: An independent review into the treatment of, and outcomes for, Black, Asian and Minority Ethnic individuals in the Criminal Justice System (Ministry of Justice 2017), 5.

[160] It is of course necessary to note that simply because disparity could be justified by reference to the various purposes of sentencing contained in s.142 of the Criminal Justice Act 2003, that does not mean that such disparity is in fact justified. It is submitted that only a case by case analysis of sentencing decisions could truly ascertain, on such a granular level, whether disparity is justifiable or not.

to plead guilty to criminal offences as this is likely to result in gross inconsistency, to level criticism at sentencing judges, or the sentencing process, for this deficiency seems incorrect. To do so legitimately, it must be established that there is some unjustified inconsistency in *the sentencing determination* when deciding the appropriate reduction in sentence for pleading guilty:[161] using our critical framework, this requires us to consider whether the data suggests the principle of proportionality is being properly applied.

Hudson found disparities in sentencing in relation to black offenders, only a proportion of which was capable of justification by reference to legally relevant factors.[162] While the initial analysis revealed a pronounced disparity, consideration of the offence-type (robbery and drugs offences being disproportionately committed by black offenders, for instance) reduced the extent of the disparity. Irrespective of the presence and extent of discrimination elsewhere in the system, efforts to control for various legally relevant factors produced results which affirmed previous findings that black offenders progressed more quickly through the hierarchy of non-custodial disposals than white offenders, thereby receiving custodial sentences sooner than white offenders.[163] In particular, Hudson found that in cases of offences against the person, there was "*a direct race effect on sentencing which produces custodial sentences in circumstances where white defendants would receive non-custodial disposals*".[164] This provides strong evidence of mis- or dis-application of sentencing principles resulting in unjustified inconsistency.

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161 In England and Wales, since 2007 there has been a sentencing guideline which regulates the reductions made for pleading guilty. The details and effect of this guideline will be explored in detail in Chapter 8.

162 Barbara Hudson, 'Discrimination and disparity: The influence of race on sentencing' (1989) 16(1) Journal of Ethnic and Migration Studies, 23, 27.

163 Hudson (n 162), 29.

164 Hudson (n 162), 30.

Hood's seminal study of Crown Court sentencing practices found a "*residual race difference*" of a greater likelihood of a custodial sentence in the region of 5% for black offenders.[165] The data required a degree of estimation, with Hood seeking to control for factors such as the composition of the cases coming before the courts, including the proportion of black offenders and the fact that they were generally being sentenced for more serious offences. Interestingly, the study found that 13% of the disparity – i.e. the lengthier sentences imposed on black defendants – was attributable "*almost entirely to the greater propensity of black defendants to plead not guilty*".[166] Ashworth describes this as the most wide-ranging and careful examination of race and sentencing in England and Wales.[167]

In the US, Rehavi and Starr found that although legally relevant factors could explain much of the disparity present in case data, significant gaps remained. They concluded that there was "*robust evidence that black male federal arrestees ultimately face longer prison terms than whites arrested for the same offenses with the same prior records*."[168] Spohn observed that studies conducted between 1930 and 1970 concluded that racial disparities in sentencing reflected "*overt racial discrimination*".[169] Reviewing recent studies in non-capital cases, Spohn asserted that the suspicion that race and/or ethnicity is a factor in sentencing (though not the primary determinant) had been confirmed. Further US studies have found a "*direct race*

165 Roger Hood, *Race and Sentencing* (OUP 1992), 78.

166 Ashworth (n 3), 255. This claim is also made by others, for example see Michael Tonry, *Punishment and Politics: Evidence and emulation in the making of English crime control policy* (Willan 2004), 78.

167 Ashworth (n 3), 255.

168 M Marit Rehavi and Sonja B. Starr, 'Racial Disparity in Federal Criminal Sentences' (2014) 122(6) Journal of Political Economy, 1320-1354, 1349.

169 Cassia Spohn, 'Racial Disparities in Prosecution, Sentencing, and Punishment' in Sandra Bucerius and Michael Tonry (eds) *The Oxford Handbook of Ethnicity, Crime, and Immigration* (OUP 2014), 180.

effect";[170] although the extent of the inconsistency naturally varies. Testing for interactive effects of race and gender has found that black female offenders on average received longer sentences (about three months) than white female offenders.[171] Though providing some evidence of net inconsistency, the weight which may be placed on this rests heavily on the extent to which the controls are rigorous.

A recent multivariate study commissioned by the Ministry of Justice found that those self-reporting as belonging to an ethnic minority were more likely to be sentenced to custody than those self-reporting as white; the data revealed statistically significant increases for those self-reporting as black, Asian or Chinese.[172] This robust study produced evidence of both gross and net disparities, the latter being the product of controls for certain case characteristics. Having controlled for variables such as previous convictions, previous cautions, age, and offence group, the data revealed a 50-55% increase in the odds of being sentenced to imprisonment for those self-reporting as Asian or black, and an 80% increase in the odds of being sentenced to imprisonment for those self-reporting as Chinese, as compared with being white. There was no increase in odds for those self-reporting as Mixed. The study also sought to evaluate the interactive effects of race and certain characteristics. Focussing upon the plea, it was noted that white offenders are more likely to plead guilty than black, Asian or Chinese offenders.[173] The study concluded that while plea could partially explain the association between race and sentencing, there remained a direct association between racial group and the

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[170] Cassia Spohn, Thirty Years of Sentencing Reform: The Quest for a Racially Neutral Sentencing Process (US Department of Justice 2000).

[171] Steffensmeir et al (n 143), 430.

[172] Kathryn Hopkins, Noah Uhrig, and Matthew Colahan, Associations between ethnic background and being sentenced to prison in the Crown Court in England and Wales in 2015 (Ministry of Justice Analytical Services 2016), 1.

[173] This has been stated elsewhere, see for example Tonry, (n 166), 78.

likelihood of receiving a custodial sentence.[174] This evidence of a residual and unexplained inconsistency suggests problems with the application of the principle of proportionality and also perhaps with the determination of sentence within the proportionate range.

The UK data is strong and consistent, particularly as it presents similar results 30 years apart, from Hudson and Hood in 1989 and 1992 to Ministry of Justice data in 2016; there is evidence of unjustified inconsistency which is attributable to the race of the offender. While studies from other jurisdictions are of more limited value, the view given by the US studies supports that provided by the UK data. This does not, however, paint a precise picture of the extent of unjustified inconsistency on grounds of race, but merely shows that there is a consistent body of literature demonstrating that studies in various jurisdictions, from various times, employing differing methods have produced evidence that BAME offenders are more likely to be sentenced to custody than white offenders and more likely to receive a lengthier custodial sentence than white offenders, when attempting to control for other variables. That such disparity ought to be addressed is entirely uncontroversial, though there may be disagreement regarding the remedial steps ought to be taken.[175] It might be said that this is a 'sentencing problem' and therefore it ought to be addressed with sentencers and the structures placed around the sentencing process. On the other hand, there may be factors which are better addressed earlier on in the process, such as the disparity in guilty pleas between white and black defendants.[176] This clearly – and rightly – leads to inconsistency in sentences imposed,

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174 Hopkins et al (n 172), 8.

175 Michael Tonry noted the many grounds on which policies leading to such results ought to be repealed and recommended an 'audit' of racial disparities in the criminal justice system. See Tonry (n 173), 87.

176 For a discussion as to whether the sentencing stage is too late to promote equality, see Rory Kelly and Andrew Ashworth, 'State Responses to Criminal Offences in England and Wales' in Matthew Dyson and Benjamin Vogel (eds) *The Limits of Criminal Law: Anglo-German Concepts and Principles* (Intersentia 2018), 345-361.

but not one which is objectionable on sentencing principles. That is not to say that it is not objectionable *per se*.

The literature is inconclusive as to whether the unjustified inconsistency is a product of the misapplication of the principle or proportionality (producing sentences outside the proportionate range), or a disapplication of sentencing principles attributable to conscious or unconscious biases towards BAME defendants (producing differential treatment within the proportionate sentencing range) or both. What is clear, however, is that unjustified inconsistency attributable to race exists and remedial action is necessary.

Intersectionality

Although this chapter has considered the two primary illegitimate factors which impact upon sentencing consistency in near isolation, it is important to note the interaction between them (and other factors) and the combined effect upon the present inquiry. Race and gender have been recognised as the dominant non-legal factors in the sentencing disparity debate for some time. By contrast, the extent to which these (and other such factors) interact, correlate or coalesce – i.e. intersectional factors – is a comparatively recent area of study.[177] Intersectionality literature argues that definitions of race and ethnicity are impacted by gender and vice versa.[178] The argument is therefore that such single-factor studies are incomplete, not providing a full and informed account. For instance, considering the gender disparity in the

[177] For the purposes of this chapter, the definition of intersectionality and intersectional adopted is as follows: "the concept or conceptualisation that each person has an assortment of coalesced socially constructed identities that are ordered into an inequitable social stratum", from Hillary Potter, *Intersectionality and Criminology: Disrupting and revolutionizing studies of crime* (Routledge 2015), 3.

[178] Potter (n 177), 8.

Lightowlers study would give the impression of a chivalrous approach, yet when the interaction with intoxication is considered, the effect of gender is transformed, as we know that intoxication has a differential impact for the sentencing of male and female genders.

Hitherto in the sentencing disparity debate, intersectionality research is barely mentioned. This is despite an increasing number of intersectional research studies into crime and criminology.[179] A 2010 study in the US considered the extent to which race and gender intersected at sentencing based on the composition of the courtroom staff, finding that courtrooms with greater female and ethnic staff were more inclined to leniency and increased representation of black prosecutors saw greater leniency for black female offenders.[180] More research is needed.

It seems as though sentencing disparity scholars are slowly moving away from the traditional offence-based approach, exemplified by studies such as Palys and Divorski. More modern studies – even those concerned with single factors – avoid the sole focus upon offence characteristics and consider offender characteristics too. That is not to say that the older studies ignored offender characteristics, but merely that they adopted a more traditional view, considering retributively significant factors such as previous convictions and factors such as employment (which might be said to be consequentialist and therefore relevant to the purposes of sentencing in s.142 of the Criminal Justice Act 2003).

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[179] Potter (n 177), 145.

[180] Farrell et al (n 157), 122.

The relevance of, for instance, socioeconomic status and its interactions with race and gender are important in this regard, as a greater proportion of women and persons of colour are situated in lower socioeconomic statuses than white men.[181] For instance, US data suggests that black women tend to be in less advantageous financial positions as they are less likely to have a partner and therefore are less likely to benefit from a second income. If they do have a partner, their partner is more likely to have a lower income than the partners of white women.[182] When this is set against the data referred to the in Halliday report, for instance that sentencing outcome is influenced by employment status (and therefore financial position), it is easy to see how the focus on one factor can mask the true picture of inconsistency. This has as least two important consequences: first, that we are unaware of the extent to which the principle of proportionality (and the purposes of sentencing listed in s.142 of the Criminal Justice Act 2003) are being mis- or dis-applied; and secondly that the true extent of inconsistency (and the extent to which it is unjustified) is masked. In relation to the second point, where a sentence is within the proportionate range, a focus upon one factor, such as gender, may create an impression that any residual variation may be unexplained but not unjustified as there is a degree of discretion and imprecision built into the sentencing scheme. A focus upon a fuller range of factors is likely to provide more accurate data enabling a higher quality analysis. Such a focus better accords with the recent increased interest in the offender; Sentencing Council guidelines relating to the custody threshold, children and young persons and domestic abuse focus far more on factors which pertain predominantly to the offender and not the offence, and in some cases, have nothing to do with the offence whatsoever.

181 Potter (n 177), 31.

182 Potter (n 177), 31.

The conclusion is obvious. Better data and analysis enable any remedial steps considered to be necessary to be more targeted and more effective. While there is a dearth of evidence as to inconsistency in sentencing having regard to intersectionality, the awareness of this knowledge gap will feed into the later analysis of the effectiveness of the current sentencing system in England and Wales in achieving the conception of consistency proposed in Chapter 2. This will ensure that the conclusions drawn later in this thesis will be more relevant to the current debate regarding race, gender and similar factors. It is hoped that it will be in turn produce more accurate and better-quality analysis of the methods currently in place to structure the discretionary sentencing decision in England and Wales.

Conclusion

This chapter has evaluated the literature on sentencing disparity. It is evident that there is strong, consistent evidence of inconsistency in sentencing derived from multiple jurisdictions. There appear to be various 'sources' including factors such as geographical variation and subjective assessments of particular cases, but also factors such as race and gender. It was argued that the existence of inconsistency in relation to these factors may not be unjustified as it is possible that they may feed into the assessment of the seriousness of the offence or may be relevant to one of the five statutory purposes of sentencing. That said, even if this unexplained inconsistency is legitimate on that basis – a difficult argument to sustain given the scale – there remains great cause for concern. The literature provides evidence of unjustified inconsistency in the form of sentences falling outside of the proportionate range and differential treatment between offenders by the imposition of sentences inside the proportionate range (where studies have isolated one factor, such as gender, and been able to attribute the residual variation to that factor). It is therefore evident that the application of the

principles of sentencing, predominantly retributive proportionality, is currently imprecise resulting in a state of affairs which cannot be conceived of as conforming with a normatively sound definition of consistency.

Chapter 4: Are individualised justice and consistency incompatible?

Individualized justice is prima facie at war with…consistency.[183]

Introduction

Krasnostein and Freiberg described consistency and individualised justice as being in "*perennial conflict*".[184] Is that correct, and if so, how might such conflict be resolved? This chapter explores the role that the concept of consistency has to play in a discretionary sentencing system. As established in Chapter 2, across the common law world, consistency is widely regarded as a necessary component of a fair sentencing system. However, in systems affording individual sentencers degrees of discretion in the sentencing process, so too is the concept of individualised justice. Beginning with an exposition of individualised justice, this chapter examines in depth the concept of a permissible range of sentences, as relied upon in Chapter 2. Having established the way in which individualised justice operates within a discretionary sentencing system, the chapter considers the ways in which the concept of consistency interacts with it. This chapter attempts to reconcile these apparently conflicting concepts.

Individualised justice requires that the determination of sentence ought to consider both the features of the offence and the offender but place a particular emphasis upon the characteristics of the individual. It is present in most, if not all, Western sentencing systems and is inextricably related to principles of sentencing and theories of punishment. It is

183 Frankel, 1973, (n 85), 10.

184 Krasnostein and Freiberg (n 31), 265.

suggested that reference to tension between the two concepts is misguided and that the argument that individualised justice results in a loss of (or reduction in) consistency is not borne out by principled analysis. This chapter argues that principled sentencing permits individualisation, it does not hamper it.

Individualised justice

The basic concept and its importance

The importance of individualised justice is generally accepted in the common law world, however the extent to which the concept is deployed varies. In the Australian Capital Territory, there is a statutory duty to "*have particular regard to the common law principle of individualised justice*" when sentencing a young offender.[185] Justices of the Supreme Court of New South Wales have previously commented that "*if justice is not individual, it is nothing*".[186] In the context of sentencing Aboriginal offenders in Australia, taking account of the disadvantaged treatment suffered by Aborigines has been held to be an application of equal justice, rather than a denial of it.[187] The CACD in England and Wales has similarly stressed the need to "*do justice in an individual case*".[188] Further, the US District Court has commented that "*…individualised sentencing is so important to the constitutional scheme that any legislative attempt to limit a defendant's ability to advocate mitigating circumstances to a jury*

185 Crimes (Sentencing) Act 2005 s.133C (ACT).
186 *Kable v DPP (NSW)* (1995) 36 NSWLR 374.
187 Justice Stephen Rothman, 'The Impact of Bugmy & Munda on Sentencing Aboriginal and Other Offenders' (Ngara Yura Committee Twilight Seminar, New South Wales, 25 February 2014) available at <http://www.austlii.edu.au/au/journals/NSWJSchol/2014/6.pdf> cited in Thalia Anthony, Lorana Bartels and Anthony Hopkins, 'Lessons lost in sentencing: Welding individualised justice to indigenous justice' (2015) 39:47 Melbourne University Law Review, 53.
188 *R. v Taylor* [2012] EWCA Crim 630; [2012] 2 Cr.App.R. (S.) 98 at [13] per Gross LJ.

is unconstitutional."[189] A pilot study conducted by Ashworth in the 1980s found that whereas judges considered consistency in sentencing to be an important feature, they were of the opinion that flexibility was needed in order to allow the court to do justice in an individual case.[190] The recognition of a need for consistency, but also for individualised justice demonstrates that there is a 'balancing act' to be performed when sentencing in order to achieve these two ideals. This too envisages consistency and individualised justice as being in conflict to some degree.

Individualised justice is generally understood to refer to the notion that a sentence should be bespoke to the particular features of the case.[191] An individualised approach requires that the sentence is tailored to the particular offence and offender.[192] This is in contrast to systems which limit the determination of sentence, perhaps by the use of minimum and maximum sentences, or permitting sentence determination by reference to 'key' factors only, such as prior record and offence seriousness. Individualised justice therefore encompasses a broader consideration of the case in order to balance often competing aims of punishment such as crime control measures legitimising the pursuit of rehabilitation verses the need to punish.[193] There is a tendency to view individualised justice as necessarily rehabilitative, however it appears that, at its core, individualised justice is rather agnostic as to whether the underlying theory is retributive, consequentialist or mixed. Further, while individualisation typically

[189] *US v Pitera* 795 F.Supp. 546 (1992), at p 564.
[190] Andrew Ashworth, *Sentencing in the Crown Court: Report of an Exploratory Study, Occasional Paper No.10* (Centre for Criminological Research 1984), 20.
[191] von Hirsch (n 62), 27.
[192] Anthony et al (n 187), 51.
[193] Anthony et al (n 187), 52.

results in mitigation of sentence, both common law jurisdictions and continental systems endorse the aggravation of sentence in pursuit of the individualisation of sentence.[194]

A system which does not adopt an individualised approach will tend to operate with a greater restraint on judicial discretion, limiting the extent to which a sentencer is able to reflect the nuances of the particular case in the sentences they impose.[195] In England and Wales, the concept has longstanding roots, Radzinowicz and Hood described the Victorian Criminal Law Commissioners' desire to preserve judicial discretion as stemming from the English common law tradition of leaving room to "*accommodate the peculiarities of individual cases*".[196] The result may be a sentence which differs from the normal or expected sentence in a given scenario and is justified by conceptions of fairness and justice to the individual offender.[197] Yet this definition of individualised justice, focussing upon the "*particular features of the case*" is vague; unless a sentence is imposed arbitrarily, then all sentences are to some extent 'bespoke' and tailored to the individual. A tighter definition is needed.

[194] As an example, the French Penal Code devotes an entire section to the individualisation of sentences and the aggravation of sentence is permitted both at the judgment stage and the sentence execution stage.

[195] See for example the description of the approach taken in England and Wales as compared with the US Sentencing Commission, as described by Hutton: Neil Hutton, Sentencing as a Social Practice in Sarah Armstrong and Lesley McAra (eds) *Perspectives of Punishment: The contours of control* (OUP 2006), 159.

[196] Leon Radzinowicz and Roger Hood 'Judicial Discretion and sentencing standards: Victorian attempts to solve a perennial problem', (1979) 127(5) University of Pennsylvania Law Review, (University of Pennsylvania 1979), 1294.

[197] For example, see *R. v Glover* [2010] EWCA Crim 1714 at [7] and *R. v Gibson* [2004] EWCA Crim 593; [2004] 2 Cr.App.R. (S.) 84 at [3].

The offence, the offender, or both?

While there is a general consensus as to the importance of individualised justice, there is disagreement regarding its scope. Does it permit an "*anything goes*" approach to sentencing, providing that there is some rationale underpinning the 'alternative' sentencing disposal imposed by the court, or is it more structured and more principled? Are considerations limited to the offender, or are they broader than that?

While Doob and Brodeur note that individualisation is often used to mask anarchy in sentencing as order and to market chaos as deliberation, they are clear in their view that the stronger justification for individualisation is that the sentence should fit the individual offender.[198] Interestingly, they note that in the history of sentencing theory, it is evident that individualised justice began not as a mechanism of distinguishing between individuals but to enable the courts to distinguish between "*common criminals*" and politically motivated offenders.[199] While this may encompass some consequentialist considerations, at its origin, individualised justice appears to have permitted an enquiry into circumstances of the offence as well as the offender, with a focus principally on the offence (and the offender's motivations for its commission). However, as Doob and Brodeur note, the emphasis now appears to be on the individual in a wider sense. This is presumably at least partly due to the fact that in most systems, offence-based factors will be considered in any event.

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198 Anthony N Doob and Jean-Paul Brodeur, 'Achieving Accountability in Sentencing' in Phillip C Stenning (ed) *Accountability for Criminal Justice: Selected Essays* (University of Toronto Press 1995), 387.

199 Doob and Brodeur (n 198), 387.

Doob and Brodeur go on to set out their view of individualised sentencing "*at its best*", describing a system which required the judge to assess the factors which spoke to that purpose.[200] Yet they accept that this is not the concept that the term refers to. They suggest two possible definitions, the first being so broad that it can be described as an "*anything goes*" approach, so long as it is possible to form a *post hoc* justification. The second, "*less anarchistic*" definition is that individualised justice requires the court to decide what the major goal of the sentence should be, and then to impose a sentence which best meets that goal.[201] It is worth noting that in England and Wales, that is similar to the current approach permitted by the Criminal Justice Act 2003 s.142.

The broader definition suffers from theoretical difficulties. Permitting an "*anything goes*" approach focuses upon the discretion of the judge, however this, as is implied by Doob and Brodeur's description of "*anarchy*", pays no regard to rule of law principles such as clarity and certainty, in addition to the need for consistency. It would, however, accord with Hutton's view that much of the literature regards individualised justice as being without rules.[202] This first definition, requiring a *post hoc* justification for whatever disposal is identified, is understandably rejected by Doob and Brodeur; it would be practically problematic and antithetical to the general direction of travel as regards sentencing being increasingly principled and rule-driven.[203]

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[200] Doob and Brodeur (n 198), 387.
[201] Doob and Brodeur (n 198), 388.
[202] Neil Hutton, 'Visible and Invisible Sentencing' in Annie Hondeghem, Xavier Rousseaux and Frédéric Schoenaers (eds) *Modernization of the Criminal Justice Chain and the Judicial System*, (Springer 2016), 2.
[203] See e.g. Norval Morris 'Towards principled sentencing' (1977) 37 Maryland Law Review 267; Sentencing Guidelines Council, *Overarching principles: Seriousness Definitive Guideline* (Sentencing Guidelines Council 2004); Julian V Roberts and Jan W de Keiser, 'Democratising punishment:

The latter definition better describes the way in which the concept is applied in practice in England and Wales: with a list of sentencing principles, none of which take precedence,[204] the court is permitted to sentence according to its own penal philosophy (within the bounds set by the purposes of sentencing). Yet this second definition subtly moves away from the offender-based focus which emanates from much of the literature and the case law. This definition is wider than many of the others discussed above in that it appears to be agnostic as to whether the focus ought to be on the offence or the offender. Such an approach however does encompass a principled approach to sentence determination as it is wedded to the purposes of sentencing to which the particular system subscribes.

Hutton suggests that the "*...discourse of 'individualised sentencing'*" argues that each case is unique and that a just sentence can only be reached by the consideration of the detailed facts and circumstances of each individual case. Judges craft a bespoke sentence which fits the distinctive combination of facts and circumstances which make up the case and this in turn generates a sanction which achieves a "*just*" sentence.[205] In doing so, he identifies a wider definition of the concept to seemingly include offence-based in addition to offender-based factors. This, again, appears to move away from the more traditional view of the concept as being almost exclusively offender-based, but appears to enable its operation within the confines of sentencing principle. While each case may be unique – in the sense that no two cases are factually identical – the reliance upon judicial discretion and the concomitant experience of a

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Sentencing, community views and values' (2014) 16(4) Punishment and Society 474; Northern Ireland Assembly, *Sentencing guidelines mechanisms in other jurisdictions: Research Paper* (79/16, 2016), 10.

[204] See the Criminal Justice Act 2003 s.142 and Ashworth (n 3).

[205] Hutton (n 202), 2.

sentencing judge appears to undermine the argument that cases are unique and therefore individualisation commands a wide discretion to enable the court to 'do justice'.

As Hood and later Ashworth noted, if experience is of value, then all cases cannot be unique and must be to some degree comparable.[206] The Hood/Ashworth rebuttal however runs contrary to the account of consistency proffered in Chapter 2 as it favours sentencing by comparison as opposed to by reference to principle. Is it impossible to view all cases as being unique, but simultaneously rely upon the experience of sentencers in the determination of sentence? I suggest it is possible where the application of the experience concerns sentencing principles as opposed to other, comparable, cases (or the 'going rate'). Perhaps a better interpretation of Hutton's view is that cases are unique and therefore require a consideration of all of the circumstances in order to arrive at a just sentence. That is not to take away from Hutton's wider definition of individualised justice however. It is capable of operating within a scheme grounded in sentencing principle, as noted above, but the individualisation is likely to have a more muted impact than narrower definitions of the concept owing to the focus placed upon the offence as well as the offender. Such a definition therefore appears to fit more comfortably within a retributive scheme.

While there is evidently disagreement, the general view appears to be that the concept focusses upon the individual rather than other particulars of the offence. In *R. v Gladue*[207] the Canadian Supreme Court considered the issue, stating that "*[s]entencing is an individual process and in each case the consideration must continue to be what is a fit sentence for this*

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[206] Roger Hood, *Sentencing in Magistrates' Courts: A Study of Variations of Policy* (Stevens and Sons 1962) 16; Ashworth (n 23), 25-6.

[207] [1999] 1 S.C.R. 688.

accused for this offence in this community."[208] While seemingly adopting a slightly broader view than is traditional, encompassing offence-based factors into the equation, the general thrust of the judgment was to focus upon the individual's characteristics and how that might justify adopting a different course. Similarly, in *Bugmy v The Queen*[209], the High Court of Australia described a submission that account should be taken of the systemic background of deprivation of Aboriginal offenders as "*antithetical to individualised justice*" which said "*nothing about a particular Aboriginal offender*".[210] In so doing, it seemingly adopted the approach taken in *Gladue*, setting out its view that the concept of individualised justice predominantly concerned the individual offender (as opposed to the offence).

There is further support for this approach in practice; guidance issued jointly by the Home Office and Ministry of Justice on integrated offender management emphasises the need to provide individual offenders with paths out of crime.[211] This recognition of individualised justice was also seen in the major Ministry of Justice consultation on sentencing and managing offenders: *Breaking the Cycle.*[212] The paper noted the scope to increase the use of community orders with rehabilitative requirements, thereby placing an emphasis on the need – at least in certain cases – for individualisation. The paper also noted the use of community disposals in

[208] At [93](5).
[209] (2013) 249 CLR 571.
[210] At [41].

[211] Home Office and Ministry of Justice, *Integrated Offender Management: Key Principles: February 2015* (Home Office and Ministry of Justice 2015) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/406865/HO_IOM_Key_Principles_document_Final.pdf> accessed 9 February 2017. It is worth noting that this can be distinguished from sentencing on the basis that the guidance is concerned with the administration of sentence rather than its imposition, however it is suggested that it demonstrates a system-wide endorsement of individualised justice at a more general level.

[212] Ministry of Justice, *Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders: Evidence Report* (Ministry of Justice 2010).

the case of young offenders, identifying the "*sustained focus on tackling the factors that contribute to the young person's offending behaviour*."[213] In the response to consultation, the Government noted the need to ensure certain offenders received more individualised treatment by the courts and throughout their sentences and to increase judicial discretion to enable a greater number of non-immediate custodial sentences to be imposed.[214]

Therefore, while there is some disagreement as to the precise nature of individualised justice, it is clear that the emphasis – at the very least – is on the individual and his or her characteristics rather than the offence. Unless otherwise indicated, 'individualised justice' will henceforth refer to the concept that requires the sentencing court to consider the features of the offence and the offender, placing particular emphasis upon the individual's characteristics.

Individualised justice: Structured discretion or carte blanche?

How much discretion is it appropriate for a court to have? Hutton regards the literature as consistent in the view that individualised justice carries with it an absence of rules. He asks the question "*How can the exercise of discretion by individual judges produce broad patterns of consistency in sentencing?*"[215] This therefore appears to accord with the "*anything goes*" view of individualised justice proffered by Doob and Brodeur.[216] Can individualised justice be reconciled with a theoretically sound sentencing system, or does it simply give a court *carte blanche* to do as it pleases?

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[213] Ministry of Justice (n 212), para.3.32.
[214] Ministry of Justice, *Breaking the Cycle: Government Response*, (Cm 8070 2010), paras.21 and 30.
[215] Hutton (n 202), 2.
[216] Doob and Brodeur (n 198), 387.

Some judicial definitions of individualised justice are looser than that suggested by their academic counterparts. These general definitions include that individualised justice "*...necessitates a broader inquiry into all aspects of the defendant's life and the crime committed...*"[217] and "*depends on the elementary proposition that the wide variation of circumstances of both the offence and of the offender must always be taken into account, so that the sentence is appropriate to the individual case.*"[218] Whether one adopts the loose, judicial definition or a somewhat tighter, academic definition placing a greater emphasis on the individual, it is clear that individualised justice can incorporate retributive concerns as, notwithstanding the focus to be placed upon the individual's characteristics, "*the severity of punishment should be a function of the seriousness of the offence*".[219]

The broader inquiry into the considerations of the offender's personal circumstances unrelated to the offence incorporates utilitarian values.[220] For this reason, conceptions of individualised justice are naturally drawn towards mixed theories, with limiting retributivism perhaps the most obvious. The focus on the offender – rather than the offence – however, remains clear in much of the literature.

If one adopts Morris' limiting retributivism model – an approach using an 'exchange rate' between sanctions to allow for individualisation within the bounds of proportionality[221] – individualised justice in fact appears to be a central feature. As noted by Frase:

217 *US v Pitera* 795 F.Supp. 546 (1992).
218 Spigelman (n 34).
219 Douglas N Husak, 'The Seriousness of Drug Offences' in Ashworth and Wasik (n 44), 189.
220 Richard S Frase, 'Limiting Retributivism' in von Hirsch, Ashworth and Roberts (n 24), 137-139.
221 Frase (n 220), 138.

> *"Sentencing severity can be precisely scaled to desert by means of sanction equivalency scales and interchangeable sanction. This would allow equally culpable offenders to receive very different forms of punishment that are deemed to have equivalent punitive bite but which can be tailored to the particular crime control, restorative justice or other needs of the particular case…"*[222]

This permits two outcomes: first, that sentences of differing severity (within the bounds set by proportionality) are imposed on equally culpable offenders who have committed an identical offence; or second, that the individualisation merely allows a sentence of the same severity but of a different nature to be imposed on equally culpable offenders who have committed an identical offence. For the limiting retributivist, either approach would appear to be permissible and in accordance with principle.

But what of those who do not subscribe to retributivism as a limiting principle?[223] The approach permitted under Morris' model above would attract criticism regarding the "*morally problematic*" situation of visiting differing degrees of punishment on equally culpable offenders, where punishment embodies blame.[224] Morris accepted that such a scenario could occur, but viewed equality as a guiding principle which applied only unless there were good reasons to impose different sentences.[225] Therefore, where other considerations, say, deterrence, applied, different amounts of punishment would be permissible. Such a response does not appear to assuage the concerns of the defining retributivist; von Hirsch purports to offer a solution by recognising "*the crucial difference between the comparative ranking of punishments on the one hand, and the overall magnitude and anchoring of the penalty scale*

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[222] Frase (n 220), 139-140.
[223] See for example Andrew von Hirsch, 'Proportionality in the Philosophy of Punishment' (1992) 16 Crime and Justice, 75.
[224] Andrew von Hirsch, 'Proportionate Sentences' in von Hirsch et al (n 24), 119.
[225] Richard S Frase, *Just Sentencing: Principles and Procedures for a Workable System* (OUP 2012), 83.

on the other",[226] criticising Morris for neglecting this distinction. Yet this 'solution' – a recourse to his ordinal and cardinal proportionality theory – is, with respect, nothing of the sort. Instead, it is merely a rejection of Morris' limiting retributivism in favour of von Hirsch's pure proportionality. By relying upon cardinal proportionality to anchor the penalty scale, and ordinal proportionality to guide the imposition of the appropriate sentence within that scale, von Hirsch simply reaffirms his stance and in so doing dismisses limiting retributivism.[227] It does not appear to advance the debate as to the conflict between pure and limiting retributivism. However, von Hirsch has advocated a limiting retributivist model in an article considering a more integrated system of non-custodial penalties which are not simply rehabilitative sentences as alternatives to punishment. Their proposal assumes "*full adherence*" to desert principles but recognises that utilitarian aims may be considered where they do not infringe proportionality requirements.[228]

Returning to the issue of the role individualised justice plays in such schemes, for the limiting retributivist, the role is clear. But does this reasoning not also assuage the concerns of the defining retributivist? The crucial element is surely the different sanctions of equal punitive bite - another form of individualisation of sentence.[229] Individualised justice would permit considerations broader than purely offence seriousness to determine which of the equally severe sentences should be imposed. The von Hirsch criticism therefore appears to fall away. However, for the retributivist who considers there is only one appropriate disposal (as opposed

[226] von Hirsch (n 224), 120.
[227] von Hirsch (n 224), 119.

[228] Martin Wasik and Andrew von Hirsch, 'Non-custodial penalties and the principles of desert' [1988] Crim LR 555.

[229] This enables a court to individualise a sentence based on the impact of sentences on the individual before the court. This might manifest as a reduction in sentence by virtue of custody being more onerous for a person of advanced age or ill health, or a recognition that a community sentence may be more onerous than a short custodial sentence.

to multiple disposals) does individualised justice have a role? The key here is culpability, a core requirement of a retributive justification for sentencing. In the assessment of culpability, there is room for a broader consideration of the individual's characteristics to influence the sentence. For example, culpability does not simply have to operate as a proxy for *mens rea* but can involve a wider consideration of an individual's purpose and motivations. For an offender who committed a robbery, the purpose of the robbery – to obtain money to buy food for their starving family – can be a relevant consideration in the assessment of culpability. It is suggested therefore that individualised justice can have a role to play, even in a defining retributive scheme. However, as Tonry notes, only the most rigid retributivist would hold that there is only one appropriate sanction for a given offence.[230] Yet even for the strictest retributivist, individualisation of sentencing is not precluded; a wider consideration of the offence and offender such as that required by individualised justice can be incorporated within such a theory.[231]

In relation to consequentialist approaches to punishment, a form of individualised justice is capable of justification by a different route. Consequentialist theory justifies punishment by reference to its effects, namely that the imposition of punishment can reduce criminal actions and is therefore morally acceptable and rational. The theory principally revolves around three key mechanisms; deterrence, incapacitation and rehabilitation.[232] At a rather general level, it is immediately apparent how individualised justice interacts with two of these three strands of consequentialist sentencing theory. Incapacitation and rehabilitation necessarily involve consideration of the offender's personal circumstances in order to assess

230 See for example, Michael Tonry, 'Individualizing Punishments' in von Hirsch et al (n 24), 356.

231 This of course depends on how one views the definition of "*offence*" in relation to the object to which the punishment must be proportionate.

232 See e.g. Ashworth (n 3), 83-93.

the likelihood of any punitive measure achieving its crime control goal. As for deterrence, closer inspection is required.

Rehabilitation is the most compatible with individualised justice. Sentencing disposals justified by a rehabilitative rationale include treatment,[233] for example, to tackle substance dependency, a predilection for indecent images or difficulties in controlling one's temper. In England and Wales, explicitly rehabilitative disposals exist as requirements as part of a sentence to be served in the community.[234] However, such goals could also be pursued inside the prison estate.[235] Further, courses designed to educate and develop skills can assist in the pursuit of rehabilitation. This may be in order to remove the (perceived) need to commit crime in order to obtain money by improving prospects of entering employment. Alternatively, it may be to provide education in a broader sense to promote reflexive thinking on the part of the offender as to their motivation and decision to offend.[236]

Rehabilitation, at least on the correctional model, primarily concerns the attempt to foster law-abiding habits among offenders by attempting to change attitudes and

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[233] Ashworth (n 3), 91.

[234] For example, see the Criminal Justice Act 2003 s.177 and the list of requirements which may be imposed as a part of a community order. These include alcohol and drug treatment, mental health treatment and rehabilitation activity requirements.

[235] A frequent criticism of short custodial sentences is that (particularly with early release and release on home detention curfew) it leaves insufficient time to complete courses while inside custody, see e.g. Ofsted, *Learning and skills for offenders serving short custodial sentences*, (Ofsted 2009) <http://dera.ioe.ac.uk/338/1/Learning%20and%20skills%20for%20offenders%20serving%20short%20custodial%20sentences.pdf> accessed 25 November 2016, 5.

[236] There is perhaps here, an overlap with restorative justice and the concept of forcing an offender to face the reality of their offending as a method of promoting desistence. See Andrew Ashworth, 'Responsibilities, Rights and Restorative Justice' (2002) 42 Brit J Criminol 578; and Ministry of Justice, *Restorative justice* (Ministry of Justice 2013) <https://www.gov.uk/government/collections/restorative-justice-action-plan> accessed 9 February 2017.

inclinations.[237] Ashworth notes that "*[t]he term 'treatment' has often been used in this context…as an allusion to the medical model in which the pathological state of the offender is diagnosed and treated by experts.*"[238] This clearly adopts an individualised approach; the disposal is directly influenced by considerations of the offender's personal characteristics. The opposite approach, which as Ashworth notes is more aligned with the continental European approach, focuses upon reintegration into society.[239] While this at first blush might appear to be less ingrained with an individualistic approach than the correctional model, it still necessitates a consideration of the offender's circumstances. This approach may involve considerations of the offender's friends and family members, and even the involvement in a discourse with what Ashworth terms 'stakeholders' in the offender's resettlement in the community.[240] This, too, involves tailoring the disposal to the particular offender, though, as suggested above, employs perhaps a wider interpretation of factors relevant to the decision. Ashworth notes that the resettlement model stems from a resurgence of criminological interest in desistence and resettlement, in an attempt to identify the conditions most favourable to an offender's desisting from offending. He notes that the focus is on "*dealing with the aftermath of the offence and the sentence so that the offender can be re-established as a law-abiding member of the community.*"[241] This, he states, is in contradistinction to the correctional model which places emphasis on responding to the individual's offending behaviour.[242] Regardless of whichever model is adopted, it is apparent that rehabilitation necessitates an individualised

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237 Andrew Ashworth, 'Rehabilitation' in von Hirsch et al (n 24), 2.
238 Ashworth (n 237).
239 Ashworth (n 237).
240 Ashworth (n 237), 2, suggests that such individuals could also include victims, which inevitably introduces an overlap with restorative justice methods.
241 Ashworth (n 237), 2.
242 Ashworth (n 237), 2.

approach to the determination of sentence and that it is merely the parameters of the relevant considerations which differ.

Putting aside the lack of evidence of marginal deterrence, deterrence poses a greater challenge if one seeks to reconcile it with an individualistic approach to sentence.[243] It is necessary to distinguish between special and general deterrence. The former, in seeking to deter the specific offender from reoffending, adopts an individualised approach. The latter, however, focuses on deterring society from offending and so an individualist approach is difficult to read into general deterrence theory.

It is possible then, for the purposes of this discussion, to address special deterrence rather swiftly. In focusing on the propensity of the individual to reoffend, special deterrence adopts an individualised approach, requiring an assessment of the individual and mandating the imposition of a penalty which achieves the crime control goals for that specific offender. In this way, the individualised approach focuses principally on the offender and how his or her previous criminal history informs the risk of reoffending.[244] However, one might consider the view that special deterrence employs an individualised approach as somewhat stretching the definition; the thrust of much of the literature suggests that individualised justice tends to focus on more lenient punishments, or disposals which do not seek to punish at all whereas deterrence tends to support the imposition of more severe punishments.[245] Yet all that individualised

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[243] See e.g. Anthony N Doob and Cheryl M Webster, 'Sentence Severity and Crime: Accepting the Null Hypothesis' (2003) 30 Crime and Justice 143-195.

[244] Ashworth (n 3), 83.

[245] It will be noted that almost all of the foregoing discussion surrounding individualised justice concerns measures in response to factors which would be considered to mitigate (or at least not aggravate) a sentence.

justice requires, as noted above, is that the sentencing disposal is tailored to the individual offence and offender, with a focus upon the individual's characteristics. For the recidivist offender (the most obvious example of when special deterrence would be employed as a purpose of sentencing)[246] the severity of a sentence is increased (within the bounds set by proportionality) unless a minimum sentence applies. As a method of preventing the commission of further crime, an assessment of the offender's criminal history will have informed the decision to employ special deterrence as a purpose of sentencing and to what extent.

General deterrence on the other hand seeks, through the imposition of severe penalties, to deter the public at large (or a particular group of the public) from committing offences of the kind committed by the offender.[247] Is it possible to achieve general deterrence within an individualised justice framework? If, as established above, individualised justice requires consideration of the offence and the offender, the natural conclusion one may be drawn to is that general deterrence cannot be achieved by an individualistic approach as the focus is on the offence, to the exclusion of the offender. Warner stated that "*[f]or general deterrence the individual offender does not matter.*"[248] This logically follows the rationale underpinning general deterrence as a justification of punishment; the deterrent effect would be limited where considerations of the offender permit a deviation from such a sentence. For instance, allowing the existence of a mental disorder reducing culpability to permit a deviation from deterrent

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[246] Ashworth (n 3), 83.

[247] Ashworth (n 3), 84.

[248] Kate Warner, 'Theories of sentencing: punishment and the deterrent value of sentencing', (Sentencing: From theory to practice conference, Canberra, 8-9 February 2014) <https://njca.com.au/wp-content/uploads/2013/05/Warner-paper.pdf> accessed 29 November 2016, 5.

sentences could be argued to "*water down*" their effect.[249] While some have acknowledged the argument that to impose deterrent sentences on for instance, those with mental disorders reducing culpability,[250] undermines the purpose, the stronger argument goes the other way. By imposing deterrent sentences on all, including those suffering from a mental disorder reducing culpability, the message communicated to the public is that there is little chance of avoiding condign punishment, as the courts will severely punish even those who it recognises are less culpable.[251] In practice, the courts are unlikely to pursue such a policy in a system grounded in mixed theory (as most Western systems are) as the likely result would be a disproportionate sentence which would likely be in contravention of the principles underpinning the system.[252]

But is it correct to state that the individual offender does not matter in general deterrence theory? Consider an offence of possession of a prohibited firearm committed by the partner of a drug dealer. Where the offender allows the drug dealer to store a prohibited firearm at their address, through fear of violence, the decision as to whether to impose a deterrent sentence to 'send a message' to others in a similar position necessarily encompasses considerations of the individual offender. This is due to the need to consider the effectiveness of a general deterrent

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249 The counter hypothesis would be that if reduced culpability is not taken into account, resulting in a reduction in the frequency with which general deterrence is employed as a rationale for sentencing, the public would see sentencing as unjust. This is an empirical claim which is not appropriate to venture into here.

250 See e.g. Warner (n 248), 6.

251 This echoes the principled objection to general deterrence as a rationale for sentencing, namely that it would, in theory, permit harsh treatment to be imposed upon an innocent individual if such treatment would deter others from committing such offences, see Ashworth (n 232), 85 for a discussion.

252 An example of such an approach can be seen in the cases concerning the possession of a prohibited firearm which is subject to a minimum sentence of five years' imprisonment (which the courts have noted are designed to achieve general deterrence, see *R. v Rehman* [2005] EWCA Crim 2056; [2006] 1 Cr.App.R. (S.) 77 at [4]). In cases where culpability is low or non-existent (as the offence is one of strict liability), the courts routinely disapply the minimum sentence, rejecting general deterrence as a purpose of sentencing. An examination of the case law reveals that such an approach is required when the minimum sentence would be disproportionate.

sentence and the class of people to whom the 'message' is being sent. It is necessary to consider the circumstances of the offender in order to ascertain whether or not a general deterrence sentence is suitable. Therefore, Warner's claim that the individual is irrelevant seems to be questionable. However, if, in theory, general deterrence does permit punishment to be visited upon an 'innocent' individual, as it permits a disproportionate punishment to visited upon an offender of little or no culpability, is that fatal as regards a role for individualised justice? While considerations of the individual can be arguably encompassed within general deterrence theory, the question of whether or not individualised justice has a role to play in this context depends on the definition one adopts; if the prioritisation of the offender's characteristics requires a consideration of what is best for that particular offender, then it can have no role in general deterrence theory. However, if it merely requires that the personal characteristics themselves are prioritised, then it is arguable that there is a role for individualised justice to play. As this chapter has subscribed to the latter, it is suggested that individualised justice does in fact have a role to play here, though it is recognised that this is rather contentious.

There is support for this in practice. Certain jurisdictions have indicated that particular cases are inappropriate for deterrent sentences. In the Australian case of *Muldrock v The Queen*,[253] the Chief Justice noted that such a principle was "*well established*" in relation to mentally disordered offenders. The court stated:

> *"A question will often arise as to the causal relation, if any, between an offender's mental illness and the commission of the offence. Such a question is less likely to arise in sentencing a mentally retarded offender because the lack of capacity to reason, as an ordinary person might, as to the wrongfulness of the conduct will, in most cases, substantially lessen the offender's moral culpability for the offence. The retributive effect and denunciatory aspect of a sentence that is appropriate to a person of*

[253] (2011) 244 CLR 120 at [54].

ordinary capacity will often be inappropriate to the situation of a mentally retarded offender and to the needs of the community."

In *R. v Gomes Monteiro*,[254] the Lord Chief Justice underlined earlier guidance given by the Court of Appeal (Criminal Division) that:

"*Given the prevalence of knife crime among young persons, the youth court had to maintain a very sharp focus, if necessary through the use of more severe sentences, on preventing further offending by anyone apprehended for carrying a knife in a public place and to securing an overall reduction in the carrying of knives by young persons."*

While underlining the need for deterrent sentences, this appears to invest courts with a degree of discretion when considering whether or not a particular case requires such a sentence. That there is a role for individualised justice in general deterrence theory is capable of further support through parliament's approach to minimum sentences. The possession of a prohibited firearm for instance is subject to a five-year minimum sentence,[255] for the purposes of general deterrence.[256] In *R. v Rehman*[257] the court when considering the minimum sentence provision for an offence of possession of an offensive weapon said:

"The weapons, with which we are concerned, are ones in relation to which Parliament by s.51A has signalled it was important that there should be imposed deterrent sentences. By "deterrent sentences" we mean sentences that pay less attention to the personal circumstances of the offender and focus primarily upon the need for the courts to convey a message that an offender can expect to be dealt with more severely so as to deter others than he would be were it only his personal wrongdoing which the court had to consider."

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[254] [2014] EWCA Crim 747; [2014] 2 Cr.App.R. (S.) 62.

[255] See the Firearms Act 1968 ss.5 and 51A.

[256] It is noteworthy that in setting a minimum sentence for the purposes of general deterrence, the exercise of individualisation is performed by the judge in determining whether or not to disapply the statutory minimum sentence and how severe the sentence ought to be (either above or below the minimum). The imposition of a deterrent sentence is at first *ex ante* as opposed to *ex post facto,* determined only by the offence itself.

[257] [2005] EWCA Crim 2056; [2006] 1 Cr.App.R. (S.) 77.

Yet this minimum sentence is subject to an 'escape clause' allowing the court to disapply the minimum sentence provision where exceptional circumstances exist.[258] Typically the escape clause is applied in cases of low culpability[259] but can be utilised on the basis of other factors such as guilty plea and matters of personal mitigation.[260] This forces a consideration of the individual features of the case as a gateway criterion to the imposition of a deterrent sentence. Therefore, as the court in *Rehman* noted, the offender's personal characteristics remain a relevant consideration. Take the example of an offender who suffers from a mental disorder. In sentencing for an offence concerning the use of a knife – an offence for which the courts have consistently imposed deterrent sentences – the court may consider whether or not a deterrent sentence is appropriate, balancing the need to communicate to the wider public that severe sentences will be imposed for such offences against the presence of the mental disorder. If deterrence is appropriate, it may require a severe sentence in pursuit of those aims and the mental disorder may be relevant in determining how severe the sentence ought to be; if it is not, it will impose a sentence in accordance with one or more of the other sentencing principles. In both cases, the court will have considered the individual's characteristics (i.e. the mental disorder) to determine whether or not general deterrence is an appropriate aim to pursue, tailoring the sentence to the individual case.

Is this appropriate to bring sentences imposed in pursuit of general deterrence under the umbrella of individualised justice? It is arguable that this approach stretches the definition too

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[258] Other instances of minimum sentence legislation in England and Wales use a seemingly wider "unjust in all the circumstances" test for disapplication.

[259] For instance where the offender has a mental disorder or where the offender had no mens rea in the context of a strict liability offence, see for example s.51A of the Firearms Act 1968.

[260] HHJ Mark Lucraft QC (ed) *Archbold Criminal Pleading, Evidence and Practice 2019*, (Sweet and Maxwell 2018), § 5A-63 et seq.

far; individualised justice must require more than merely the fact of considering the circumstances of the case and imposing sentence. Otherwise, every system which imposed sentences by reference to the circumstances of each case could be said to subscribe to the concept of individualised justice.

While the Doob and Brodeur definition, discussed above, would appear to place general deterrence under the umbrella of individualised justice on the basis that it requires the court to select a primary rationale for sentencing and impose a sentence which meets that rationale, such a definition eschews the focus on the offender which is so central to the concept. Without such a focus, the concept would be so general as to permit widespread disparity in sentencing – something which Doob and Brodeur described as "*anarchy*" and sought to avoid. Yet their second, preferred, definition did not achieve that aim. In a mixed theory system such as England and Wales in which the court is able to select a primary rationale for sentencing from a wide range, disparity would result so as to fundamentally undermine the sentencing system.

I suggest that a consideration of the offender's characteristics in determining firstly whether or not a general deterrent sentence is appropriate and thereafter the severity of the sentence in pursuance of general deterrence are sufficient to identify an element of individualisation within deterrence theory. It is accepted that it relies upon a rather weak account of the concept and the underlying rationale for deterrence has the ability to rather marginalise the effect of the individualisation. That said, as argued above, a consideration of whether a sentence increased in the name of general deterrence is appropriate requires a consideration of factors which can fall within a wide definition of individualised justice. As noted above, while much of the literature suggests a de-escalation of sentence severity in the name of individualised justice, the foregoing discussion does not appear to identify this as a

pre-requisite. By prioritising the offender's characteristics in order to determine the appropriate sentence, the sentence is individualised within the scope of the sentencing principles to which the system subscribes.

Judicial discretion

Some have opined that individualised justice requires *wide* judicial discretion[261] in order to enable a sentencing court to impose the sentence most appropriate to the individual facts of the case. However, this is of course a matter of degree; individualised justice is, like consistency, a vehicle which can be used to arrive at a principled sentence. It can operate with a narrow discretion afforded to sentencing judges, just as it can operate with a wide discretion. The extent to which the sentence is tailored depends upon the limits of the particular sentencing scheme and the sentencing disposals made available to a sentencing court by the legislature. While it therefore seems that a wide discretion is not a prerequisite, it certainly assists in the pursuit of individualised justice. In any event, a degree of discretion is absolutely necessary. Perhaps unsurprisingly then, the case for individualisation (and a wide discretion) has traditionally been made by the judiciary.[262] The argument has however been made by academics too; for example, von Hirsch described the need for "*the widest discretion…hampered by as few legal constraints as possible*" in order to achieve individualisation.[263]

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[261] Arie Freiberg and Sarah Krasnostein, 'Statistics, damn statistics and sentencing' (2011) 21 Journal of Judicial Administration 73, 74.

[262] See for example Cyrus Tata et al, 'Assisting and advising the sentencing decision process: The pursuit of 'quality' in pre-sentence reports' (2008) 48 Brit J Criminol 835, 851.

[263] von Hirsch (n 62), 27.

According to Freiberg and Krasnostein, individualisation is shaped by a number of "*well-established*" propositions, including:

a) there being no single correct sentence;
b) no two cases are the same; and
c) sentencing cases are not precedents.[264]

These propositions would appear to compliment rather than underpin the concept of individualised justice. If the core of individualised sentencing is to tailor the sentence to the unique facts of each case, then at its most simplistic, all that would appear to be required is that the court has sufficient flexibility to impose what it considers to be the appropriate sentence within the bounds of the particular sentencing regime. It is not necessary to have a wide range of sentencing disposals, simply the discretion to do what is appropriate within the confines of the particular system. This of course makes sense in theory, however in practice having a very narrow range of disposals (for example, just the power to imprison or fine) would undermine the concept of individualised justice to the extent that it arguably could not be achieved. Accordingly, it appears that the concept rests on the discretion afforded to sentencing courts to reflect the individual circumstances of the offence and offender before the court. That is assisted by a wide range of sentencing disposals capable of meeting different purposes of punishment.

Other propositions, such as those advanced by Krasnostein and Freiberg, assist in the application and realisation of individualised sentencing, but are not essential to it – at least in the abstract. Such propositions are desirable, however. A system of individualised justice

[264] Freiberg and Krasnostein (n 261), 74.

which subscribed to the notion that there was a single correct sentence would be entirely unworkable in practice, inviting a significant increase in the number of appeals against sentence and flooding the appellate courts with cases. Further, such an approach would, in a system predicated upon judicial discretion, undermine the sentencing regime as it would be likely that the number of successful appeals against sentence would increase sharply, suggesting that the inferior courts frequently make mistakes.

Similarly, the notion that no two cases are the same – a view held by many[265] – is not a pre-requisite of individualised justice. As a concept it is capable of diverse interpretation, with its scope greatly dependent on the meaning of 'the same'. For example, 'the same' could refer to all factors in the case being identical – in which instance it is axiomatic that no two cases are in fact the same. Alternatively, 'the same' could refer to a similarity between the legally relevant factors in a case – in which case a case may be 'the same' as another. The resolution of this issue is perhaps not determinative of whether it is complementary to individualised justice. The rationale for a sentencing system predicated upon the concept of individualised justice remains, whether or not one subscribes to the notion that no two cases are in fact 'the same'. The resolution of that question is more germane to the issue of methodology, in that it goes to the process by which an appropriate sentence is arrived at. Sentencers will rely upon principles, guidance and perhaps comparable cases; the fact that one considers that no two cases are in fact the same is not fatal to the use of comparable cases, it merely alters the way in which those cases are used. If, for example, a comparable case could be used to demonstrate the general approach to sentencing in a particular offence class, or the

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[265] For example, see Crown Prosecution Service, Sentencing: How it works, Sentencing Council (Crown Prosecution Service) <https://www.cps.gov.uk/publications/docs/sc_leaflet_aw.pdf> accessed 12 October 2016; and Scottish Sentencing Council, 'About Sentencing' (*Scottish Sentencing Council*) <https://www.scottishsentencingcouncil.org.uk/about-sentencing/> accessed 12 October 2016.

appropriate starting point for a particular offence. This would be in contrast to a system where it was accepted that it is possible for two cases be to be sufficiently similar so as to require the same or similar treatment, in which the comparable case might be relied on to demonstrate the propriety of a particular sentence in a particular case. That being said, the notion that no two cases are the same – taken literally – complements individualised justice as it underlines the complex nature of a sentencing exercise, involving different and often competing factors which must be weighed in order to determine the appropriate sentence. It therefore serves as a reminder of the need for a focus on individualised justice in order to deal most appropriately with each case. For this reason, the idea that no two cases are the same complements individualised justice, irrespective of one's interpretation of it.

The view that sentencing decisions are not precedents is prevalent throughout practice in England and Wales. The courts have regularly stated that cases decided on their own facts are of little or no utility.[266] This view is closely linked with the notion that no two cases are the same. In a move towards more principled sentencing, the CACD has sought to limit reliance upon cases which simply illustrate the 'going rate' for a particular offence in favour of reference to cases establishing or illustrating principles or offering broader guidance than merely what was decided in a particular case.[267] As will be explored later in this chapter, this marks a shift away from a focus upon inconsistency (or disparity), as traditionally understood, to an approach consistent with the account of consistency given in Chapter 2.

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266 See for example *Attorney General's Reference (Nos.26 and 27 of 2016)* [2016] EWCA Crim 613; [2014] 2 Cr.App.R. (S.) 45 at [35]; *R. v Dart* [2014] EWCA Crim 2158 at [24] and *R. v King* [2013] EWCA Crim 1599; [2014] 1 Cr.App.R. (S.) 73 at [12] as some recent examples.

267 *R. v Thelwall* [2016] EWCA Crim 1755 at [22].

A permissible range of sentencing decisions

A system adopting an individualised justice approach to sentence determination will necessarily assume that there is no single, correct sentence for a given offence. This is so for pragmatic reasons, such as the likely scale and attendant cost of appeals in a system which adopted strict proportionality, for principled reasons, such as legal certainty and for reasons of common sense, such as the recognition that in a human process with many variables, different sentencers are likely to arrive at different conclusions.[268] It is often claimed that sentencing is an art and not a science;[269] this appears to suggest that it is a question of judgement. If that is so, this requires a rejection of a mathematical approach in favour of something more creative and (at least partially) subjective, which inevitably leads to a divergence of outcome.[270] Moreover, a mathematical approach providing a narrower range – or perhaps even providing very precise results so as to avoid a range entirely – would be antithetical to the notion of individualisation. It is not possible to devise a sentencing guideline which applies to all offenders without the need for an escape clause to avoid disproportionate results in unusual or difficult cases. Similarly, it is not possible (at present at least) to devise a mathematical approach to sentence determination that is able to recognise the 'key' factor(s) in a given case and give primacy to it in order to serve the aims of individualised justice. Sentencing remains a human process.

[268] See Hogarth (n 62), 91 as to the differences in penal philosophies, effectiveness of different kinds of sentence and the importance of each of the purposes of sentencing among judges, evidenced by his study of Canadian magistrates.

[269] See e.g. *Attorney General's Reference (No.4 of 1989)* (1989) 11 Cr.App.R. (S.) 517 per Lord Lane CJ.

[270] The question of sentencing involving the exercise of discretion and the exercise of judgement is explored in more detail in Chapter 5.

It will be recalled that the concept of a permissible range of sentences was introduced in Chapter 2 and is relied upon in the construction of consistency there established. This section of this chapter develops that concept within the context of an individualistic sentencing system.

A permissible range of sentences and the pursuit of principled sentencing

On a practical level, the rejection of the notion of a permissible range of sentences would be to bring a sentencing system to its knees by virtue of an unrelenting flood of appeals geared towards minor adjustments to sentencing quanta.[271] But the concept of a permissible range of sentences is well grounded in theory, too.

A sentencing system which affords sentencers any meaningful degree of discretion necessarily relies upon the existence of a range of sentences that are 'not wrong' for any given offence. This is so irrespective of the theory to which one subscribes. The widely held view is that because sentencing relies upon the exercise of judgement as opposed to the application of a mathematic equation or scientific formula,[272] there is no single, correct sentencing outcome in a given case.

Limiting retributivists subscribe to the notion of a range of 'not undeserved' punishments,[273] on the basis that the concept is too imprecise to accurately identify the

[271] The practice of the CACD is not to 'tinker' with sentences, allowing appeals and Attorney General's references only where the court considers that the sentence should be materially different. See Ashworth (n 190), 47 and Chapter 7 for an exposition of the court's approach to appeals against sentence.

[272] See for example *R. v Haining* [2016] EWCA Crim 854 at [26] and *R. v Price* [2016] EWCA Crim 1919 at [12].

[273] Frase (n 220), 119.

sentence.[274] Morris' position is that retributivism is a limiting principle, setting only the upper and lower bounds of the appropriate sentence. Within those bounds, he argues that crime prevention concerns determine the appropriate penalty, thereby establishing a range of "*not wrong*" sentences.[275] von Hirsch criticises Morris' approach on the basis of censure; on utilitarian grounds, two similarly culpable offenders could receive different sentences within the range set, thereby impliedly conveying differing degrees of censure notwithstanding that the 'reprehensibleness' of their conduct is the same.[276]

Of the conflict between limiting and determining retributivism, von Hirsch asks "*limiting or determining for what purpose?*",[277] suggesting that desert should be viewed as determining ordinal magnitudes but limiting in relation to cardinal dimensions of severity.[278] This too accepts that there is a range of sentences, however only in relation to the upper and lower limits for the offence. If desert is properly construed as partly limiting and partly defining, but desert is a vague concept which is "*poorly defined and understood*",[279] then there is scope for a permissible range.[280] A "*traditional retributivist view of substantive commensurability*" would, however, disagree with this notion, as a pure retributivist considers

[274] Norval Morris, *Punishment, Desert and Rehabilitation in Equal Justice Under the Law* (US Government Printing Office 1977), 158.
[275] Andrew von Hirsch, *Past or future crimes: Deservedness and dangerousness in the sentencing of criminals* (Manchester University Press 1986), 38.
[276] von Hirsch (n 24), 40.
[277] von Hirsch (n 24), 39.
[278] von Hirsch (n 24), 39.
[279] Mirko Bagaric, 'Proportionality in sentencing: its justification, meaning and role' (2000) 12(2) Current Issues in Criminal Justice, 143-165.
[280] The range would presumably operate on narrower basis, however the justification for the existence of a range for the purposes of consistency remains the same: it is not possible to be so precise as to identify a single correct sentence.

there to be only one appropriate sentence.[281] Yet, even those adopting a pure proportionality stance (thereby incorporating fewer considerations in the determination of offence seriousness and (arguably) producing a more precise result) appear to accept that the more precise result manifests itself as a narrower range, as opposed to a single sentence.[282] This is because, as von Hirsch accepts, proportionality does not furnish specific quanta of punishments (as it presupposes a "*heroic intuitionism*" which is simply not born out by reality).[283] A permissible range is therefore an inevitable feature of a system grounded in desert theory. As Krasnostein and Freiberg stated:

> "*Within a discretionary framework, [consistency of approach] assumes that sentences will only ever be "reasonably consistent," reflecting an acceptance that there is no correct sentence but rather a range of correct sentences, and that this is necessary if sentences are to be consistently proportionate.*"[284]

This view has support from others who, for example, consider that consistency means "*not uniform sentences*" and that "*…individual sentences will differ*".[285] Similarly, Tata and Hutton, in a study of the sentencing practices of 10 Sheriffs in Scotland, commented that *"…the concept of disparity is itself dependent on some notion of a 'normal' sentence from which the disparate sentence varies*".[286] Inherent in the notion of the 'normal' sentence is the existence of a range of sentences as opposed to a single correct sentence. Additionally, many other academics explicitly or implicitly recognise the existence of a permissible range (to a greater

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281 Anthony E Bottoms, 'Five puzzles in von Hirsch's theory of punishment' in Andrew Ashworth, and Martin Wasik (eds) *Fundamentals of Sentencing Theory: Essays in Honour of Andrew von Hirsch*, (1998 Clarendon), 60.

282 Paul Robinson, 'The A.L.I.'s Proposed Distributive Principle of "Limiting Retributivism": Does It Mean in Practice Anything Other than Pure Desert?' (2003) 7(3) Buffalo Criminal Law Review, 10.

283 See von Hirsch (n 223), 76 and Tonry (n 230), 356.

284 Krasnostein and Freiberg (n 31), 271.

285 Alec Samuels, 'Consistency in sentencing' in Pennington and Lloyd-Bostock (n 23), 66.

286 Tata and Hutton (n 33), 354.

or lesser extent)[287] and in fact, it is very difficult to find academic arguments to the contrary. The theory, and its limits, therefore appears to be relatively well-settled.

How does this operate in practice? The English courts have been unequivocal in endorsing the notion of a permissible range of sentences. In *Peters*,[288] Judge LJ stated in the context of the then recently enacted Criminal Justice Act 2003 Sch.21 governing the determination of the minimum term for the mandatory life sentence for murder:

> "*If, looked at overall, this Court takes the view that the end result fell within the appropriate range of sentence and the margin of judg[e]ment and discretion given to the sentencing judge...*"[289]

More recently, in *Khan*[290] the court stated that:

> "*It is not for this court to interfere or to tinker with sentences when they are perhaps at the higher end of the permissible range.*"

This approach is not exclusive to England and Wales; rather, it is shared by numerous jurisdictions who afford a varying degree of discretion to sentencing courts.[291]

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[287] See for example: John Raine and Elaine Dunstan, 'How well do sentencing guidelines work?: Equity, proportionality and consistency in the determination of fine levels in the magistrates' courts of England and Wales' (2009) 48(1) The Howard Journal, 13-36, which discusses inconsistency and disparity in terms of "significant differences" in sentencing levels, the inference being that insignificant differences do not constitute disparity or inconsistency. Pina-Sanchez and Linacre (2014) (n 28), which proposes to measure consistency by reference to, *inter alia*, the extent to which sentences vary, thereby acknowledging the notion of a permissible range of sentences and Spigelman (n 34) in which the author states that "…*within reasonable bounds, different judges can permissibly reach different conclusions*", thereby endorsing the notion of a permissible range of sentences.

[288] [2005] EWCA Crim 605; [2005] 2 Cr.App.R. (S.) 101.

[289] [2005] EWCA Crim 605; [2005] 2 Cr.App.R. (S.) 101 at [9].

[290] [2016] EWCA Crim 125 at [17].

[291] See for example, Tata and Hutton (n 33), 351; the Supreme Court of New South Wales in *R v Jurisic* [1998] 45 NSWLR 209; the Supreme Court of Minnesota in *State v Evans* 311 N.W.2d 481 (Minn. 1981); and the High Court of Australia in *Lowe v The Queen* (1984) 154 CLR 606 at [3].

The notion of a permissible range of sentences is vital to consistency in sentencing because it concerns one of the key questions to be addressed when applying the concept of consistency to a practical scenario: what constitutes like treatment? A mere difference in sentences will therefore be insufficient to sustain a complaint as to the inappropriate length of a sentence; the length must therefore be sufficiently different so as to render it inappropriate. A sentence falling outside of the permissible range would be (by definition) disproportionate to the severity of the offence, and therefore be incapable of justification and unfair.

A system committed to individualised justice therefore relies upon the notion of a permissible range of sentences. Without an acceptance of the notion of a permissible range of sentences, the concept of consistency becomes less about fairness and equality, and more about uniformity, which, as was established in Chapter 2, is an invitation to inconsistency.

The apparent tension between individualised justice and the concept of consistency

Are the two concepts actually in "*perennial conflict*" as claimed by Krasnostein and Freiberg? Does individualised justice truly permit an "*anything goes*" approach as suggested by Doob and Brodeur? The foregoing discussion suggests not.

In the 1830s, the Criminal Law Commissioners saw a need to reform sentencing and balance the need for individualisation with the need for consistency,[292] identifying a tension between the two. The literature demonstrates that thinking has not advanced much in that regard since Victorian times: there is still a body of opinion which regards consistency and

[292] Radzinowicz and Hood (n 196).

individualised justice as being inherently incompatible. Yet to posit these two concepts as requiring sentencers to balance conflicting demands, I suggest, is to misunderstand the premise of each.

Many accounts of consistency are premised on the basis that justice requires similar sentences be imposed on similarly culpable offenders committing similarly serious offences. Yet, as established in Chapter 2, this is insufficiently focussed upon sentencing principles. Consistency does not require the same sentence to be imposed upon similarly culpable offenders convicted of offences of a similar gravity, but that each sentence is imposed by a consistent application of sentencing principle. As this chapter has established, it is necessary, too, for individualised justice to operate within the confines of sentencing principles, enabling the determination of sentence in a principled manner. If the key to both concepts is to allow sentencing principle to determine the sentence, the two concepts cannot be in conflict as claimed. In a mixed system such as that prevailing in England and Wales, the permissible range of sentences is set by retributive theory and individualised justice operates within those bounds to determine a sentence appropriate for the individual on other considerations, including those deriving from consequentialist theory.[293] This is not an "*anything goes*" approach to sentence, but rather a highly principled approach to sentence.[294]

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[293] See for example Frase (n 41), 144, in which the author states "*Instead, virtually all modern systems have adopted some version of limiting retributivism…" and "In some systems, retributive values define a range of allowable severity and available forms of punishment…in choosing the particular form of punishment, courts consider offender characteristics, crime-control goals and other non-retributive factors.*" It is submitted that this aptly describes the system in England and Wales; while the legislation provides for five purposes of sentencing, both retributive and consequentialist, primary legislation mandates that the severity of the sentence is driven by reference to offence seriousness, a retributive consideration. Thereafter, courts are required to apply Morris' parsimony principle and may take into account non-retributive factors.

[294] This fits neatly within the statutory scheme in force in England and Wales as described in Chapter 1.

If, as suggested, individualised justice is inextricably linked to sentencing principles and theories of punishment, does the tension between individualised justice and consistency remain? If consistency is properly construed as being concerned not with the disposals of other 'similar' cases, but with the consistent operation of sentencing principle, then the apparent tension identified by the Victorian Criminal Law Commissioners, and Krasnostein and Freiberg, among others, falls away and it can be said that an individualised justice approach to sentence determination promotes consistency. I suggest that structuring the discretion afforded to sentencers by strengthening the link between sentencing principle and the concept of individualised justice is more likely to produce a well-reasoned decision. If a decision taken in pursuit of individualised justice is underpinned by sentencing principle, then one could expect a greater degree of consistency in such cases, both so far as the decision to overtly pursue an individualised approach to sentence but also the degree to which the sentence ultimately imposed differs from the 'normal' sentence which could be expected in such a case. A body of caselaw may develop or Sentencing Council guidance may be created to distil or espouse some principles or general rules as to the operation of a sentencer's discretion in this regard. For example, it might be said that an individualised justice approach to sentence is inappropriate in certain types of case, or that a particular type of sentence is, or is not, well-suited to consequentialist considerations. I suggest that over time, this structuring of discretion has the ability to promote consistency rather than undermine it, as some of the literature suggests.

A response to such a suggestion might well be that the fact that individualised justice interacts with the different theories of punishment differently creates a greater risk of inconsistency. This is so as the determination of sentence comes down to the individual sentencer's discretion: if individualised justice can be aligned to different principles which may rely on different factors, then there will be a lesser degree of consistency of sentencing

principle, not more. Yet this criticism would only have traction where two different systems were being compared; this would give rise to different factors being taken into account. For example, identical robberies being sentenced by two different systems subscribing to two different schemes would likely result in disparate outcomes. However, within a single system, such disparity would not arise as the principles to which sentencers make reference in the determination of sentence remain the same, and consequently, the decision ought to be consistent, at least in theory.[295]

This is well exemplified by the system adopted by England and Wales. Where proportionality sets the outer limits of the permissible range, say, two to five years for an offence of drug supply,[296] other considerations operate to determine sentence within that range. If within the two to five year range, any sentence could be said to be 'consistent', there remains the potential for a degree of disparity which would not be addressed by the approach adopted in Chapter 2.[297] Individualised justice can add another layer to the equation, thus narrowing the scope of potential inconsistency, as the sentences within the permissible range are then subject to further scrutiny in order to determine where within the range the appropriate sentence is. Where an offender has, for example, a substance dependency and has dependent children and has made efforts to find employment, a sentence towards the bottom of the range would likely be merited. Conversely, the absence of such factors is likely to receive a sentence towards the

[295] This relies upon the definition of consistency discussed in Chapter 2; while s.142(1) of the Criminal Justice Act 2003 lists five purposes of sentences with no order of primacy, this proposition rests upon the notion of a permissible range of sentences and so where two judges may give primacy to different purposes of sentencing, providing the sentence falls within the permissible range for the offence, there would be no inconsistency.

[296] Two to five years is the category range for an offence of supplying a Class A drug contrary to s.4(3) of the Misuse of Drugs Act 1971 or possession with intent to supply a Class A drug, contrary to s.5(3) of the Misuse of Drugs Act 1971, under the Sentencing Council's *Drug Offences Definitive Guideline* (2012) (see page 12, Category 4 significant role).

[297] Save for where the alleged disparity is between co-defendants in the same case.

middle or top of the range. Such considerations fall squarely within the remit of individualised justice and thus, individualised justice operates as an additional level of scrutiny inside the outer limits set by the principle of proportionality, funnelling sentences in similar cases closer together.

Conclusion

This chapter has concluded that while individualised justice requires a sentence to be determined on the basis of the features of the offence and the offender, the focus is upon the individual and their characteristics. Adopting that interpretation of the concept, I considered the way in which individualised justice interacts with judicial discretion, concluding that in England and Wales, individualised justice operates in conjunction with sentencing principles and therefore operates within a structured discretion. This rejects the suggestion made by some academics that individualised justice permits an "*anything goes*" approach to sentence determination. This chapter concludes that by viewing individualised justice through the prism of sentencing principles, a sentence imposed in pursuit of individualised justice is one which accords with principle; it is the application of principle which permits the individualisation. As such, I have rejected the notion that a move towards consistency in sentencing undermines individualisation; on the contrary, I have argued that there is no tension between the two concepts.

Chapter 5: Structuring discretion

[...] the imposition of criminal penalties [is a] pre-eminently discretionary field.[298]

Introduction

This chapter takes the clarified conception of consistency and uses it as a critical tool in order to assess the relative effectiveness of the varying methods used in England and Wales to structure judicial discretion at sentencing. As O'Malley notes, "*For as long as discretion has existed, there has been an impulse to control it, and this has been particularly true in respect of the imposition of penalties.*"[299] This chapter seeks to identify when a sentencing decision involves judicial discretion and to evaluate how that discretion structured. This chapter considers the concept of judicial discretion, at first, more generally, and then in relation to sentencing specifically. As this thesis concerns consistency and the relative success of methods of structuring discretion, there would be little achieved by attempting that task without an understanding of what the term means. It is therefore necessary to establish a model of judicial discretion for use in the later chapters.

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298 Sir Thomas Bingham, 'The Discretion of the Judge' [1990] Denning Law Journal 27 cited in Colin Munro, 'Judicial independence and judicial functions' in Colin Munro and Martin Wasik (eds), *Sentencing, Judicial Discretion and Training* (Sweet and Maxwell 1992), 26.

299 Tom O'Malley 'Judgment and calculation in the selection of sentence' (2017) 28(3) Criminal Law Forum, 361-389, 374.

What is judicial discretion?

Introduction

It is commonplace in modern legal systems for there to be widespread discretionary powers to vested in a range of organisations and officials by the legislature.[300] Yet this is not a modern phenomenon. Galligan noted that:

> *"discretionary powers are not an innovation of the modern state since any system of authority relies on discretion in varying ways and degrees; the argument is only that in recent decades the quantity of discretion has increased to make it a more significant facet of state authority."*[301]

Hawkins, for example, regards it as "*...a central and inevitable part of the legal order*".[302] While one can perhaps conceive of an entirely discretionary system of law, in reality, a functioning and fair legal system requires rules creating institutions, empowering them to act and limiting the way in which they do so.[303]

According to Schneider:

> *"[d]iscretion allows decision makers more easily to consult illegitimate considerations and does nothing to stop them making mistakes,"*[304] but *"[allows]*

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300 Denis Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (Clarendon 1986), 72.

301 Galligan, (n 300), 72. This view is shared by others, for example, Ronald Dworkin. See Ronald Dworkin, 'Judicial discretion' (1963) 60(21) The Journal of Philosophy 624, 624 and Ronald Dworkin, 'The Model of Rules' (1967) 35 U Chi L Rev 14-46, 18.

302 Keith Hawkins, 'The Uses of Legal Discretion: Perspectives from Law and Social Science' in Keith Hawkins (ed) *The Uses of Discretion* (Clarendon 1992), 11.

303 Galligan, (n 300), 59.

304 Carl E Schneider, 'Discretion and Rules' in Hawkins (ed) (n 302), 68.

decisions to be tailored to the individual case…[and] allows future decisions to be informed by past decisions following an evaluation of their success."[305]

In non-legal – plain English language – terms, 'discretion' has a wide definition, referring to the jurisdiction to exercise a choice in respect of something.[306] There are, of course boundaries: the choices must be capable of selection (the discretion cannot be exercised in a sense that is an impossibility, choosing a red ball when the only options are a blue or green ball, for example); and one must have the jurisdiction to make such a choice (have the power or authority to make such a choice, choosing to sit in a first class seat having purchased only a standard class ticket, for example). Save for such basic constraints, in everyday usage there appears to be little else to govern or guide the exercise of such a discretion.

Yet in law, discretion has a narrower and more exact meaning. There is, however, disagreement as to the precise definition. An appropriate starting point may well be the legal maxim *discretio est discernere per legem quid sit justum* – 'discretion is to discern through law what is just'.[307] This provides an initial steer as to the meaning of 'discretion' and its limitations, suggesting first that judicial discretion is derived through (and therefore constrained by) law and secondly that the objective is to arrive at an outcome which is appropriate. It is possible to identify two distinct issues within this definition, namely (1) the existence of discretion ("*through law*"); and (2) the manner in which the discretion must be exercised ("*discern…what is just*").

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305 Schneider (n 304), 67.

306 For example, the Oxford English Dictionary provides as a definition for the term 'discretion': "Freedom to decide or act according to one's own will or judgement" <https://www.oed.com/view/Entry/54039?redirectedFrom=discretion#eid> .

307 Of course, 'appropriate' may well be as vague as 'just', but it imports some notion of a standard or set of standards to which the decision maker should aspire.

As will be demonstrated, writings on judicial discretion tend not to explicitly identify these two issues but approach them separately. By way of example, in his work on discretion Hart identified a key question as "*[w]hat is discretion, or what is the exercise of discretion?*"[308] seemingly not identifying a need to draw a distinction between what are, I suggest, two different questions. It will be suggested that a clearer and more coherent account of judicial discretion can be arrived at where a two-stage approach is adopted. As such, this chapter will explore various definitions of judicial discretion by a consideration of those two key questions.

The scope of the endeavor

This section of the chapter is not concerned with the source of the discretionary power granted to judges, nor is it concerned with the Hart-Dworkin debate concerning the latter's 'right answers thesis' and various conceptions of law. This chapter undertakes the more modest task of identifying from the literature core features of judicial discretion to construct a working definition of judicial discretion to be employed in the later chapters for the purpose of examining the methods of structuring judicial discretion at sentencing. The difference between a jurisprudential and legal approach to the task of defining judicial discretion was noted by Hawkins, who stated that legal philosophers have been more concerned with discretion's relationship with rules whereas lawyers have focussed their attentions on the legal and public policy issues raised by the topic.[309] Hawkins also noted that social scientists have also been interested in the issue, however that that interest has been principally concerned with an

[308] HLA Hart, 'Discretion' (2013) 127 Harv L Rev 652, 652.
[309] Hawkins (n 302), 13.

understanding of how law may be translated into action.[310] This chapter adopts a hybrid approach.

This chapter will consider Hart's work on discretion[311] before turning to consider Dworkin and Raz's contributions to the debate. Reference will be made to other commentators, however it is noted that the core of the Hart-Dworkin debate surrounds the disagreement as to the propriety of the positivist view of law as a social construct. As such, their discussions regarding judicial discretion are rather ancillary to the wider issue of the limits of the law and more general legal theory, rather than being principally concerned with a construction of a theoretically sound definition of judicial discretion. For this reason, the focus of this chapter will lie with the original discussions rather than the subsequent debates which have moved away from the issue with which this chapter is directly concerned.

Hart began his consideration of discretion by noting that the term may be "*hopelessly vague*" and that its use in practice and academia is "*entirely haphazard*". He swiftly concluded that such a view could not endure as it was possible to identify a set of characteristics which it could be agreed exist in the 'standard case' of discretion.[312] Hart considered that discretion was a vital component of any legal system owing to society's ability to regulate the future being "*inherently limited by imperfect information and an imperfect understanding of aims*".[313] Raz identified different "*sources*" of discretion requiring its existence. The first, 'vagueness',

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[310] Hawkins (n 302), 14.

[311] This was, until 2013, principally contained in his 1972 Concept of Laws. However in 2013, the Harvard Law Review published a collection of essays introducing Hart's "*lost*" essay on discretion, written in 1956.

[312] Hart (n 308), 653. Hart gives three examples, namely rate-fixing by the ICC, the grant or refusal of specific performance by a court or the granting of a pardon or reprieve by the executive.

[313] Geoffrey C Shaw, 'HLA Hart's Lost Essay' (2013) 127 Harv L Rev 666, 669.

requires discretion because language and principles are vague, and discretion cannot be dispensed with in cases of vagueness where a court must render judgment.[314] The second renders discretion necessary as:

> *"the law characteristically includes only incomplete indications as to their relative weight and leaves much to judicial discretion to be exercised in particular cases."*[315]

Dworkin identified three types of judicial discretion: two, in a 'weak' sense, referring to first, the need for judgement where a rule cannot be applied mechanistically, second, finality, in the sense that a decision is unreviewable, and a third, the 'strong' sense, to describe cases where judges are legally entitled to decide and in which there is no single correct decision. Dworkin uses this to frame the debate between himself and the positivists (principally, Hart) in order to refute their construction of the answer to the question 'what is the law?'.[316] Shiner criticised Dworkin's three types of discretion and particularly the examples used to justify it, claiming they fail to fit legal practice.[317] Such criticism accords with Hawkin's view, noted above, that philosophers and lawyers have approached the issue from different perspectives.

Hart and Dworkin disagree as to whether judges have a discretion in hard cases in Dworkin's strong sense, yet this disagreement is derivative; Shapiro notes the "*clash*" stems from "*very different theories about the nature of law.*"[318] Accordingly, the following discussion seeks to identify core features inherent in the existence and exercise of, judicial discretion; it

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[314] Joseph Raz, 'Legal Principles and the Limits of the Law' (1972) 81 The Yale Law Journal 823, 846. Hakwins (relying upon Denis Galligan's earlier work) partly shares this view as to the need for discretion stemming from the vagaries of language and law being "*fundamentally an interpretative exercise" and one involving "people in interpretation and choice*", see Hawkins (n 302), 11.

[315] Raz (n 314).

[316] Dworkin (n 301), 16.

[317] Roger Shiner, 'Hart on Judicial Discretion*'* (2011) 5 Problemas 341-362.

[318] Scott Shapiro, 'The Hart-Dworkin Debate: A short guide for the perplexed' (2007) (77) Public Law and Legal Theory Working Paper Series, University of Michigan Law School, 17.

is not the intention of this chapter to resolve any dispute between the two on this issue. Rather, the literature will be surveyed to identify the most coherent, principled and practical definition of judicial discretion, to be employed later in this thesis.

Raz considers that a discretion exists where there are available (as a matter of law), at least two possible outcomes and there exists the power vested in the judge to choose between them. Yet this is insufficient: for example, a judge choosing to make notes of legal submissions in a case with a blue pen rather than a red pen cannot sensibly fall within the label 'judicial discretion', despite being a choice between two legally correct decisions (there being no law against the use of blue or red pens). It would even be insufficient to import – as Raz does – a requirement that the outcome is 'correct'. To continue with the above example, the blue pen might be considered to be correct as red ink is conventionally reserved for noting errors or making comments on scripts. However, this choice between two coloured pens remains outwith the common understanding of the concept of judicial discretion. This issue of the exercise of discretion (in a manner which is considered to be appropriate, or correct) will be considered later in this chapter.

Both Dworkin and Hawkins explicitly consider the extent to which discretion can vary: Dworkin in his 'strong' and 'weak' senses, and Hawkins in a more practical sense, commenting that it is "*...difficult to contemplate the making of a legal decision that does not have at least a measure of discretion.*"[319] While the latter is to take an obviously broad view of the concept, it serves at least to demonstrate that the question to consider is not binary, simply asking whether a court has a discretion, but also one of degree, considering the extent of the discretion.

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[319] Hawkins (n 302), 11.

Summary of forthcoming argument

The first part of this chapter contends that in order to construct a coherent account of judicial discretion, three issues must be considered: (a) the source of the power; (b) identifying its existence; and (c) the manner in which the discretion must be exercised. This chapter will not concern itself with the question of the source of the discretionary power and so will turn its attention only to the latter two points.

Further, it is contended that in considering the latter two points, it is possible to identify the following core features which must be present to establish the existence of judicial discretion:

a) The decision maker must make a decision;
b) There are principles guiding the making of the decision; and
c) The proper application of those principles does not produce a single, obviously correct, result.

And where the following features are present the discretion was properly exercised:

a) It was not exercised in pursuit of personal whim or on an arbitrary or legally irrelevant basis;
b) Its exercise was rational; and
c) The choice made was, in the decision maker's opinion, likely to bring about the most appropriate outcome.

It is contended that such a definition is both conceptually clear and workable in practice.

Identifying the existence of judicial discretion

Galligan noted that, in a broad sense, discretion denotes an area of autonomy within which one's decisions are to some extent a matter of personal judgement.[320] Hart noted the need to avoid confusing a discretion with a choice, stating that the former was a "*near-synonym for practical wisdom or sagacity or prudence*" and placed value in the notion of judgement, stating "*it is the power of discerning or distinguishing what in various fields is appropriate to be done and etymologically connected with the notion of discerning.*"[321]

It is clear that there is an evaluative component present in the concept of discretion, however Hart's reference to practical wisdom is perhaps questionable in light of Hood's consideration of the Australian concept of instinctive synthesis and the conclusion that the claim that all cases are unique must fail if reliance is placed upon intuition and experience-based sentencing.[322] Hart relies upon the example of a discreet person not simply remaining silent, but remaining silent when silence is called for, thereby suggesting some degree of experience necessary in the decision-making process. Yet this is to mix the common-usage with the legal concept. It will be argued below that the concept of judicial discretion does not require as a constituent part a degree of sagacity, wisdom or experience. But such a discussion of experience is perhaps to place the cart before the horse; one must identify what discretion *is*, before espousing criteria by which it ought to be exercised and by whom. Hart argues that an appropriate starting point when considering the question of what discretion is, is to consider non-legal uses, suggesting that although to align the concept with the notion of choice is to fall into error, the two are related.

[320] Denis Galligan, Discretionary Powers: A Legal Study of Official Discretion (Oxford 1986), 8.

[321] Hart (n 308), 656.

[322] Roger Hood, *Sentencing in Magistrates' Courts* (Tavistock 1962) cited in Ashworth (n 3), 50.

Dworkin recognises this feature of judicial discretion where he identifies that there are two sources of judicial decision: rule and discretion.[323] The term discretion, opines Dworkin, is inappropriately used to mean that the judge must sometimes reach his decision by means other than the application of standards, that such standards sometimes leave him free to choose (the "*academics' view*") and it is more accurate to describe a judge applying established principles (the "*layman's view*").[324] The distinction between these two definitions will be explored below. In later work, Dworkin argued that:

> *"[t]he concept of discretion is at home in only one sort of context: when someone is in general charged with making decisions subject to standards set by a particular authority."*[325]

Hart also recognises this fact, focussing upon the need to "*determine*" or "*discern*" the appropriate course of action to take.[326] He identifies three categories falling "*clearly…within the agreed ambit of the term*":[327]

(a) Express or avowed use of discretion (by administrative bodies or by courts);[328]

(b) Tacit or concealed discretion;[329] and

(c) Discretionary interface or dispensation from acknowledged rules.[330]

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323 Dworkin (n 301), 624.

324 Dworkin (n 301), 625.

325 Dworkin (n 301), 32.

326 Hart (n 308), 656.

327 Hart (n 308), 655.

328 Examples given are licensing for carrying on a particular trade and sentencing in criminal cases.

329 The two instances listed are interpretation of statutes and the use of precedent.

330 The two instances listed are a reprieve or pardon and injunction against exercise of common law remedies.

From this point, Hart, employs the non-legal example of a person hosting a dinner party faced with a decision between their best and second-best sets of cutlery. This, as noted by Shaw, was a "*classic application of Hart's analytical method*"[331] examining the uses (both legal and non-legal) of the term. Hart considered that the dinner party host example presented features "*characteristic of discretion everywhere*":

a) There is no clear right or wrong and "*honest and sensible*" persons may take different views;
b) There is no clear definable aim (though a successful dinner party may be the stated aim, that encompasses numerous elements at which the host is aiming);
c) The precise circumstances over which the decision will operate once it has been made are not known with any great certainty;
d) Within the vaguely defined aim of a successful dinner party, there are distinguishable constituent values or elements but there are no clear principles or rules determining the relative importance of these constituent values or, where they conflict, how compromise should be made between them;
e) The decisions taken will not happily be called "*right*" or "*wrong*" but rather terms such as "*wise*," "*sound*," and perhaps comparatives such as "*wiser*," "*sounder*," "*better*" are more appropriate; and
f) If the decision is challenged there are two different ways in which a defence may characteristically be made of it: justification (i.e. explaining how the result

[331] Shaw (n 313), 696.

was arrived at) and vindication (i.e. relying upon the success of the result of the decision taken).[332]

These features bear examination but first it is useful to examine the example chosen by Hart. The various decisions to be taken by a person hosting a dinner party may be better suited to the issue of the exercise of the discretion, rather than the identification of it; a choice between the best and second-best sets of cutlery speak to the considerations surrounding the decision between the two, rather than the features which make that choice a discretionary one. In this example, Hart's host is faced with a choice between two options, both of which appear (in the absence of further information) to be appropriate and fit for the stated purpose.

Now to consider the features identified by Hart which he considers illustrate discretion. The first, namely the absence of a clear right or wrong is perhaps better expressed as the absence of a single, correct answer: Hart's expression of this feature is problematic as it places the focus upon the inability to identify right from wrong, yet this appears to be borne from his the specific example chosen. To modify Hart's dinner party example, where three options were presented, namely the best cutlery set, the second-best set, or no cutlery at all, it would be rational to consider the third option as clearly wrong, and the first two as correct.[333]

The question of which to choose then becomes one concerned with the exercise of the discretion rather than the existence of it and the existence of a discretion is not obviated by the

[332] Hart (n 308), 659.

[333] Perhaps this would be better expressed as "not wrong"; such would, as Shaw noted, probably find favour with Hart (and Henry Hart too), as *"...Henry Hart went on to concede that "'[r]ight' means rationally justifiable by reasoning from settled or properly assumed premises," which harmonized with H. L. A. Hart's criterion for sound discretion.",* see Shaw (n 313), 713.

existence of a clear wrong answer, or two answers which are clearly capable of being correct. Hart later appears to characterise this as the absence of a single correct answer,[334] and so it may be better to view this feature in that way in light of that unacknowledged modification and the brief criticism contained in this paragraph. Dworkin's view on this point stems from the distinction he draws between rules and principles. That will be explored below in more detail in relation to the claim that for a discretion to exist there must exist principles guiding the decision. However, at this stage, it suffices to note that Dworkin considers that the application of a rule can determine a case whereas a principle cannot. It follows that Dworkin regards a discretion to exist only where there is no single, clearly correct answer. Raz shares this view:

> *"a legal system which contains a rule that whenever the courts are faced with a case for which the law does not provide a uniquely correct solution they ought to refuse to render judgment [could exist]. In such a system there would be no judicial discretion."*[335]

The second of Hart's characteristics, namely the absence of a clear definable aim, is somewhat curious. Can it be said that the presence of a clear definable aim can (or should) operate to obviate the existence of a discretion? In a sentencing system where the single aim is to punish, in pursuit of retributive proportionality (taking that as a clear definable aim that the

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[334] Hart (n 308), 660. When constructing the account of judicial discretion which forms the basis of the discussion in this chapter, an earlier draft of this chapter had included 'the choice does not involve the application of a legal test', however during writing I realised that this was a red herring in so far as the identification of core features of judicial discretion. The application of a legal test, for instance the determination of an application to admit hearsay evidence or the finding of 'dangerousness' pursuant to the Criminal Justice Act 2003 involves a binary choice and the application of a threshold; in fact, the determining feature in this regard is not that the court must apply a legal test, but that that proper application of principles produces an obviously correct result. For instance, the determination of a hearsay application involves the application of principles and case law, the proper application of which will produce a single, correct result. A judge making such a determination has to make an evaluative judgement, but it is not one which involves a true choice between various legitimate options as the application of the principles to the legal test produces only one legitimate result. This is reinforced by the way in which the Court of Appeal (Criminal Division) deals with such decisions on appeal and by contrast, the way it deals with decisions concerning sentence quantum on appeal.

[335] Raz (n 314), 843 and 845.

sentence should be proportionate to the seriousness of the offence), can it credibly be said that the exercise in determining the length of sentence to be imposed for an offence is not a discretionary decision? Perhaps it is directed at the situation where there exist multiple (perhaps competing) aims, rather than appealing to the notion that the decision is to be made without direction. If so, this may be operating as a proxy for complexity. This in fact speaks to the need for discretion, as Hart identifies (though not in this connection), namely the inability of society to adequately regulate the future.[336] Dworkin does not regard this to be a feature determinative of the existence of a discretion.

The third, namely that the precise outcome of the decision is not known with any degree of certainty, appears to be another proxy for the complex nature of the decision to be taken.[337] A simple choice, say between playing with a blue ball and a red ball which are otherwise identical, produces a definite result. Yet where the choice is complicated by other factors, say where one ball is larger than the other, or there are multiple persons of varying ages, physical capabilities and skill intending to play with the ball, the outcome becomes less precise. Whether or not this feature is determinative of the existence of a discretion is unclear: Hart fails to justify why the outcome is linked to the existence of the discretion. I suggest that this feature operates as a proxy for complexity, it being correlative with the existence of a discretionary decision but not causative.[338] This returns us, again, to Hart's justification of the need for discretion, namely the inability to predict the future. Where outcomes are readily identifiable with a degree of certainty, it is possible to create rules prescribing the appropriate course of action. More complex scenarios would, it is suggested, be more likely to require a discretion owing to the

[336] Shaw (n 313), 669.

[337] This in fact might be said about the second feature identified by Hart.

[338] The decision to imprison a person is binary and therefore the results are known, but the decision remains one involving a discretion.

inability to accurately and comprehensively predict the appropriate outcome in every instance thereby preventing the creation of a rule. Again, Dworkin does not appear to regard this as a feature present in instances of judicial discretion, however Hawkins appears to, stating "*[t]he particular way in which discretion may be exercised may not be predictable from the particular forms of rule.*"[339]

The fourth, namely the absence of clear principles or rules guiding the importance of values comprising the decision, again might be viewed as a proxy for complexity – the issue being more complex to resolve (or at least resolve in an appropriate manner) in the absence of guidance. However, a better view may well be to place the emphasis on the inclusion of the qualifier "*clear*". If this is read as referring to principles or rules which resolve the decision, i.e. the application of a principle or rule produces an obviously correct result, then Hart's point is more credible. Otherwise, it remains unclear as to why the absence of clear principles or rules leads to a decision involving the exercise of discretion. It may be premised upon the idea that such guidance is limiting and therefore the nature of the decision cannot be said to be truly discretionary. However, this appears to adopt too rigid an approach. Can the presence of a rule or principle render an otherwise discretionary decision one not involving a discretion? Is the imposition of a sentence upon a criminal conviction not a discretionary exercise by virtue of it being governed by principles such as proportionality and parsimony? Hart perhaps contradicts himself here, as he identifies sentencing as a discretionary exercise earlier in the essay.[340] It seems that in fact, the converse is true; the existence of principles or rules guiding the exercise

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[339] Hawkins (n 302), 36. The example given is where a rule seeks to limit a discretion to achieve a particular result; Hawkins suggests that this is not always successful.

[340] Hart (n 308), 655. This point could be rescued if it were argued that such principles are not sufficiently "*clear*".

of the decision is a constituent element of a discretionary decision. Without such guidance the exercise of the decision is unregulated and could permit a degree of arbitrariness.

Dworkin had much to say in relation to this issue. He argued that "[t]he concept of discretion is at home in only one sort of context: when someone is in general charged with making decisions subject to standards set by a particular authority."[341] Therefore, he states, it is appropriate to view discretion as the hole in the doughnut, existing only as "an area left open by a surrounding belt of restriction."[342] A variation of this metaphor is employed by Hawkins in his exposition of the uses of discretion.[343] Yet Dworkin focuses upon the relationship between rules and principles[344] and the importance that has for the wider discussion of the limits of the law rather than seeking to justify why a discretion must involve principles guiding the decision.

Dworkin discusses rules, which he describes as being "*exhaustive of 'the law'*"[345] and notes that where a case cannot be determined by the application of a rule (as none is appropriate for example), the judge must decide the case by recourse to discretion. Dworkin describes this as "*reaching beyond the law for some other sort of standard to guide him in manufacturing a fresh legal rule or supplementing an old one.*"[346]

341 Dworkin (n 301), 32.

342 Dworkin (n 301), 32.

343 Hawkins (n 302), 11.

344 Dworkin uses the term 'principle' to mean "*a standard that is to be observed, not because it will advance or secure an economic, political, or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality*.", Dworkin (n 301), 23.

345 Dworkin (n 301), 17.

346 Dworkin (n 301), 17.

While it is not necessary for the purpose of this discussion to enter into a jurisprudential discussion of the Dworkinian account of legal positivism and his conception of 'the law', the extent to which this work considers the nature of discretion is illuminating. He distinguishes rules from principles by appealing to their logical distinction.

> *"Rules are applicable in an all-or-nothing fashion. If the facts a rule stipulates are given, then either the rule is valid, in which case the answer it supplies must be accepted, or it is not, in which case it contributes nothing to the decision."*[347]

A non-legal example is relied upon to demonstrate this, namely a game consisting of a rule which cannot be acknowledged but overridden. A principle on the other hand, Dworkin claims:

> *"…does not even purport to set out conditions that make its application necessary. Rather, it states a reason that argues in one direction, but does not necessitate a particular decision."*[348]

Dworkin also claims that unlike rules, principles carry a weight relative to one another, so that when they intersect the conflict can be resolved. Implicit in this statement is that rules do not, and cannot conflict. Dworkin states that if two rules conflict, one is not a valid rule.[349] He disagrees with the positivist position that a rule can dictate a result whereas a principle cannot, stating that:

> *"[p]rinciples…incline a decision one way, though not conclusively, and … can dictate a result. If a judge believes that principles he is bound to recognize point in*

347 Dworkin (n 301), 25.

348 Dworkin (n 301), 25.

349 Dworkin (n 301), 27.

one direction and that principles pointing in the other direction, if any, are not of equal weight, then he must decide accordingly, just as he must follow what he believes to be a binding rule."[350]

This recognises the evaluative nature of discretion, requiring a subjective but rational assessment of the governing principles when resolving the question. To permit a judge to act contrary to Dworkin's statement would be to permit irrational or unreasonable decisions which would not be conceptually satisfactory.

Joseph Raz's writings on discretion similarly identified the need for principles to guide the exercise of discretion. Continuing to consider this issue via a two-stepped approach as outlined above, this speaks to both the existence of a discretion and its exercise. Raz stated:

"There are situations in which what ought legally to be done is determined directly by the application of various principles to the case…The whole area of sentencing is governed almost exclusively by principles."[351]

In a wider discussion, Raz identified two types of principles in the context of judicial discretion: substantive principles which dictate a goal to be pursued or a value to be protected and principles of discretion which guide discretion by stipulating what type of goals and values the judge may take into account in exercising the discretion.[352] In doing so, Raz considered that principles presuppose the existence of judicial discretion and direct and guide it.[353]

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[350] Dworkin (n 301), 36.

[351] Raz (n 314), 841.

[352] Raz (n 314), 846.

[353] Raz (n 314), 847.

The fifth characteristic, namely preferring "*wise*" or "*sound*" to "*right*" or "*wrong*" overlaps with the first, rejecting the concept that the outcome of a discretionary decision can be right or wrong. As noted above, Hart later appears to modify this to a rejection of the notion that there is a single right answer. Hart suggests that the terms might be better used in a relative sense – "wise" becomes "wiser" for example. This of course concerns the manner in which the discretion is exercised, rather than the identification of a discretion, it being directed at a value judgement as to which of the available options is best. This will be further considered below.

The sixth, namely the way in which a defence may be mounted to a challenge of the decision taken, need not concern us here; Dworkin says nothing of this feature. It is difficult to envisage how the manner of the defence could be determinative of whether a discretion exists. In any event, this feature speaks more to the exercise of the discretion rather than existence of it and so will not be considered here.

Hart later summarises his view of discretion as follows. Discretion exists where:

> *"…there remains a choice to be made by the person to whom the discretion is authorized which is not determined by principles which may be formulated beforehand, although the factors which we must take into account and conscientiously weigh may themselves be identifiable."*[354]

If the criticisms above are accepted, a hybrid account of the existence of judicial discretion can be constructed, comprising the following features: (1) the individual has a decision-making power conferred upon them; (2) there is a choice to be made; and (3) there is

[354] Hart (n 308), 661. The latter part of Hart's work on discretion considered the place discretion has in a legal system. That is not germane to this discussion and so nothing further will be said about it in this chapter. Shaw's essay on Hart's work on discretion considers this point in more detail, see Shaw (n 313).

no single answer by the application of principles (though factors to consider when making the choice may be identifiable).

The manner in which the discretionary power must be exercised

As noted above, Hart discussed the use of more nuanced evaluative terms such as "*wise*" and "*sound*" in preference to "*right*" and "*wrong*". While this may, as suggested above, overlap with the rejection of the notion that there might be a single, correct resolution to a discretionary decision, this is perhaps better viewed as Hart importing a degree of subjective judgement into the equation. Hart suggests that the terms might be better used in a relative sense – "*wise*" becomes "*wiser*" for example. This requires an evaluation of the available options in isolation – whether or not a particular option is permissible, for example, whether a sharp knife or a teaspoon, or a plastic fork could be used to cut a piece of cheese. It also requires an evaluation of each option relative to the others – which is the best option, for example, the teaspoon would be better than the plastic fork, and the sharp knife would be better than the teaspoon.[355]

Dworkin speaks of judgement in terms of the reasonableness of the decision.[356] Implicit in much of Dworkin's writing on discretion is the notion that the decision-maker takes the decision on the basis that it is the most appropriate disposal of the case, or resolution of the issue.[357] It can be inferred that such judgement and reasonableness of the decision are linked to the application of the principles which Dworkin argues so strongly must be present for a

355 *A fortiori* the knife will be better than the fork.

356 Dworkin (n 301), 37.

357 Dworkin (n 301), e.g. at 34.

discretion to exist. Raz, however, explicitly recognised the courts' duty to act "*as they think best*".[358] This clearly imports a subjective element to the exercise of discretion – as is no doubt obvious in an exercise which requires the decision-maker to apply standards to a situation to discern an appropriate outcome. As to the subjective element of this exercise, Dworkin notes that "*...reasonable men may disagree*".[359] Dworkin disagreed with the positivist position that a rule can dictate a result whereas a principle cannot, stating that:

> *"[p]rinciples…incline a decision one way, though not conclusively, and … can dictate a result. If a judge believes that principles he is bound to recognize point in one direction and that principles pointing in the other direction, if any, are not of equal weight, then he must decide accordingly, just as he must follow what he believes to be a binding rule."*[360]

For Dworkin therefore the decision must be reasonable; it would not be reasonable to take a decision having recognised the weight of the principles falls in the other direction.[361]

It is worth noting that the subjective element of discretion has been criticised. Hawkins notes in his survey of writings on discretion that although the subjectivism can be invaluable in individualising the application of the law, it can also be the cause of inconsistency, which can be said to be arbitrary.[362] Hawkins notes that this criticism has been frequently made in sphere of criminal sentencing.[363]

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[358] Raz (n 314), 847.

[359] Dworkin (n 301), 37.

[360] Dworkin (n 301), 36.

[361] See note 357 above and associated text.

[362] Hawkins (n 302), 15.

[363] Hawkins (n 302), 15.

Shaw described Hart's construction of discretion as "*…a special form of constrained, reasoned decision-making based on appeal to rational principles.*"[364] This appears to import a value judgement (as noted above in relation to Hart's dinner party example) and is supported by Hart's reliance on the idea of wisdom and experience. However this is perhaps better viewed as the foundation for establishing that judicial discretion is to discern an appropriate result to the exclusion of personal whim or caprice.[365] Such an approach has to be correct: to conceive of judicial discretion as involving a preference on the basis of one's personal whim would be to allow a judge to find in favour of one party on the basis that the judge preferred the presentation of counsel's arguments, or their dress, or the fact that they were friends or former colleagues, irrespective of the merit of each case. Hart relies on an example of a voter at the ballot box who may be exercising a discretion but, where they decide to vote for one candidate because of their personal like for them, that, so Hart says, would be a choice but not the exercise of discretion. In distancing discretion from merely that involving an indulgence of whim or desire, Hart focusses on the quality of the result of the decision, namely that it is an appropriate outcome to the scenario at hand. This serves an important purpose in identifying a discretion and when it is exercised and is underlined by Hart's demarcation between a choice and a discretion, best demonstrated by Hart's example of a discrete person remaining silent when it is appropriate to do so, not merely remaining silent all of the time.[366]

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[364] Shaw (n 313), 668. As to rational decision theory, see Hawkins (n 302), 20 for a general overview.

[365] Hart (n 308), 656-657.

[366] It is perhaps important to note that while Shaw uses the term 'rational', Dworkin uses the term 'reasonable'. While in pure linguistic terms there may be a difference between the two, e.g. the former may allow for a consideration of the peculiarities of the decision maker – a mother choosing to save her child rather than 20 others, for instance – it appears that Dworkin uses the term 'reasonable' in the public law sense, directed at an assessment of the public body's action and whether a reasonable authority could have arrived at the same decision. See Harry Woolf, Jeffrey L Jowell, Andrew Le Sueur and Stanley Alexander de Smith, *De Smith's Judicial Review* (7th ed) (Sweet and Maxwell 2016), §11-018.

Such a conception of discretion envisages three situations: (a) choosing an appropriate outcome out of numerous appropriate outcomes; (b) choosing an appropriate outcome from numerous appropriate and inappropriate outcomes; and (c) choosing the least inappropriate outcome out of numerous inappropriate outcomes. Take a non-legal example of affixing a framed picture to a wall. If the available means are via a hammer and a nail, an adhesive hook, a strip of sticky tape and some chewing gum, in (a) above, the hammer and nail and the adhesive hook may be considered to be appropriate and therefore the sticky tape and chewing gum would not be options; in (b) the sticky tape and chewing gum would also be options (as this encompasses all means), but may not be considered to be appropriate means of affixing the frame to the wall; in (c) the hammer and nail and adhesive hook would not be options, and the choice would be between the sticky tape and the chewing gum.

Would it be permissible in (a) and (b) to choose the adhesive hook and in (c) to choose the sticky tape? In Hart's writings, the concept of discretion appears to require a value judgement as to the 'best'[367] resolution of the case at hand, though he does not go so far as to state that the exercise of discretion is to choose the most appropriate outcome. It does however appear legitimate to read this into his writing and worked examples appear to demonstrate that this is an important component of discretion.

In the previous paragraph I used the word "*choose*" to describe the court's decision between one outcome and another. Yet Hart uses numerous examples to draw out the differences between 'choice' and 'discretion'. These examples seek to limit discretion to the

[367] The term 'best' is not defined and would have to be subjective if such a test were to be practicable in the real world.

exercise of a choice guided by principles or rules yet excludes decisions where there is only one "*sensible*" option, or where convention or rules dictate the correct result. This, Hart professes, demonstrates that "*so much depends on the precise description of the choice with which the individual is faced.*"[368] He states:

> *"It seems to me then that discretion occupies an intermediate place between choices dictated by purely personal or momentary whim and those which are made to give effect to clear methods of reaching clear aims or to conform to rules whose application to the particular case is obvious."* [369]

This lends credence to the point above regarding the absence of *clear* rules or principles guiding the exercise of discretion. Hart's discussion then returns to focus upon its existence and exercise in a legal context, considering the need for discretion by virtue of the *"human situation"*.[370] Hart concludes that:

> *"Pending the evolution of rules, discretion must take its place because the area is really one where reasonable and honest men may differ, however well informed of the facts in particular cases.*
>
> *Hence, in such fields as these, the important matter, having diagnosed what it is that renders discretionary jurisdiction inevitable, is to identify what are the optimum conditions for the exercise of discretion, because where we cannot be sure of being right, we can at least do what we can to obtain the best conditions for decisions."*[371]

In relation to the exercise of discretion, Raz states that:

> *"...judicial discretion is not arbitrary judg[e]ment. Courts are never allowed to act arbitrarily. Even when discretion is not limited or guided in any specific direction the*

[368] Hart (n 308), 658.

[369] Hart (n 308), 658.

[370] Hart (n 308), 663.

[371] Hart (n 308), 663.

courts are still legally bound to act as they think is best according to their beliefs and values."[372]

Raz is therefore in agreement with Hart in relation to the exclusion of arbitrariness and the requirement that the discretion is exercised in a manner in which the decision-maker considers is the best resolution in the particular situation. Raz however makes a stronger claim than Hart (who tended to focus upon the exercise of discretion involving a reasoned elaboration),[373] stating that:

"[a judge] has discretion when the law requires him to act on reasons which he thinks are correct, instead of imposing its own standards. When discretion is denied the law dictates which standards should be applied by all the judges. When discretion is allowed each judge is entitled to follow different reasons but he must believe that they are the best."[374]

So, we can see that there is broad agreement as to the fact that discretion must be exercised in a manner which is rational, reasoned and in pursuit of the 'best' outcome according to the purpose(s) of the exercise. Drawing the threads together, the key components of the exercise of discretion are that the decision must be taken:

a) for reasons which the decision maker thinks are correct;
b) by an application of the principles or standards which are required to be considered in the decision-making process;
c) in a manner which is not arbitrary or in pursuit of personal whim; and

[372] Raz (n 314), 847.

[373] Shaw (n 313), 713.

[374] Raz (n 314), 848.

d) having performed a comparative exercise between the various options (rather than an assessment of each in isolation).

Many of these conclusions are echoed by the limited writings on judicial discretion in the context of sentencing. Building upon the general literature, Ashworth states:

> *"[t]he purpose of discretion is certainly to allow the sentencer to select the sentence which he believes to be most appropriate in the individual case, considering both the facts of the case and any reports on the offender's character. The purpose of discretion is surely not to enable individual judges and magistrates to pursue personal sentencing preferences."*[375]

This concerns both the exercise and the existence of discretion, identifying the need for a choice exercised in accordance with principles (making reference to proportionality, individualisation and, obliquely, the purposes of sentencing in s.142 of the Criminal Justice Act 2003, the belief on the part of the sentencer that the resolution chosen is the 'best', and the exclusion of arbitrariness. It is, therefore, in accordance with the conclusions drawn above.

Ashworth therefore shares a commonality with Hart (and others) in the rejection of the existence of discretion where a decision may be taken on an arbitrary basis. This requires there to be some guidance as to the way in which the decision may be exercised, clearly acknowledging the need for rules or principles. Yet Ashworth builds upon the general position (the exclusion of arbitrariness and so on) to incorporate the notion that the outcome chosen in the exercise of the discretion is the one which the judge regards as most appropriate (echoing Hart's "*best*" outcome requirement). This statement as to the purpose of discretion similarly rejects the notion of personal whim in favour of an approach which is informed by other

[375] Andrew Ashworth, *Sentencing and Penal Policy*, (Weidenfeld and Nicholson 1983), 69.

sources. While not delving into the issue of the location of such sources, I suggest that it is clear that this speaks to sources of guidance such as principles, by virtue of the references to factors concerned with the offence and the offender.

Ashworth further notes that there is a distinction to be drawn between a discretion to determine which policy to pursue, and how best to pursue that policy in an individual case, concluding that the arguments in favour of judicial discretion clearly go in favour of the latter, rather than the former.[376] The point here appears to be that it is for sentencers to exercise their discretion and impose a sentence (or package of sentences) which best pursues the policy aim as determined by the legislature.[377] This can be read as being in concert with Hart's requirement that the decision is not made in pursuit of the judge's personal opinion or "*whim*".

Such a view has historical support; it was the view taken by the Victorian Criminal Law Commissioners, who identified a lack of certainty as being problematic and leading to arbitrary sentences "*depending on peculiar notions of policy entertained by different individuals, or their firmness and resolution of mind.*"[378] The Victorian Commissioners sought to limit the "*mischief*" to the narrowest of margins, and thereby curtail judicial discretion: they proposed that sentence types were to be limited and that sentences had to fall within a minimum and maximum level.[379]

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[376] Ashworth (n 375), 69.

[377] Ashworth considers the current regime in England and Wales to be problematic. Under s.142 of the Criminal Justice Act 2003, there is a list of various (and conflicting) purposes of sentencing in the case of those aged over 18 at conviction. Some are retributive, some are consequentialist. The details of the operation of that section and the objections to it are not germane to the present discussion. For more, see Ashworth (n 3), § 3.3.1.

[378] Radzinowicz and Hood (n 196), 1292.

[379] Radzinowicz and Hood (n 196), 1293.

Conclusion

Bringing the various elements of this discussion together, the following propositions emerge:

a) that the issue is most logically and clearly approached from considering two distinct questions, first the existence of a discretion and secondly, the way in which it must be exercised;

b) that the long-standing disagreement between Hart and Dworkin, and as commented upon by numerous academics since, principally stemmed from the discussion of positivism and theories of law rather than a conception of judicial discretion in and of itself; as such the later debates do not add much by way of substance to this enquiry into judicial discretion; and

c) that there is broad agreement as to the central tenets of what a theoretically sound conception of judicial discretion comprises, with vague disagreement around the edges.[380]

Proceeding on the above analysis, it is possible to construct a theoretically sound account of judicial discretion for the purposes of the analysis of sentencing in England and Wales in this thesis.[381] Earlier in this chapter, I sought to identify and analyse Hart's and Dworkin's conceptions of judicial discretion, with additional commentary from, *inter alia*, Raz. I then sought to bring together the commonalities of these three dominant accounts into one, rationalised, account of judicial discretion. The account I now put forward is based heavily

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380 As to this final point, it is noted that the comment on the Hart-Dworkin debates has furthered the overall debate regarding legal positivism, for instance, see Timothy A O Endicott, *Vagueness in Law,* (OUP 2000), particularly chapter 4.

381 This account does not purport to speak to the Hart-Dworkin debate on positivism, being constructed for its own purpose rather than as a part of a wider task of discerning the limits of the law.

on the agreement between Hart and Dworkin as to the nature of judicial discretion, borne out of their wider work on the limitations of the law and positivism. It is suggested that to answer the question 'what is judicial discretion?', one must consider two issues, each of which have three constituent parts. While it is accepted that there are competing accounts (though not substantially in conflict), the following is offered as a credible account of judicial discretion for the purposes of the examination of methods of limiting or structuring discretion.

I suggest therefore that a discretion exists where the court is required to make a decision in circumstances where there are applicable rules and/or principles but where these rules and/or principles when properly applied allow for more than one result. This is to omit matters such as the exclusion of evidence, or the determination of an application to withdraw the case from the jury.[382] Moving on to the second limb, concerning the exercise of the discretion, a discretion is in fact exercised (and this is a determination *ex post facto*) where the decision was taken not in pursuit of personal opinion or on an arbitrary basis, but by virtue of a proper and reasonable application of the rules or principles. The account of judicial discretion proffered is therefore as follows.

Discretion exists where:

a) the decision maker is required by law to make a decision;
b) principles (or standards) exist which guide the making of the decision; and
c) the proper application of those principles does not produce a single, obviously correct, result.

Discretion was properly exercised where:

[382] The precise application of this definition to sentencing is considered below.

a) the decision was not taken in pursuit of personal whim or on an arbitrary or legally irrelevant basis;
b) the decision was taken by an application of relevant principles;
c) the exercise was rational; and
d) the decision made was, in the decision-maker's opinion, likely to bring about the most appropriate outcome.

The case for structured judicial discretion

Chapter 3 set out our current understanding of the realities of inconsistency in sentencing. While there may be some disagreement as to the extent of disparity, and the nature of the principal causes, the empirical literature is clear that unjustified disparate sentencing practices exist. Against that background, the need to promote greater consistency is manifest.

With unbridled discretion comes, as demonstrated by the literature earlier in Chapter 3, a very real risk of unjustified disparity. The response therefore has to be to somehow exert some influence or control over the exercise of discretion in order to reduce the possibility of the impact of non-legally relevant factors impacting upon the outcome of the sentence. This could take many forms such as judicial education on diversity,[383] a reduction in the number of available sentencing disposals or the creation of binding sentencing ranges. The extent to which such methods will impact upon the exercise of discretion will of course vary, and, perhaps, vary drastically.

[383] See for example Sonja B Starr and M Marit Rehavi, 'Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of Booker' (2013) The Yale Law Journal, 2.

The term "*control*" is likely to be cause for concern for many, not least members of the judiciary who value so dearly the discretion with which they are afforded. It also connotes a degree of oversight which does not necessarily follow from the desire to influence the exercise of the discretion. Instead, hereinafter, the term "*structure*" will be used to mean a device designed to influence the way in which a discretion is exercised. All methods of influencing discretion in this way operate to provide some sort of structure to the decision-making process. Accordingly, the following paragraphs make the case for structured discretion as that response to the problems identified in the empirical literature discussed above.

To sentence in the absence of structure – or even in the absence of robust structure – is to invite inconsistency. Such can be seen from the empirical literature discussed above. Van Duyne described "*open problems*" and "*well-defined problems*" – the former being one for which there was no objective test to ascertain whether the problem-solver's solution is the correct one, the latter being one for which an objective test does exist. He continued to state that the task of imposing sentence for a criminal case:

> *"is considered to be an open problem: the decision makers have no unambiguous criteria by which they can determine whether their decisions have been the correct ones. The only guideline is their conscience – their feelings of what constitutes a 'fair' sentence."*[384]

The absence of structure, to provide the unambiguous criteria by which decisions can be evaluated, inevitably produces uncertainty and, as demonstrated by the empirical studies discussed in Chapter 3, inconsistency. How then should judicial discretion be structured? The section begins with a simple thesis: methods of structuring discretion can be divided into one

[384] Petrus van Duyne, 'Simple decision making' in Pennington and Lloyd-Bostock (n 23), 146.

of two categories, (1) those which limit discretion; and (2) those which guide discretion. It moves on to consider the different devices used to structure discretion before drawing conclusions regarding the utility of those devices and their application to sentencing systems with different approaches and principles.

Methods of structuring discretion: Limiting or guiding?

This thesis uses the term 'structure' in relation to judicial discretion at sentencing to describe a measure which has influence over the exercise of that discretion. It is helpful to identify two types of structure, namely those which limit discretion, and those which guide it.[385] The term 'limit' is used here in its literal sense, to convey the concept of the measure acting to curtail or restrict the options available to the court in the exercise of its discretion. A simple example is that of a maximum sentence: where the law prescribes that a sentence for a particular offence may not exceed a particular level, that operates as an inviolable limit. The term 'guides' is used here also in its literal sense to connote a means of informing the way in which the discretion should be exercised. This requires an extra step in the application of the measure of structured imposed on the exercise of discretion, namely a judgement on the part of the sentencer, to interpret the guiding measure. A basic example of that is the principle of proportionality; the sentence is told that a proportionate sentence is one which is commensurate with the seriousness of the offence, having regard to culpability and harm, but is left to determine how it applies to a particular offence and offender.

[385] There appears to have been a tendency to shy away from the term 'limit' when considering methods employed by the courts and legislatures to set boundaries within which sentencing courts may exercise a discretion. It may be that this is a pragmatic attempt to avoid the overt acceptance of the notion that the courts and the legislature have employed (and continue to employ) methods to curtail the once almost limitless discretion enjoyed by sentencing courts in this jurisdiction. Irrespective of the reason for a tendency to avoid that term, this thesis will continue to use it.

It is the simple hypothesis of this chapter, therefore, that one can distinguish between methods of structuring judicial discretion at sentencing by assessing the nature of the measure and whether it operates to limit, or merely to guide discretion. It is further suggested that an appropriate determinative feature of whether a measure is limiting or guiding is whether or not the measure is rules-based and therefore by its application produces an objectively definitive result. For example, the maximum sentence prescribed by law for the offence of theft would operate as a limiting method as it is rules-based: the rule being that no sentence in excess of seven years' imprisonment is able to be imposed.[386] A rule operates as absolute, defeating other considerations[387] and can be objectively said to produce a definitive, unambiguous result. To continue the theft example, where a judge feels an offence of theft is so serious that a sentence of 10 years is merited, the rule, i.e. the maximum sentence, is inviolable: a sentence in excess of the maximum of 7 years is not available.[388] The objective nature of the definitive result is key here, as it needs to be capable of application without the additional subjective judgement of the sentencer in order to apply it to the situation at hand. The absence of judgement avoids any disagreement as to the result of the application of the rule.

By contrast, a guiding measure is not rules-based and therefore does not produce an objectively definitive result, nor does it limit the available options. Such measures are instructive rather than determinative, requiring evaluation and judgement in order to apply

[386] Theft Act 1968 s.7.

[387] Dworkin stated "Rules are applicable in an all-or- nothing fashion. If the facts a rule stipulates are given, then either the rule is valid, in which case the answer it supplies must be accepted, or it is not, in which case it contributes nothing to the decision." See Dworkin (1967) (n 301), 25.

[388] Gardner discusses the application of a rule, and an 'absolute' rule, and what he calls Dworkin's view that rules are applicable in an all or nothing fashion was "misleading". In particular, the brief discussion of where two 'rules' conflict, and how that might be resolved, is of interest, although beyond the scope of this thesis. See Gardner (n 2), 13.

them to a given case. Perhaps it is simpler to describe the defining feature of a guiding measure as being of an evaluative nature, requiring the sentencer to exercise a degree of judgement in understanding and applying its effect. For example, it is commonly accepted that the principle of proportionality as understood in retributive theory is incapable of producing a definitive result when applied to an offence of theft. It might be possible to discern a range of sentences which could be permissible, but it is not possible to be definite about that range; the available sentences are therefore not restricted, but there is a discernible preference towards one or more of the available options. The key here is the amorphous nature of the guiding measure. It is contingent, to a degree, on subjective interpretation which is not present in the limiting category.

The task of a sentencing court is to determine the appropriate response to the transgressive behaviour which led to the conviction. That decision may (and in reality, must) be structured by the powers vested in the sentencing court and may be further structured by guidance as to the manner in which the decision should be made. It is helpful to conceive of this exercise as two concentric circles; the outer circle defines the powers as prescribed by the law (i.e. the limiting measures); the inner circles define the principles and other guidance as to the exercise of the decision within the boundaries set by the outer circle (i.e. the guiding measures). The outer circle is best conceived of a solid line (i.e. they cannot be breached), whereas the inner circles are best conceived of a dotted line or as though it is porous (i.e. they can be breached). It would be lawful to impose a sentence inside the outer-circle but outside of the inner-circle, contrary to the guiding measure.[389] As will be seen later in this chapter, such a result may well be correct.

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[389] The amorphous nature of guiding measures invariably requires a degree of flexibility to be present in the application of such measures. Whereas there is no flexibility in relation to the limiting measures,

Limiting measures

Methods of limiting discretion invariably come from primary legislation. As noted above, one distinction between a rule and a principle in relation to the exercise of discretion is that a rule obligates (i.e. requires, a particular outcome whereas a principle merely informs as to the proper outcome). It is suggested that the following measures can be classified as 'limiting' on the above analysis:

The range of penalties available: by primary legislation available penalties are prescribed by the law, making certain sentencing orders available to sentencing courts. This device has at least two constituent parts; first, the general range of sentencing orders, e.g. imprisonment, a fine, a community order, a behaviour order and so on; and secondly, any restrictions placed upon the availability of those penalties by reference to certain factors such as the age of the offender, e.g. imprisonment is not available for a person aged under 21 when convicted. This operates to limit the sentencing powers of the court by, in the case of the former, prescribing the penalties which may be imposed, and in the case of the latter, removing certain sentencing orders from the available list.

Maximum penalties: Primary legislation sets down maximum sentences for almost all offences.[390] For example there is a maximum sentence of 14 years' imprisonment for domestic burglary by virtue of the Theft Act 1968 s.9. Any sentence in excess of this limit would be

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those being absolute and inviolable (and most likely enforceable by law), guiding measures are capable of both dispute as to the appropriate result but also violation for exceptional cases. The latter point is explored later in this chapter.

[390] Certain common law offences have no maximum sentence; the sentence is therefore "*at large*" and the in practice the maximum sentence is one of life imprisonment.

unlawful. This requires the judge to impose a sentence not in excess of that maximum; or put another way, enables a judge to impose a sentence only within the limit.[391]

Minimum sentences: Primary legislation requires a sentence of a particular nature and length to be imposed in certain cases, for example a minimum of 7 years' imprisonment for a third conviction for a drug trafficking offence.[392] This requires a judge to impose a sentence of not-less than the prescribed amount. While the judge could omit to do so, either through forgetfulness or caprice (and in that sense it differs from the two previous categories) in theory this device of limiting judicial discretion remains appropriately classified as a rule as the law requires it to be applied and the non-application of it is therefore unlawful.[393]

Combinations of sentences: Primary legislation in England and Wales prohibits the combination of certain penalties. For example, it is not permitted by law to impose a referral order and a youth rehabilitation order on a young offender.[394] Similarly, the common law prohibits the imposition of certain combinations of sentences, for instance the Court of Appeal (Criminal Division) has stated that a suspended sentence order and a sentence of immediate imprisonment should not be imposed together.[395]

Mandatory approach to sentencing: This final sub-category poses some difficulty. Measures which prescribe a particular approach to sentencing operate both as limiting but also

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[391] As will be discussed in Chapter 6, however, maximum sentences may also be guiding, in that they provide a steer as to where an offence falls within the scale of penalties available.

[392] Where the requisite conditions are met, see Powers of Criminal Courts (Sentencing) Act 2000 s.110.

[393] Chapters 6 and 7 discuss the 'escape clauses' present in the legislation and how they operate in practice.

[394] Powers of Criminal Courts (Sentencing) Act 2000 s.19(1) and (5)(b).

[395] *R. v Sapiano* (1968) 52 Cr. App. R. 674.

guiding. Take, for example, the duty to treat a particular factor as aggravating the seriousness of the offence. This can be placed within the limiting category by virtue of their effect, namely that a definitive result is produced (the aggravation of the offence) which operates as a limitation on the sentencing court's discretion (it has no option but to treat the factor as rendering the offence more serious than it would otherwise be but for the presence of the factor). The complication is that such a measure does not prescribe the result with any more precision. That can be resolved however by dividing the measure into two: the part which is limiting and the part which is merely guiding. The same can be said for statutory provisions which set down the sentencing scheme: section 143 of the Criminal Justice Act 2003 makes clear that proportionality is the guiding principle of sentencing in England and Wales (and concomitantly any derogation from this would be unlawful) but does not provide any further clarification as to how to translate that into a particular sentence in a particular case. It is therefore both limiting and guiding.

Guiding measures

Methods of guiding discretion may also come from hard law, but are more likely to come from cases, as well as legislation, and quasi-legal sources such as sentencing guidelines, prosecutorial decision-making. It is suggested that the following measures can be classified as guiding on the above analysis:

Sentencing guidelines: Sentencing guidelines vary: by way of example, different jurisdictions adopt different approaches to the binding nature of the guideline,[396] the style of

[396] For example, whether it is presumptive, like those in Ohio and Minnesota, or voluntary, like those in Virginia and Alaska.

the guideline,[397] the type of guideline[398] and the type of disposal with which it deals.[399] However a common thread binding them together is the way in which they inform the determination of sentence. By an evaluative exercise, courts apply the guidelines which produce a range of appropriate sentences, or an indication of the appropriate sentence, in a particular case. This is therefore a measure which informs the determination of sentence without providing a definitive result.[400]

Approach to sentencing: This category forms the other side of the coin, so to speak, to the "*mandatory approach to sentencing*" category listed in the 'Limiting measures' section above. Examples of such are principles such as totality, parsimony and proportionality.[401] The application of these concepts is incapable of being precise.[402] This, too, is an evaluative exercise designed to inform the decision as to what is the most appropriate sentence. While the application of such principles produces a comparatively narrow range of permissible sentences, this is of course subjective and there will be disagreement regarding the precise range produced by applying those principles to a particular case. This category could also be said to incorporate overarching sentencing guidelines, such as those providing guidance as to the approach to sentencing generally, or to a particular area of sentencing.

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[397] For example, whether it is narrative, like those in England and Wales and Delaware or numerical grid-based guidelines like those in Pennsylvania and the District of Columbia.

[398] For example, whether it is offence-specific or overarching.

[399] For example, whether a wide range of disposals are dealt with, like in England and Wales, or just determinate prison sentences, like in Virginia.

[400] This will be explored fully in the following chapters.

[401] See the later discussion of totality as a principle, in the following chapter.

[402] For example, Norval Morris was a proponent of this view. See Richard S Frase, 'Sentencing Principles in Theory and Practice' (1997) 22 Crime & Just 363, 368.

Case law: The Court of Appeal (Criminal Division), as an appellate court, provides both remedies in individual cases – for example by reducing a sentence it considers to be manifestly excessive – and guidance to other constitutions of the court, and lower courts, on matters pertaining to sentencing. Ashworth recently identified six categories of Court of Appeal (Criminal Division) case law: (a) application and interpretation of definitive guidelines; (b) assessing departures from definitive guidelines; (c) creating or developing offence-specific guidance; (d) creating or developing guidance on general principles (including sentencing procedure); (e) interpreting sentencing legislation; and (f) "common law" sentencing.[403] This guidance is again evaluative; as will be seen in the following chapters however, the degree to which this guidance requires subjective interpretation can vary.[404]

Prosecutorial decision-making: While this element will vary significantly between jurisdiction, the central point remains the same; prosecutors (generally) have influence over the sentencing process through their decision-making power. Even where, as in England and Wales, the traditional role of the prosecutor at sentencing was almost non-existent, the decision to charge one offence or another (or accept a guilty plea to such) impacts upon the sentence to be imposed. This too has different dimensions and consequences by virtue of the maximum sentence which attached to the particular offence, availability of an ancillary order or the existence of any minimum sentence.[405] There is of course a question surrounding both the

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[403] Andrew Ashworth, 'The evolution of English sentencing guidance in 2016' [2017] Crim LR 507, 508.

[404] This will be explored fully in Chapter 7.

[405] As indicated in the previous sentence, the role of the prosecutor in England and Wales has changed. Prosecuting advocates are now an active part of the sentencing process, making submissions to the judge on the law, applicability of sentencing guidelines and even guideline categorisation and appropriate sentence length. See for example Crown Prosecution Service, 'The Prosecutor's Role In Sentencing', (*CPS Legal Guidance*) <https://www.cps.gov.uk/publications/code_for_crown_prosecutors/role.html> accessed 27 November 2017. For a brief comparative view, see Lyndon Harris, 'The Role of the Prosecutor at Sentencing'

intention (or inevitability) and the legitimacy of a prosecuting authority using its decision-making power to influence the sentence process.[406] This is not explored here, however, as it is outside of the scope of the thesis.

Conclusion

This chapter has sought to provide, from a consideration of major works on discretion, a definition of judicial discretion which is theoretically credible both in terms of its relationship to the general literature on the subject and to the nuances of the law and theory of sentencing. Adopting a two-staged approach, the account proffered considers how to identify the existence of a discretionary decision and then to determine whether the manner in which the discretion was exercised was appropriate. This provides a clear account of the concept which can be applied to the multitude of decisions which a sentencing court has to make to clearly identify whether a decision is one involving a discretion.

Having determined that it is necessary to structure discretion in order to counter the risk of inconsistency, this chapter then explored the various methods of structuring discretion. Two broad categories were identified, namely limiting and guiding. This categorisation will be used later in this thesis, in conjunction with the account of discretion, to facilitate an analysis of the methods of structuring discretion and their relative success.

(University of Oxford Faculty of Law Blog, 4 March 2016) <https://www.law.ox.ac.uk/centres-institutes/centre-criminology/blog/2016/03/role-prosecutor-sentencing> accessed 27 November 2017.

[406] For a discussion in the Australian context, see John Willis, 'Some Aspects of the Prosecutor's Role at Sentencing' (Prosecuting Justice Conference, Melbourne, April 1996). Available at <http://www.aic.gov.au/media_library/conferences/prosecuting/willis.pdf> accessed 27 November 2017.

Chapter 6: Statutory methods of structuring judicial discretion at sentencing

In the United Kingdom there has been very little legislative guidance on sentencing.[407]

Introduction

In the previous chapter it was suggested that structuring judicial discretion at sentencing was the appropriate response to the manifest inconsistencies evidenced by the empirical literature. It was argued that methods of providing such structure can be grouped into either limiting or guiding measures, so characterised by their nature and effect upon the sentencing process. This chapter and the following three chapters consider the efficacy of the measures employed by the three main institutions responsible for promoting consistency in England and Wales: (1) parliament; (2) the Court of Appeal (Criminal Division) ("*CACD*"); and (3) the Sentencing Council ("*SC*").

In essence, this chapter considers two questions: first, whether and if so, to what extent, parliament has provided in statute sufficient structure to the discretionary sentencing decisions of criminal courts, and second, whether further structure is necessary in order to pursue, and achieve, consistency as conceived of in Chapter 2. This chapter surveys the key provisions which operate to structure sentencers' discretion and considers both theoretical and practical strengths and weaknesses in light of the overarching pursuit of consistency. For reasons of space, the chapter does not seek to be exhaustive.

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[407] Martin Wasik and Ken Pease, 'Discretion and sentencing reform: the alternative' in Martin Wasik and Ken Pease (eds) *Sentencing Reform: Guidance or guidelines?* (Manchester University Press 1987), 1.

This chapter begins with a brief consideration of the sentencing scheme in England and Wales before exploring the main 'general' provisions concerned with determining the sentence for a criminal offence. Next, the chapter examines the sentencing orders which may be imposed for criminal offences by exploring the statutory maximum sentences and the availability of sentencing orders. The chapter then works through the conventional methodology adopted by the courts, namely to consider aggravating and mitigating factors and other factors reducing the seriousness of an offence or otherwise reducing the severity of a sentence (such as a guilty plea), before concluding with an assessment of minimum and mandatory sentencing orders.

Parliament's role in providing structured discretion at sentencing

History

Constitutionally, parliament determines its own role and the role of other actors in the provision of structure as regards the sentencing regime: Parliament created the CACD and the SC and provided each with their powers.[408] The first point to note is that parliament's role is not to provide a comprehensive scheme for regulating sentencing discretion: on the contrary, parliament's involvement acknowledges the role that the CACD and the SC have to play. In a civil law jurisdiction, where criminal codes are prevalent, the position is different. Yet in a common law jurisdiction, the comprehensive regime comes from multiple sources. That is of course not to say that the regime is incapable of improvement. As will be seen in the following discussion, the Criminal Justice Act 2003 (the principle statute containing provisions concerning sentencing discretion in England and Wales) is deficient in a number of respects.

[408] See for example Criminal Appeal Act 1907 s.1; Criminal Appeal Act 1966 s.1; and Senior Courts Act 1981 s.2; and in relation to the Sentencing Council (and its predecessors), Crime and Disorder Act 1998 s.80 et seq.; Criminal Justice Act 2003 s.167 et seq.; and Coroners and Justice Act 2009 s.118 et seq.

In England and Wales, the Criminal Law Commissioners criticised the lack of certainty and identified this as leading to arbitrary sentences "*depending on the peculiar notions of policy entertained by different individuals*".[409] It will be noted that this conclusion is supported by the review of empirical literature in Chapter 3, some considerable time before academic studies evidenced the dangers of discretionary sentencing in the absence of structure. The Commissioners' reports spoke of injustice where aggravating factors were defined in law and observed that crimes which bore little resemblance to one another in terms of moral blameworthiness were routinely classed together without discrimination as to penal consequences. The problems of an inconsistent and incoherent legal framework, in addition to the dangers of personal opinion and the 'human' factor in discretionary sentencing, were therefore a major cause for concern to the Commissioners in their early reports in the 1830s.

Thomas identified that the object of achieving harmony in sentencing, without destroying its essentially discretionary character, has occupied the attention of reformers inside and outside of parliament for decades, noting that various methods of structuring discretion have been employed in the jurisdiction from the mid-1800s.[410] Indeed, various methods of structuring discretion have been utilised in the past 150 years, from minimum sentences in the mid-1800s[411] to systematic reviews of sentences at specified intervals[412]. This response, at least

[409] Radzinowicz and Hood (n 196), 1292.

[410] David Thomas, *Constraints on judgment: The search for structured discretion in sentencing, 1860-1910* (Institute of Criminology, Occasional Series No.4, University of Cambridge Institute of Criminology 1979), 2.

[411] In 1861, the Offences against the Person Act 1861 s.61 abolished the death penalty for buggery and reduced the maximum sentence to one of penal servitude for life, with a minimum sentence of 10 years' penal servitude. In 1891, the minimum sentence was repealed by the Penal Servitude Act 1891 s.1.

[412] Home Office, *Standard Sentences in Criminal Cases* (Home Office 1899) cited in Thomas (n 410), 7.

in the mid to late 1800s stemmed from a concern regarding disparity of sentence. Radzinowicz and Hood noted the various attempts to bring more order to the criminal law in the late 1800s, including proposed changes to maximum sentences, yet reform was slow and disparity remained "*a stark reality*".[413] Reliance was placed on a review conducted in 1895 of sentences imposed at the Central Criminal Court; the review detailed that the Common Serjeant would impose sentences of 14 years for offences for which other judges at that court would routinely impose sentences of only 12 months to five years.[414] Concern was also expressed by the press and groups such as the Howard Association.[415] Thomas referenced the practice of flogging, which upon a judicial consultation exercise as to the potential extension of the power to impose flogging, conducted by the Home Secretary in 1874, revealed marked differences of opinion as to its ideal usage, success as a crime reduction tool and its efficacy.[416] Thomas noted that its usage, as being "*reserved by general consent for the worst cases*" was more likely to be a product of the individual judge's view rather than agreed criteria.[417] This echoes the custody threshold debate which has plagued sentencing legislation for decades.[418]

Similarly, Thomas noted that the greater difficulty of controlling the sentencing practices of quarter sessions (there being circa 5,000 magistrates at that time) than in the higher

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413 Radzinowicz and Hood (n 196), 1307.

414 Radzinowicz and Hood (n 196), 1308.

415 Radzinowicz and Hood (n 196), 1308.

416 Thomas (n 410), 8-9.

417 Thomas (n 410), 9.

418 See for example Julian V Roberts and Lyndon Harris 'Reconceptualising the Custody Threshold in England and Wales' (2017) 28(3) Criminal Law Forum 477; Julian V Roberts and Lyndon Harris 'Addressing the problems of the prison estate: The role of sentencing policy' (2017) 231 Prison Service Journal 8-14; Nicola Padfield, 'Time to bury the Custody Threshold?' [2011] Crim LR 593; and Lyndon Harris et al, (2016) 'Academic response to the Sentencing Council's Consultation Paper on the draft guideline for the Imposition of Community and Custodial Sentences', 1 Sentencing News 12-17.

courts had been apparent to the Criminal Law Commissioners in 1843. The need to guide discretion had been realised then in their Seventh Report.[419] Similarly, proposals for recidivist premiums were discussed in parliament in the mid to late 1800s. The Habitual Criminals Bill (1869)[420] contained a clause which, had it been enacted, would have mandated a minimum of seven years' penal servitude to be imposed on an offender convicted of a third felony. There were proposals to extend this to subsequent convictions: Thomas referred to a speech in the House of Lords on the second reading of the Bill in which the Earl of Carnarvon supported in addition fourteen years for four convictions and twenty years for five or six convictions.[421] In the event the Bill was enacted without that provision.

There were suggestions that disparity resulted from the absence of principles in sentencing and a proposal for regular meetings of sentencers to discuss and agree upon a uniform standard of punishments for the most common offences. While this proposal in the event amounted to nothing, it can be seen as particularly pioneering and an early forerunner to both Judicial College[422] and a sentencing guidelines body.[423] Later moves to secure uniformity via legislation and the creation of a Royal Commission were unsuccessful.[424]

As the death penalty was abolished for an increasing number of offences and parliament's interest in sentencing policy dwindled from the late nineteenth century onwards,

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[419] Criminal Law Commission, Seventh Report of the Criminal Law Commissioners (1843), 99.

[420] This was later enacted as the Habitual Criminals Act 1869.

[421] HL Deb, 5 March 1869 vol 194 cc691-715 cited in Thomas (n 410), 15.

[422] The judicial body which is now responsible for the continued education and training of judges in England and Wales.

[423] Radzinowicz and Hood (n 196), 1319-1320.

[424] Radzinowicz and Hood (n 196), 1319-1320.

the extent to which the courts had discretion at sentencing grew.[425] This growth of discretion continued throughout the 20th century and has continued into the 21st. Munro and Wasik noted that this led to the courts filling that void and suggested that "*perhaps two generations of judges had become accustomed to think of sentencing policy as being entirely their own concern.*"[426] High maximum sentences in conjunction with minimum sentences becoming "*virtually unknown*"[427], led to the wide discretion with which judges were afforded in the 20th century.

Politics

While this chapter does not propose to explore in any detail the extent to which politics impacted – and continues to impact – upon parliament's role in structuring judicial discretion, one cannot explore the legislative landscape without acknowledging the role that populism and politics has played. Law and order, once a cross-party issue without politicisation became a key topic on which elections were fought. For instance, policing matters were not generally considered to be of political concern until the 1970s.[428] Thatcher's conservative party (partly) ran their election campaign on a 'law and order' platform. Once elected, her government became the 'law and order party', instigating a rise in "*punitiveness*" and a shift in the dialogue in the political rhetoric around tacking crime.[429] In the early 1990s, the landscape changed once more as Tony Blair became the leader of the Opposition and eventually took Labour into a

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425 Munro and Wasik (n 298), 26.

426 Munro and Wasik (n 298), 26.

427 Munro and Wasik (n 298), 26.

428 Robert Reiner, 'Law-and-order politics' *The Guardian* (London, 22 December 2008) <https://www.theguardian.com/commentisfree/2008/dec/22/police-conservatives> accessed 28 May 2018.

429 Stephen Farrell, Naomi Burke and Colin Hay, 'Revisiting Margaret Thatcher's law and order agenda: The slow-burning fuse of punitiveness' (2016) 11(2) British Politics 205-231, 208.

landslide general election victory with the now-famous "*tough on crime, tough on the causes of crime*" slogan.

So, from the 1980s, a slew of criminal justice legislation followed which dramatically altered the legislative landscape and the way in which sentencing courts could approach their task. From Acts in the 1980s providing the prosecution with the ability to 'appeal' against certain sentencing decisions[430] to providing purposes of sentencing[431], the face of judicial discretion at sentencing in England and Wales dramatically changed. This increased politicisation has impacted upon the view that parliament has taken as to the need to intervene in the extent to which sentencing courts exercise their discretion.

Parliament's role in structuring discretion

As the quotation at the head of this chapter indicates, it was not until the creation of the Court of Criminal Appeal in 1907 that an appellate court expressly acknowledged its role in the provision of guidance on sentencing. As seen above, parliament remained only moderately interested in sentencing policy in the first half of the 20th century, with the focus on youth justice and expanding the types of sentencing order available to a court, rather than making further inroads into the discretion afforded to the judiciary. It did, however, enact maximum and (some) minimum sentences, widen the range of sentencing options available to the court and create an appellate court with the capacity and authority to provide sentencing guidance. It also, in limited circumstances, sought to restrict judicial discretion in a greater way. For instance, section 40(2) of the Criminal Justice Act 1925 added to the discretionary power to

[430] Criminal Justice Act 1988 ss.35 and 36.

[431] Criminal Justice Act 2003 s.142.

disqualify an offender from driving under the Motor Car Act 1903 by imposing a mandatory period of 12 months' disqualification for offenders convicted of being drunk while in charge of a mechanically propelled vehicle. Additionally, section 17 of the Criminal Justice Act 1948 both prohibited the imprisonment of those under 17 and introduced a custody threshold (of sorts) providing that a court must only impose imprisonment on those aged under 21 where it was of the opinion that no other method of dealing with the offender was appropriate. A Private Members Bill (supported by the Howard League for Penal Reform) sought to extend that to adult offenders dealt with in the magistrates' courts.[432] This was perhaps parliament's first real foray into structuring judicial discretion beyond the creation of certain mandatory sentences in the 1800s and the creation of different sentences which courts may impose. It is evident, therefore, that in the first 60 years of the 20th century, parliament only sought to limit judicial discretion sparingly and in very limited ways.

Returning to the modern day, has parliament fulfilled its role, or is more needed? Parliament can be both proactive and reactive, though as will be seen, its contribution to the application of the sentencing regime is likely to be at either end of a scale of 'vague' to 'overly prescriptive', rather than occupying some intermediate ground. As discussed in the previous chapter, measures of structuring discretion may be categorised as either limiting or guiding, and typically the former will be blunt instruments with an inconsistent application or inconsistent results, whereas the latter will be vaguer and more reliant upon nuance and interpretation. As to parliament's role, it has generally seen fit to provide an overarching structure (of types of penalty, maximum sentences and so on) and to intervene in a limited number of specific cases only (such as the mandatory life sentence for murder and selected other mandatory or minimum sentences).

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[432] J E Hall Williams, 'Statutes: The First Offenders Act 1958' (1959) 1 MLR 41.

This was recognised in 2001, when the Halliday Report stated that it was parliament's role to set down a framework for a sentencing regime.[433] By its nature, a framework may be described as skeletal and therefore reliant upon other actors to contribute to add 'flesh to the bones'. It is well accepted that parliament has expected the appellate courts to intervene in matters of sentencing requiring guidance and clarification.[434] This was recognised by the scheme created by parliament. Halliday observed that when considering how sentencing was "*supposed to work*", the interested enquirer would need to consider the morass of legislation in addition to the decisions of the CACD and the Magistrates' Courts' Sentencing Guidelines (which were created by an informal group convened by the Magistrates' Association[435]). The report criticised the "*unnecessary rigidities*" inherent in the scheme prevailing at the time, noting that a greater number of available sentencing orders would make the scheme less restrictive.[436]

This bolsters the claim that the examination of the extent to which discretion at sentencing is structured must extend beyond legislation. What is clear, however, is that parliament must provide – at least – the structure and the outer limits of the court's discretion and that it may, where is chooses to, expand its involvement in this exercise into areas formerly the preserve of the courts. Parliament is merely one actor in a tripartite effort to provide adequate structure to sentencing; this conjoined effort to provide adequate guidance is one which is entirely intentional.

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433 Home Office, Making Punishments Work: Report of a review of the sentencing framework for England and Wales (Home Office 2001) § 1.32.

434 This will be expanded upon in the following chapter, however it is clear from the early 1900s that the court recognised this as its function and that parliament had legislated to that effect.

435 Home Office (n 433), § 1.9.

436 Home Office (n 433), 1.31.

Parliament limits its role in this regard, requiring input from (principally) the CACD and latterly, a sentencing guidelines body. This division of labour seems, in principle, appropriate given the respective expertise, ability to effect change and the available resources.[437] There may be specific instances where parliament could be said to have over-stepped the mark, or conversely, to have failed to act where perhaps it ought, but in general, this thesis adopts the position that broadly, the division of labour as regards providing structured discretion is appropriate. Parliament's role is to provide the architecture of the scheme – a framework within which the other actors can work to provide additional guidance where required – but not intrude too far into the way in which a court should resolve particular cases.

It falls next to consider the way in which parliament has provided such structure.

Provisions of general application

General

Sentencing in England and Wales is awash with primary and secondary legislation. Such is the proliferation of parliamentary intervention in the sentencing process that between 1991 and 2019, there have been at least 19 pieces of primary legislation making changes to the

[437] For instance, as will be seen in the following chapters, it is more appropriate for a guidelines body to provide sentencing guidelines than the CACD (or heaven forbid, parliament) because of the resource implications of providing a guideline designed to replicate current practice but remove unjust disparity in sentencing decisions, yet it is more appropriate for parliament to set the parameters of the court's sentencing powers given its constitutional role and the importance of such powers being democratically accountable.

sentencing process and affecting the exercise of judicial discretion.[438] The Law Commission recently identified the primary legislation concerning sentencing procedure (therefore excluding offence-creating and penalty-setting provisions), a summary of which ran to over 1,300 pages.[439] Parliament is almost continuously amending the sentencing regime; but more importantly it demonstrates that Parliament finds the time (on an almost annual basis) to enact legislation affecting sentencing and judicial discretion. There has therefore been ample opportunity to review the operation of structured discretion and make appropriate changes to increase its effectiveness.

As discussed in Chapter 5, statutory methods of structuring discretion may be limiting, or they may be guiding: the form of the method does not dictate its nature. A limiting measure, being rules-based, is naturally a rather blunt instrument with which parliament seeks to influence the exercise of discretion at sentencing; by contrast, guiding measures are comparatively vague. As was briefly explored in the previous chapter, limiting measures tend to be statutory as it is predominantly parliament that has the ability to impose rules upon the exercise of discretion at sentencing. These typically take the form of hard limitations on sentencing powers. In contrast, guiding measures can be statutory or non-statutory and, by their nature are vague and take many forms. This chapter will limit itself to courts of first instance and will not consider provisions applying only to appellate courts.

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[438] Criminal Justice Act 1991; Criminal Justice Act 1993; Drug Trafficking Act 1994; Criminal Appeal Act 1995; Crime (Sentences) Act 1997; Powers of Criminal Courts (Sentencing) Act 2000; Proceeds of Crime Act 2002; Criminal Justice Act 2003; Serious Organised Crime and Police Act 2005; Terrorism Act 2006; Criminal Justice and Immigration Act 2008; Coroners and Justice Act 2009; Legal Aid, Sentencing and Punishment of Offenders Act 2012; Offender Rehabilitation Act 2014; Serious Crime Act 2015; Criminal Justice and Courts Act 2015; Psychoactive Substances Act 2016; Armed Forces Act 2016; Assaults on Emergency Workers (Offences) Act 2018; Counter-Terrorism and Border Security Act 2019 and Offensive Weapons Act 2019.

[439] Law Commission, Sentencing Law in England and Wales – Legislation Currently in Force (2015).

Principles underpinning the sentencing scheme in England and Wales

Perhaps the most appropriate starting point in a consideration of statutory methods of providing structure to discretion at sentencing is with the Criminal Justice Act 2003 ss.143, 148, 152 and 153. Through these provisions, parliament has provided guidance as to the approach to determining the nature and severity of sentence to be imposed. Section 152 – commonly referred to as the "*custody threshold*"[440] – acts as a limitation on the use of custodial sentences, prohibiting the imposition of a custodial sentence unless the offence (or the combination of the offence and any offences associated with it) was so serious that only a custodial sentence could be justified. Similarly, section 148 – known as the "*community threshold*" – serves the same purpose but in respect of community sanctions. Section 153 provides that any custodial sentence imposed must be for the shortest period which is commensurate with the seriousness of the offence. Finally, section 143 provides that in assessing the seriousness of an offence, the court must consider the offender's culpability in committing the offence and any harm caused, intended to be caused or might have foreseeably been caused. Section 143 adopts a traditional retributive account of offence seriousness and provides a theoretically clear and well-accepted approach to the determination of sentence.[441] The concept of offence seriousness therefore is at the core of the scheme; while section 143 'defines' offence seriousness, it does so by reference to two other concepts – harm and culpability – which themselves are not defined. How is one to assess seriousness? In this regard, it is instructive to view this aspect of structured discretion through von Hirsch's account of proportionality: ordinal proportionality requires that sentences should be proportionate to the severity of the offences, resulting in more serious offences receiving more severe penalties,

[440] See for example, Padfield (n 418) and Roberts and Harris (n 418).

[441] There are many criticisms of retributive theory; for a brief overview, see Ashworth (n 3), 95.

whereas cardinal proportionality operates in a non-relative sense, setting the overall level of punishment. A sentencing system may therefore be cardinally disproportionate despite being ordinally proportionate.[442] A more culpable offence involving greater harm is more serious than a lesser culpable offence involving lesser harm (ordinal proportionality) yet there is nothing in these provisions which assists with the question of cardinal proportionality – the anchoring point for the offence seriousness. The paucity of guidance is strongly suggestive of the fact that parliament expects other actors to assist in providing guidance as to the application of these provisions.[443] Without more, consistency of application is unobtainable, simply by virtue of the fact that the exercise is subjective.[444]

As has been extensively discussed over the decades, retributivism prescribes that an offence be met with a disposal proportionate to the seriousness of the offending, serving as punishment for the wrongdoing in circumstances where the offender has society's disapprobation communicated to them.[445] Ashworth notes that:

> *"[c]ritics…have called for a less prescriptive form of retributivism which recognises that the concept of proportionality cannot be made sufficiently precise to indicate rankings of offences and punishments."*[446]

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[442] Rory Kelly, 'Reforming Maximum Sentences and Respecting Ordinal Proportionality' [2018] Crim LR 450.

[443] The impact of maximum sentences and the structure they provide is discussed in detail below.

[444] While it may be said that ordinal proportionality is concerned also with the consistency as between different cases, the conception of consistency advocated in this chapter obviates the need for that; if the application of principle is correct in an individual case, as is argued below, consistency will be achieved.

[445] von Hirsch (n 92), 17.

[446] Ashworth (n 3), 95.

An alternative while remaining within a desert-based model – which would claim to be a solution to the unobtainable ideal of retributivism as a defining principle – is limiting retributivism. This enables other principles to determine the appropriate disposal within the proportionate range set by desert.[447] Parliament has opted to modify the otherwise clearly retributive approach set out in sections 143, 152 and 153, instead adopting limiting retributivism by enacting s.142 of the Criminal Justice Act 2003.

Through section 142, courts must have regard to five purposes of sentencing:

(a) the punishment of offenders;

(b) the reduction of crime (including its reduction by deterrence);

(c) the reform and rehabilitation of offenders;

(d) the protection of the public; and

(e) the making of reparation by offenders to persons affected by their offences.

This firmly establishes the system in England and Wales as a limiting retributivism model, with the purposes under section 142 operating to guide the determination of the appropriate disposal within the range of proportionate sentences by reference to the seriousness of the offence.

There are, however, numerous problems in the application of section 142 and its interaction with the general provisions concerning the assessment of seriousness. It is these provisions which underpin the entire scheme and which are required to do much of the theoretical and practical work in the determination of sentence. Principally, the statute provides no guidance as to how the provision should be interpreted. First is that there is no hierarchy of

[447] Ashworth (n 3), 95.

purposes explicit or implied by the statute. One might suggest that the order in which the purposes appear implies a descending order of importance. This might be supported by the fact that punishment is the overriding aim of the scheme; such is clear from ss.143, 152 and 153 as discussed above. Yet this would be, at best, to strain principles of statutory interpretation,[448] or worse, to do no little violence to the statute.[449] Are sentencers to choose one (or more)? This was Ashworth's view when giving evidence to the House of Commons Justice Select Committee in relation to sentencing:

> *"...because they are contradictory I think it is very difficult to pursue two of them in particular cases, and I think giving the court the choice rather than having a hierarchy of purposes is a mistake..."*[450]

This can, one might say, permit (or even encourage) disparity; two closely similar cases may result in two wildly different sentences by virtue of the sentencing judges choosing different, competing purposes of sentencing. One may decide to pursue punishment and deterrence, imposing a harsh sentence of immediate custody, whereas another may choose to prioritise rehabilitation, imposing a community order. Parliament has offered no guidance as to how such a situation should be resolved.

Second, the purposes are not defined. Before a court determines which of the purposes of sentencing to pursue in a given case, it must first understand what is meant by each.

448 Daniel Greenberg, *Craies on Legislation, 11th edition* (Sweet and Maxwell 2017), 733 *et seq.*

449 A phrase relied upon by the courts when considering submissions in relation to statutory interpretation, see e.g. *R. (Gibson) v Secretary of State for Justice* [2018] UKSC 2; [2018] 1 W.L.R. 629 at [20].

450 Justice Committee, *Sixth Report Sentencing guidelines and Parliament: building a bridge* (HC 2008-2009), 715 at [49]. This view was repeated in Ashworth (n 3), 82.

Parliament has given no steer as to the meaning of, for instance, punishment.[451] Other enactments concerning sentencing present similar difficulties; for example, section 73 of the Powers of Criminal Courts (Sentencing) Act 2000, which makes provision for reparation orders, includes the rather circular definition:

> *"(3) In this section and section 74 below* "make reparation"*, in relation to an offender, means make reparation for the offence otherwise than by the payment of compensation…"*[452]

In the absence of clear definitions of concepts which are central to the sentencing exercise, it is clear that parliament envisages the courts, (either first instance courts or the CACD or the SC) to offer assistance on such matters. One can well imagine two judges determining that two identical sentences serving different purposes in different cases, or perhaps even in the same case.[453] When such crucial interpretation is left to the subjective judgement of individual courts, there is a veritable invitation to inconsistency. While there has been criticism as to the ineffectiveness of provisions such as section 142,[454] such provisions are frequently referred to by courts and permit sentencers to impose different sentences and justify them by reference to whichever purpose and whichever interpretation of that purpose they seek to pursue.

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[451] The same is true of the duty upon a court when imposing a community order; the court must impose a requirement for the purposes of punishment and/or impose a fine: Criminal Justice Act 2003 s.177(2A). The statute does not define "*punishment*" for this purpose and it is simply for the court to consider which requirement in the circumstances of the case satisfy that duty.

[452] It is correct to note that section 73 includes reference to "*work*" which may be undertaken as part of a reparation order, but there is no further indication of what a reparation order may comprise.

[453] Though perhaps this is not as ill-considered as first appears. As was suggested in *R. v Williscroft* [1975] VR 292 at [300], "*No sentencing principle or factor is decisive in every case. The purposes of punishment vary from offender to offender and from crime to crime.*".

[454] Ashworth (n 3), 82-83.

A recent example of this is *Attorney General's Reference (R. v Youngman)*[455] in which the offender had been convicted of misconduct in public office having taken prohibited items into a custodial institution following an inappropriate relationship with an inmate. She had provided a mobile telephone, a psychoactive substance (on three occasions) and letters of a sexual nature. When sentencing, the judge imposed 12 months' imprisonment suspended for two years, with 300 hours of unpaid work. The Attorney General sought leave to refer the sentence under the unduly lenient sentence scheme, under which the CACD could increase a sentence where they consider it to be 'unduly lenient'.[456] The Attorney General submitted that the offence called for a deterrent sentence and that the suspended sentence imposed was unduly lenient and should be increased. The court examined the judge's sentencing remarks, noting that the judge had considered a number of mitigating features and decided that an immediate custodial sentence was not necessary. The court concluded that the judge's conclusion was open to him, declined to find that the sentence was unduly lenient and accordingly refused the reference. Therefore, the risk of inconsistency is not just a theoretical possibility but a practical reality.

A recent independent report into the Sentencing Council suggested a sentencing guideline concerning section 142 and argued that future sentencing guidelines (including offence-specific guidelines) should be informed by "*research evidence on consequences*" given section 142 includes some consequentialist purposes.[457] This demonstrates a need for others to step in provide additional guidance. It is unclear whether this was contemplated by

[455] [2016] EWCA Crim 2224.

[456] For a summary of the unduly lenient sentence scheme, see Lyndon Harris and Nicola Padfield, *Thomas' Sentencing Referencer 2018* (Sweet and Maxwell 2018), 31.

[457] Sir Anthony Bottoms and A R (Jo) Parsons, The Sentencing Council in 2017: A report on research to advise on how the Sentencing Council can best exercise its statutory functions (Sentencing Council of England and Wales 2017), 30 et seq.

parliament, however, as will become clear in the following chapters, it is clearly within the remit of both the CACD and the SC to do so. Parliament should provide further guidance, in the form of definitions and a hierarchy of purposes, to aid a more consistent application of these provisions in a bid to curb the inconsistency which it is clear (as explored in Chapter 3) exists in practice at present.

In light of the empirical literature, particularly that in relation to the "human" element of sentencing and the consequences of wide discretion, the broad terms used by parliament in prescribing the approach to sentencing can only lead to inconsistency. While it might be said that there will be consistency of approach (in the broad sense that courts are applying the same principles), that is likely to be superficial arising out of the inevitable difference in application stemming from the absence of any guiding measures to achieve a consistent approach and outcome.

Which sentences may be imposed for which offences?

Perhaps parliament's most significant contribution to the structuring of discretion at sentencing is by prescribing the ways in which the state may respond to a criminal conviction. This is achieved by two principal means; (1) legislation setting the available penalties for particular offences; and (2) the legislation creating the sentences which form part of a sentencing court's arsenal. To this should be added the limited, complimentary role of the common law in both prescribing the availability of certain sentences, and in determining the nature and extent of sentences which may be imposed for certain offences.[458]

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[458] For instance, the Crown Court has an inherent jurisdiction to impose a sentence of imprisonment, subject to any limitations placed upon it by parliament, see Senior Courts Act 1981 s.45 which expressly reserved the common law powers extant prior to the Act.

The maximum sentence available for particular offences

For all statutory offences (and some common law offences),[459] parliament has provided a maximum sentence. This prescribes whether or not an offence is imprisonable (i.e. an offender convicted of that offence is liable to a term of imprisonment) the maximum length of any such imprisonment and (usually) whether a fine may be imposed alongside any term of imprisonment. Where an offence is not imprisonable, the statute states that a fine is available, either by reference to an amount or by reference to a level on the 'standard scale'.[460] For those common law offences for which parliament has not prescribed a maximum sentence, but instead designated that the sentence is "*at large*" the maximum penalty is life imprisonment.[461]

Parliament therefore imposes limitations by restricting the ability to impose a level of sentence of a particular severity, giving a steer as to its view as to the seriousness of offences and offence types. This is to be seen in conjunction with the provisions listed above concerning proportionality; here we see that maximum sentences perform both a limiting function (as described above) and a guiding function providing guidance as to the cardinally proportionate sentence (in concert with the general provisions discussed above). But is this sufficient?

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[459] For example, murder (see the Murder (Abolition of Death Penalty) Act 1965 s.1, manslaughter (see the Offences against the Person Act 1861 s.5) and conspiracy to defraud (see of the Criminal Law Act 1977 s.3).

[460] See the Criminal Justice Act 1982 s.37.

[461] For example, perverting the course of justice (see Crown Prosecution Service, 'CPS Legal Guidance Public Justice Offences incorporating the Charging Standard' (Crown Prosecution Service) <https://www.cps.gov.uk/legal-guidance/public-justice-offences-incorporating-charging-standard> accessed 6 April 2018 and misconduct in public office (see Crown Prosecution Service, 'CPS Legal Guidance, Misconduct in public office' (Crown Prosecution Service) <https://www.cps.gov.uk/legal-guidance/misconduct-public-office> accessed 6 April 2018). This is so unless the Powers of Criminal Courts (Sentencing) Act 2000 s.77 applies, which limits the maximum penalty to two years where it is not otherwise limited or expressed to be life imprisonment.

The ability of maximum sentences to structure the sentencing decisions is recognised by scholars such as von Hirsch, who observed that such provisions may provide guidance as to the relative seriousness of offences of the same, or even different types.[462] This is acknowledged by the courts; for example the High Court of Australia has described them as "*guideposts*".[463] Kelly suggests that such comparisons – say between rape which has a maximum sentence of life imprisonment, and theft which has a maximum sentence of 7 years – allow one to conclude that the maximum sentence for offence X is too low when compared with the maximum sentences for offences Y and Z.[464] This is of course relative rather than absolute; the latter would presume that offences Y and Z had cardinally proportionate maximum sentences. Yet such comparisons may inform the disposal of individual cases: what level of sentence should a (comparatively) high seriousness theft receive as compared with a (comparatively) low seriousness rape? While such comparisons may inform the disposal of a case (the rape should receive a more severe sentence than the theft, or vice versa), such guidance is unhelpfully vague. Kelly suggests – in the context of reforms of maximum sentences – that comparison is not a replacement for the consideration of why our views as to the gravity of an offence have changed, but an aid to it.[465] Kelly subtly suggests that this is perhaps an idealistic view; perhaps such comparisons *ought* to be an aid to such an analysis, but in a climate where criminal justice policy is increasingly politicised, reforms to maximum sentences (rare as they are) are brought about in an ad hoc manner without wholesale review, can any weight be placed upon maximum sentences? Such scepticism would seem to be justified.

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462 von Hirsch (n 223), 77.

463 *Muldrock v The Queen* (2011) 244 CLR 120, at [27].

464 Kelly (n 442) 450.

465 *Muldrock v The Queen* (2011) 244 CLR 120, at [27].

Can maximum sentences offer any other guidance? In (comparatively) high seriousness cases, the common law is clear that judges may compare the 'most serious example of the offence' against the case for which they must impose sentence in order to inform them as to how serious the instant offence is for the purpose of imposing sentence.[466] Accordingly, the maximum sentence may provide some guidance in the form of an anchoring point for cardinal proportionality. Yet this, too, is problematic. First, there is the obvious issue of subjectivity; when is a case in the bracket of the most serious cases of its type? Is this based on experience (in which case, it is almost infinitely variable, depending on a number of factors), is it an exercise in conceiving of the worst possible case, or a hybrid of the two? If based on experience (in whole or in part), then the criticisms of an approach akin to that of 'instinctive synthesis' – the process by which all relevant factors are simultaneously evaluated by the sentencing judge favoured in Australia[467] – must surely apply. Irrespective of one's view of the propriety of instinctive synthesis as an approach to sentence, even the most ardent defender of instinctive synthesis accepts that further guidance than mere 'intuition' is needed:

> *A sentence can only be the product of human judgment, based on all the facts of the case, the judge's experience, the data derived from comparable sentences and the guidelines and principles authoritatively laid down in statutes and authoritative judgments.*[468]

Similar considerations apply if the exercise is performed by imagining the fictional 'worst case'; individuals will inevitably concoct different factual scenarios of varying

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466 See for example *R. v Pinto* [2006] EWCA Crim 749; [2006] 2 Cr.App.R. (S.) 87. This has been refined over time and the generally understood position now appears to be that the maximum sentence is not reserved for the most serious example of the offence, but that it is necessary to consider the worst type of offence which comes before the court and ask themselves whether the particular case they are dealing with comes within the broad band of that type. For more detail, see P J Richardson (ed) *Archbold Criminal Pleading, Evidence and Practice 2018* (Sweet and Maxwell 2017) § 5-464.

467 For a brief discussion of instinctive synthesis, see Krasnostein and Freiberg (n 31), 268.

468 *Markarian v The Queen* (2005) 228 CLR 357 at [52].

seriousness which will be said to be 'the worst', and so the attendant problems of individualisation exist. Further, the concept of a bracket of 'the worst' types of case to come before the courts is surely fluid: the worst case is only the worst case until a case which is worse still. Not only may this be influenced by one's experiences as a practitioner or a judge,[469] but is subject to change.

A further complication is that maximum sentences fail to keep pace with change caused by non-legal factors. Take drug supply as an example; changes in the purity of drugs sold on the street will vary the seriousness of the band of worst cases likely to come before the courts. Perhaps a simpler example is that of acquisitive crime. Changes in the value of money, both as a result of inflation but also the relative health of the economy constantly shift where the theft of £100 falls on the scale of seriousness for the offence of theft.

But even supposing that there was unanimity as to the 'worst' type of case likely to come before the courts, there remains the significant hurdle of applying that to the instant case to be sentenced. This is reliant on the individual's assessment of the seriousness of the offence in light of the worst-case example. As has been considered above, the assessment of seriousness by reference to retributive proportionality is an imprecise concept which lends itself to inconsistency when reliance is placed upon the very limited guidance given by parliament in s.143 of the Criminal Justice Act 2003.

Even if one considers that the challenges outlined in the preceding paragraphs could be overcome, that is based on the significant assumption that the maxima provided by parliament

[469] Which of itself is another source of guidance in addition to the maximum sentence provided by parliament.

are correct relative to one another in a cardinally proportionate fashion. The strongest claim that can therefore be made is that maximum sentences provided by parliament *may* be able to provide *some* guidance as to the imposition of sentences. It seems as though such guidance is of limited utility.

In its 1978 report, *Sentences of Imprisonment,* the Advisory Council on the Penal System conducted an extensive review into the structure of maximum sentences, its terms of reference being to assess the extent to which the structure and level of maximum sentences operate as a guide to sentencing practice.[470] The report advocated a two-tier system of sentencing, reducing the maximum for the majority of cases for a particular offence, but allowing sentences in excess of that maximum for exceptionally grave cases.

The report attracted criticism from scholars. One such critic regarded its major flaw to exist in the assumption, at the heart of the Report, that maximum penalties have any great relevance to the sentences actually imposed.[471] Wasik and Pease suggest that it is generally accepted that maximum sentences are irrelevant to the control of judicial sentencing.[472] This seems somewhat of an overstatement, given the inescapable limiting effect of maxima on judicial discretion – did the reduction of the maximum sentence for theft from 10 to 7 years not impact upon judicial decision making, for example?[473] Perhaps the better point is that

[470] Advisory Council on the Penal System, *Sentences of Imprisonment: A Review of Maximum Penalties* (Home Office 1978).

[471] JEHW, 'The Advisory Council Report: Sentences of Imprisonment' (1978) 18(4) Brit. J. Criminology 396.

[472] Martin Wasik, 'Time to repeal the firearms minimum sentence provision' [2017] Crim LR 203.

[473] While it certainly limited, the discretion to impose sentences of between 7 and 10 years, the answer to the empirical question of whether sentencers interpret the change as a change in cardinal proportionality, is unknown.

maxima alone cannot adequately structure sentencing discretion or provide meaningful guidance as to the determination of sentence.

Maximum sentences thus serve a dual purpose. They have a guiding effect upon the court's discretion, operating as an indication of seriousness by providing guidance as to the cardinally proportionate sentence; this is in conjunction with the 'seriousness' provisions which provide for a framework within which to assess the ordinally proportionate sentence. They also have a limiting effect, acting as an inviolable limit beyond which a sentence for a single offence may not go. It is notable however that while this places constraint on the discretion of the court in cases of (relative) high seriousness (thereby impacting upon the sentence to be imposed) all other cases beneath the highest level of seriousness are left without much by way of guidance. Considering the provisions together, as one must, it appears that parliament has provided guidance as to the proportionate sentence. Yet this remains vague and subjective. For example, how serious is a serious robbery? How culpable is offence X when considered against offence Y? How near to the maximum sentence should the sentence be? The statutes therefore provide an overarching but limited structure; yet this is perhaps symptomatic of the fact that the concept of proportionality is considered to be imprecise.[474] Again, more is needed from the other actors at play.

[474] Most notably by Norval Morris. See Frase (n 41), 134, for a consideration of proportionality in retributive and non-retributive theories.

Availability of sentencing orders

Aside from continuing to make imprisonment an available sentence,[475] parliament has created various types of sentences and orders on conviction.[476] There has been a proliferation of sentences and ancillary orders over the past 25 years or so, providing courts with a wider range of orders which may be imposed in consequence of a conviction. Whereas in the Victorian era, available sentences included execution by hanging, imprisonment and transportation (to one of the British colonies),[477] in the 21st century, a sentencing court's arsenal now includes a range of community penalties with requirements variously designed to effect rehabilitation, treatment and punishment,[478] a multitude of 'ancillary orders' principally designed to prevent further offending[479] and orders of a compensatory nature.[480]

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475 As noted above, the Crown Court has an inherent jurisdiction to impose imprisonment; the magistrates' court has a limited power to impose imprisonment by virtue of s.32 of the Magistrates' Courts Act 1980.

476 The distinction between a 'sentence' and an 'order' available on conviction is somewhat unclear. It stems from the Criminal Appeal Act 1968 s.50 which provides a right of appeal against a 'sentence'. There appears to have been some concern regarding so-called 'ancillary orders' and their designation as 'sentences'; the avoidance of such a label relieves sentencing courts from the limitations of the criminal hearsay rules and the prohibition on retroactive penalties, see Richardson (n 466), § 5-1228.

477 When the colonies refused to accept prisoners in 1853, sentences of transportation were converted into sentences of hard labour. See 'Victorian Prisons and Punishments' (*British Library*, 14 October 2009) <https://www.bl.uk/victorian-britain/articles/victorian-prisons-and-punishments> date accessed 4 April 2018.

478 For example, the community order which is a non-custodial sentence enabling the court to impose one or more 'requirements' that must be completed or adhered to during the currency of the order (see the Criminal Justice Act 2003 ss.177-220).

479 For example, the sexual harm prevention order which is a behaviour order that imposes limitations on the behaviour of a person convicted of certain offences, such as to not be in the sole company of a child, or to only use devices capable of accessing the internet which have the ability to retain browsing history and not to delete that history (see the Sexual Offences Act 2003 ss.103A-K); the criminal behaviour order which is an order that places prohibitions on the behaviour of a person who has engaged in behaviour that caused or was likely to cause harassment, alarm or distress to any person, where it will help in preventing the offender from engaging in such behaviour (see the Anti-social Behaviour, Crime and Policing Act 2014 ss.22-33; and the forfeiture of any item which relates to a drug trafficking offence (see the Misuse of Drugs Act 1971 s.27).

480 For example, the compensation order which is designed to compensate victims of injury or loss in cases where the issue of liability is simple, see the Powers of Criminal Courts (Sentencing) Act 2000

This clearly impacts upon a court's discretion at sentencing by providing sentencing courts with a wide array of options – wider than ever before – spanning various purposes of sentencing.[481] Parliament has, however, limited the availability of certain orders, thereby curtailing the otherwise extremely wide discretion created by the sheer number of orders which may be made following a conviction for a criminal offence. Examples of this include by limiting the availability of particular orders to cases in which there is a conviction for a particular offence.[482] By adopting such an approach, parliament has structured, by way of limitation, the discretion afforded to sentencing courts. However, this is not so for a large number of sentencing orders. For instance, (for an adult) a community order is available where the offence is imprisonable; a criminal behaviour order[483] is available upon conviction for any criminal offence. The same is true of a restraining order,[484] an order for forfeiture of a vehicle,[485] a compensation order[486] and numerous others.

Even with the limitation placed on the discretion given to sentencing courts by virtue of constraints on availability of certain sentencing orders, there remains a significant discretion as to whether an order should be imposed in a particular case, and if so, in what form. Wasik and Pease noted that despite the influx of legislative provisions and available sentences in the

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s.130, and the statutory surcharge which is a financial order designed to recoup funds to finance victim support services, see the Criminal Justice Act 2003 ss.161A and B.

[481] A discussion of the statutory purposes of sentencing follows later in this chapter.

[482] For example, sentences for "dangerous" offenders are available only following conviction for an offence listed in Sch.15 to the Criminal Justice Act 2003; sexual harm prevention orders are available only following conviction for an offence listed in Schedules 3 or 5 to the Sexual Offences Act 2003.

[483] See (n 479), above.

[484] Protection from Harassment Act 1997 s.5

[485] Powers of Criminal Courts (Sentencing) Act 2000 s.143.

[486] See (n 480).

1980s, there was very little guidance on their appropriate use.[487] The availability of sentences can limit the court's discretion and can do so in a meaningful way, for example making imprisonment unavailable for a particular offence. In some circumstances, however, the availability provides little guidance. For instance, where the sentencing range is wide and/or the test for imposition devoid of substance providing guidance on whether the order should be imposed (such as a conditional discharge which may be imposed where it is "*inexpedient to impose punishment*"[488]) or where there is no guidance as to the contents of the order (such as community order or sexual harm prevention order[489]). Availability of orders can therefore only ever provide limited guidance as to the exercise of discretion.

Tests for imposing sentencing orders

With the exception of sentences of immediate and suspended custody which will be dealt with below, almost all sentencing orders have conditions which must be satisfied prior to their imposition. The 'dangerousness' test for the imposition of an extended determinate sentence or a life sentence under the Criminal Justice Act 2003 is one such example. The test requires the court to be satisfied that the offender poses a significant risk of serious harm to members of the public by the commission of further specified offences (specified offences

[487] Wasik and Pease (n 407). This remains the case today: for example, in 2018, the Sentencing Council had to issue a guidance note to sentencers and authors of pre-sentence reports in an attempt to 'correct' the misuse of suspended sentence orders, see Lord Justice Colman Treacy, 'Chairman's letter to sentencers on imposition of community and custodial sentences' (Sentencing Council of England and Wales, 24 April 2018)

<https://www.sentencingcouncil.org.uk/news/item/chairmans-letter-to-sentencers-on-imposition-of-community-and-custodial-sentences/> accessed 4 May 2018.

[488] Powers of Criminal Courts (Sentencing) Act 2000 s.12.

[489] Where the court must impose conditions or requirements.

being those listed in Sch.15 to the Criminal Justice Act 2003).[490] A further example is the 'necessity' test before a sexual harm prevention order is imposed which requires that the court is satisfied that the order is necessary for the purpose of protecting the public or any particular members of the public from sexual harm from the defendant or protecting children or vulnerable adults generally (or any particular children or vulnerable adults) from sexual harm from the defendant outside of the UK.[491]

While such tests provide a more concrete steer as to the type of case in which parliament intended such orders to be imposed, there is a comparative lack of clarity in relation to other orders. For instance, in relation to a suspended sentence order parliament has provided no guidance as to when such an order should be imposed. Section 189 of the Criminal Justice Act 2003 states:

> *(1) If a court passes a sentence of imprisonment or, in the case of a person aged at least 18 but under 21, a sentence of detention in a young offender institution for a term of least 14 days but not more than 2 years, it may make an order providing that the sentence of imprisonment or detention in a young offender institution is not to take effect unless—*
> *(a) during a period specified in the order for the purposes of this paragraph ("the operational period") the offender commits another offence in the United Kingdom (whether or not punishable with imprisonment), and*
> *(b) a court having power to do so subsequently orders under paragraph 8 of Schedule 12 that the original sentence is to take effect.*

Not only is there no test which must be satisfied before imposition (merely that where imprisonment of between 14 days and two years, inclusive, is imposed, a suspended sentence

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490 See the Criminal Justice Act 2003 ss.225, 226, 226A, 226B and 229. For a discussion of the dangerousness regime, see Lyndon Harris and Sebastian Walker, 'Difficulties with dangerousness: the timing of the assessment of risk - Part 1' [2018] Crim LR 695 and Lyndon Harris and Sebastian Walker, 'Difficulties with dangerousness: determining the appropriate sentence - Part 2' [2018] Crim LR 782.

491 See the Sexual Offences Act 2003 s.103A(2)(b).

order *may* be imposed), but there is no statutory guidance as to when it may be appropriate to impose such an order. It is right to note, however, that the opening words of the provision (requiring the court to have decided to impose a custodial sentence) operate to limit the court's discretion in making a suspended sentence order available only in those prescribed circumstances. Here it is clear that parliament's intention is for the courts to interpret the provision and self-regulate; the role of the CACD will be explored in the next chapter, but it is evident that parliament considers there to be a demarcation between matters on which it should provide guidance, and those on which it is for another actor to do so. When compared with the previous regime providing suspended terms of imprisonment (which employed an 'exceptional circumstances' test), it is clear the intention was that a greater number of orders could be imposed.

The same is true of the imposition of fines. There is some debate as to whether the power to impose a fine on conviction on indictment lies in the inherent jurisdiction of the Crown Court (e.g. it is not in debate that a fine could be imposed for a common law offence), the penalty setting provision of an offence (e.g. where statute states that an offence carries a term of imprisonment or a fine or both), or in the Criminal Justice Act 2003 s.163 (discretionary power to impose a fine save where certain mandatory sentences apply). It is, however, perfectly clear that parliament has, in the provision prescribing the power to impose a fine on indictment, provided no guidance as to when such a sentence is appropriate.[492] Again, it appears that the view taken is that it is for the courts to self-regulate in this area.

[492] The magistrates' court, a creature of statute, appears to derive its power to impose a fine from the penalty setting provisions, see the Criminal Justice Act 1982 s.37. Section 37 refers to a standard scale of fine levels (each ascribed a monetary value) and states that where a penalty setting provision refers to liability to a fine or a fine no greater than a particular level, the reference to a level is to the corresponding level in the standard scale.

It is possible therefore, to identify two variables: (1) availability (whether parliament has, in creating a power to impose an order, set down when it is available, or *ceteris paribus,* the disposal is available in all cases); and (2) test for imposition (whether or not Parliament has, in creating the power to impose an order, prescribed one or more conditions which must be satisfied before the order may be imposed).

The result is differing degrees of vagueness in the statutory provisions. Availability of orders is comparatively simple. Where parliament has provided that particular orders are available only in particular cases, that operates as a limitation on courts' discretion; where it has not so provided, the discretion is unbridled. The existence of tests for imposition of such orders is perhaps more problematic. Where there is no test, the court is left to look elsewhere for guidance. Where there is a test, the test invariably provides only limited guidance. For instance, what is meant by a 'significant' risk? When does *mere* harm become 'serious' harm? When is an order 'necessary'? Such tests are, it is suggested, necessarily vague. This provides sufficient flexibility to sentencing courts enabling their application to appropriate cases, without being overly inclusive or unnecessarily restrictive. This utilisation of loose language clearly envisages an important role for the courts to play in shaping the boundaries of the statute, intended to provide the courts with the degree of discretion they determine necessary. In this way, there is a degree of self-regulation envisaged by parliament afforded to the courts.

Earlier in this thesis, it was suggested that at sentencing, the application of a legal test is not an exercise in discretion as the proper application of principles applicable to the question (e.g. of whether or not an offender is 'dangerous', or whether or not a sexual harm prevention order is necessary) produces a single, correct result.[493] Such tests do not therefore involve the

[493] See Chapter 5.

exercise of discretion (there being no discretion if the application of principles produces a single, correct result). Instead, the provisions operate to constrain the exercise of discretion, making a test capable or incapable of being imposed in a particular case. To take a common example, where the court is faced with the sentencing exercise of an offender convicted of an offence specified in Sch.15 to the Criminal Justice Act 2003, it must consider whether the offender is ‘dangerous’. Where it applies the test – whether there is a significant risk of serious harm to members of the public by the commission of the offender of further specified offences, for which parliament has provided limited guidance as to the interpretation – it may impose an extended sentence. In this way, the test operates to limit the discretion of the court, making the order available only for dangerous offenders. However, the court may still decline to do so as the order is discretionary, not mandatory. A court may decide not to impose an extended sentence where other, less coercive, measures will achieve the same purpose of public protection.[494] This serves as an example of the tripartite provision of guidance and structured discretion: Parliament provides the framework and the general policy intention and leaves the details and specific application to the courts (and sometimes the SC).

Parliament’s constrain on the powers available to a sentencing court clearly produces a degree of consistency of approach as courts have the same tools available to them at sentencing. But it does very little to influence and guide the application of the principles underpinning the scheme. The combination of maximum sentences and the general principles provides a limited degree of structure which cannot achieve a meaningful degree of consistency as defined in Chapter 2. Simply, there is too much scope for subjective interpretation in the absence of clear guidance.

494 For a recent example, see *R. v Bourke* [2017] EWCA Crim 2150; [2018] 1 Cr.App.R. (S.) 42. See also Harris and Walker (n 490).

Aggravation and mitigation

The following discussion proceeds on the basis that sentencers in England and Wales approach sentencing decisions not as their Australian counterparts – simultaneously assessing the seriousness of the offence and weighing the aggravating and mitigating factors in an instinctive fashion[495] – but by a step-by-step methodology which begins with assessing the harm and culpability inherent in the offence and then, at a second stage, factoring in aggravating and mitigating factors.

Aggravating and mitigating factors can be divided into two categories; those which are mandated by statute and those which are not. This chapter concerns itself only with those parliament has prescribed to have an aggravating or mitigating effect. This category represents a device used to structure discretion which is comparatively minor when considered against other statutory methods of structuring discretion.[496] There are eight provisions which operate as statutory aggravating factors.

Where an offence was committed while the offender was on bail, the seriousness of the offence will be aggravated by virtue of the Criminal Justice Act 2003 s.143.[497] Sections 145 and 146 of the Criminal Justice Act 2003 require that where a court finds that an offence was racially or religiously aggravated, or that immediately before, during or immediately after the

[495] For consideration of the concept of instinctive synthesis, see Mirko Bagaric, Richard Edney and Theo Alexander, *Sentencing in Australia* (Thomson Reuters 2017), 35-50.

[496] It is submitted that the statutory aggravating factors are factors which, if present in a given case, would be unreasonable not to consider increase the seriousness of the offence.

[497] Ashworth notes that this is a re-statement of a principle which has long been recognised, see Ashworth (n 3), 166. Ashworth argues that the presence of this factor neither increases the harm caused by the offence nor the culpability of the offender, suggesting that instead, it is capable of justification on the basis of it being an act of defiance of the court or a breach of trust, though one might consider the dual breach of duty (to not commit a criminal offence, to which all citizens are subject, and the additional duty imposed in the agreement to grant bail) constitutes increased culpability.

offence, the offender demonstrated hostility based on the victim's (presumed or actual) sexuality or disability or the fact they are (presumed or actually) transgender.[498] Provisions in the Misuse of Drugs Act 1971, the Psychoactive Substances Act 2016, the Violent Crime Reduction Act 2006 and the Assaults on Emergency Workers (Offences) Act 2018[499] require that certain features are treated as aggravating the seriousness of specific offences (contained with the respective pieces of legislation). Where an offence has a 'terrorist connection', the court must treat that as an aggravating factor,[500] something which Ashworth considers the court "*would probably do anyway*".[501] That is probably true of most statutory aggravating factors. Finally, there is section 143(2) of the 2003 Act which requires a court to treat previous convictions as aggravating the seriousness of the offence.

In relation to s.145, what may be crudely described as 'general' statutory aggravating factors, it is suggested that the impact is minimal. A search of legal databases (utilising no date range) reveals 11 cases which mention the duty under s.145[502] and 12 which mention the duty under s.146. These are, of course, appellate proceedings only but perhaps indicate the extent to which the provisions are explicitly referenced in proceedings. The important point, however, is that the provisions provide no guidance as to the extent to which the sentence should be increased to reflect the aggravating factor(s). The sentencer has, by this point, decided on the proportionate range of sentences having assessed the seriousness of the offence as required by statute, for example 2-4 years' custody, and has identified a starting point within that range. It

[498] Criminal Justice Act 2003 ss.145 and 146.

[499] Misuse of Drugs Act 1971 s.4A, Psychoactive Substances Act 2016 s.6; Violent Crime Reduction Act 2006 s.29; and Assaults on Emergency Workers (Offences) Act 2018 s.2.

[500] Counter-Terrorism Act 2008 s.30.

[501] Ashworth (n 3), 167.

[502] One of which was a civil case in which reference was made to s.145 in the context of linked criminal proceedings.

is then necessary to consider the extent of the aggravation (and/or mitigation) and the effect that should have on the proportionate sentence. The only statutory guidance given to sentencers in this endeavour is by virtue of the maximum sentence which provides an upper limit on the sentence which may be imposed; otherwise, the sentencer is left to seek guidance from other sources. Again however, this appears to be a conscious and principled decision concerning the respective roles of the three main actors in structuring sentencing discretion.[503]

In relation to mitigation, there exists a general provision in section 166 of the Criminal Justice Act 2003 which serves multiple purposes.[504] Subsection (1) clarifies that the common law power to mitigate a sentence by reference to any factor it considers to be relevant is unaffected by, for example, the provisions pertaining to the imposition of fines, community sentences and custodial sentences. Subsection (2) permits a court to impose a community order in a case which, save for the factor(s) considered to reduce the seriousness of the offence, crossed the custody threshold.[505] Unsurprisingly, it does not provide a methodology to determine the extent of the reduction for the identified mitigating factor(s). As with the aggravating factors, the sentencer is therefore left to determine the extent to which the mitigating factor reduces the sentence from the starting point alighted upon earlier in the process with any assistance from the CACD or SC.

Mitigation and the assessment of its effect upon a sentence is necessarily a rather fluid concept; it calls into question the fundamental approach of the sentencer. As Hough and Jacobson note, a key question is whether justice is best served by sentencing the offence or the

[503] As to which, see (n 433) and accompanying text.

[504] Criminal Justice Act 2003 s.166(3) will be dealt with later in this chapter.

[505] Criminal Justice Act 2003 s.166(2).

offender.[506] Their empirical study identified six overlapping categories of personal mitigation, though it was noted that the categorisation was somewhat arbitrary. This speaks to the complex and amorphous nature of mitigation as a concept. They identified at least 36 factors of personal mitigation which were present in their sample of 162 sentencing decisions; against that background, it is notable that the statute does not designate which factors have (or even may have) a mitigating effect,[507] nor does it provide guidance as to the approach to determine the effect of such factors on the sentence or the extent to which mitigation could or should alter a sentence.[508]

The position is therefore worse – assuming that an absence of guidance is a negative – than with aggravating factors as the statute merely provides in section 166 that the court *may* reduce a sentence for factors it regards as mitigating. The risk of disparity, both inter- and intra-courts is therefore manifest in the absence of statutory guidance. Hough and Jacobson note the "*considerable discretion*" which sentencers are afforded in this regard.[509] They state:

> *"...in according significance to certain aggravating or mitigating factors, sentencers are (implicitly) prioritizing certain sentencing rationales over others."*[510]

Ashworth's criticism of the way in which parliament has legislated for the purposes of sentencing under the Criminal Justice Act 2003 s.142 affords sentencers the ability to

[506] Mike Hough and Jessica Jacobson, 'Personal Mitigation: An empirical analysis in England and Wales' in Roberts (n 100), 146.

[507] Save for those dealt with in the next section.

[508] Interestingly, an Australian practitioner text identified over 100 aggravating and mitigating factors: see Bagaric et al (n 495), 44.

[509] Hough and Jacobson (n 506), 156.

[510] Hough and Jacobson (n 506), 156.

determine policy and invites inconsistency could be said to apply to mitigation too.[511] Certain factors are more contentious than others. For example, as Padfield notes, one judge might determine that intoxication is an aggravating factor in the commission of an offence whereas another might consider it (on the same facts) to be a mitigating factor.[512] A prominent example which gained attention by the press in England and Wales concerned a case of sexual activity with a child in which it was said by the prosecutor at first instance the fact that the victim, a 14-year-old child, had initiated the sexual activity operated to reduce the seriousness of the offence.[513] When referred to the CACD by the Attorney General under the unduly lenient sentence scheme, the court regarded such an approach as an error of judgement and stated that that fact was an aggravating factor.[514]

Young and King, in a comparative piece considering problems arising from different factors at sentencing, note that in lieu of statutory guidance as to mitigation (among other things) judges have to rely on other sources.[515] Courts are therefore unaided by the statutory regime and the question of whether and to what extent a sentence should be modified for aggravating or mitigating factors returns them to a combination of the 'seriousness' provisions, the maximum sentence for the given offence, and their own intuition; yet each of these sources provide little (if any) accurate guidance in this context. This aspect of the discretionary decision appears to be particularly prone to inconsistency of approach and outcome.

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511 Ashworth (n 3), 82.

512 Nicola Padfield, 'Intoxication as a sentencing factor: Aggravation or mitigation?' in Roberts (n 100), 81-101.

513 'Lawyer who called 13-year-old 'predatory' is barred from sex offence cases' *The Telegraph* (London, 7 August 2013) <https://www.telegraph.co.uk/news/uknews/crime/10228621/Lawyer-who-called-13-year-old-predatory-is-barred-from-sex-offence-cases.html> accessed 7 May 2018.

514 *Attorney General's Reference (No.53 of 2013)* [2013] EWCA Crim 2544; [2014] 2 Cr.App.R. (S.) 1.

515 Warren Young and Andrea King, 'Addressing problematic sentencing factors in the development of guidelines' in Roberts (n 100), 211.

It seems clear, therefore, that parliament's efforts in this regard invite inconsistency – in the absence of further structure from elsewhere. The reliance on subjective interpretation of the 'worth' of such factors in absence of any assistance once more produces a degree of consistency of approach (in the broad sense) but provides no assistance as to the application of the principles, in particular proportionality. While courts are assisted as to the relevance of particular factors to the exercise of determining offence seriousness, the application of that is entirely a matter for them.

Other factors operating to reduce the severity of a sentence

There are three other factors which may operate to reduce the severity of a sentence: (a) providing information to the authorities regarding other offences; (b) pleading guilty; and (c) the mere existence of a number of offences, a cumulative sentence for which would render the overall penalty disproportionate. These will be dealt with briefly in turn.

The first two are non-retributive factors which are generally accepted to be legitimate to the determination of the severity of the penalty imposed for a criminal offence. Slobogin notes (in the context of plea bargaining) that such factors are problematic for desert theorists as they routinely result in disproportionate punishments.[516] Frase notes that this extends beyond the guilty plea and into other forms of cooperation and restitution.[517]

[516] See for example Christopher Slobogin 'Plea Bargaining and the Substantive and Procedural Goals of Criminal Justice: From Retribution and Adversarialism to Preventive Justice and Hybrid-Inquisitorialism' (2015) William & Mary Law Review, Vanderbilt Public Law Research Paper No. 15-4, 4.

[517] Frase (n 41), 134.

However, in a system such as that prevailing in England and Wales, those factors can be amply justified on the basis that the offender is co-operating with the state in relation to their offence (plea) and other offence(s) (assisting the prosecution). It is accepted that the state should respond to such co-operation. A slightly less positive view of such factors is that the both constitute transactions between offender and the state with the state 'buying' the co-operation (which results in cost-savings in terms of the investigation and prosecution of offences in addition to the wider social benefits). Slobogin explicitly notes, in the context of US plea bargaining, that efficiency becomes the primary concern; this is a view which can support either interpretation of the rationale for the discount in sentence. The view that the enterprise is transactional is supported by the Sentencing Council's 2017 *Reduction in Sentence for a Guilty Plea* which makes clear that a reduction in sentence for a guilty plea and remorse are divorced of one another, and that the benefits of pleading guilty to an offence are the reduction in cost, the avoidance of witnesses and victims having to give evidence at court, and the reduction of the impact of the offence on victims.[518] There are some, however, who remain of the view that a guilty plea does indicate remorse and that remorse is a factor which underpins the justification of a discount in sentence upon a plea of guilty.[519]

Assisting the prosecution

There are two routes by which the severity of a sentence can be mitigated by virtue of information provided to the prosecuting authorities: one is a creature of statute, the other is a

518 Sentencing Council for England and Wales, *Reduction in Sentence for a Guilty Plea Definitive Guideline,* (Sentencing Council for England and Wales 2017), 4.

519 Fiona Leverick, 'Sentence discounting for guilty pleas: an argument for certainty over discretion' [2014] Crim LR 338, 338.

creation of the common law. They serve principally the same purpose but for obvious reasons this chapter will concern itself only with the former.[520]

The Serious Organised Crime and Police Act 2005 ("SOCPA") created a statutory scheme whereby an offender who pleaded guilty may enter into a written agreement with a prosecutor under which they offered to assist the investigator or prosecutor. In consideration for that assistance, the court might take that into account in determining what sentence to pass on the offender, often granting a substantial reduction in the severity of a sentence. The scheme is not confined to offenders who provided assistance in relation to crimes in which they were participants or accessories.[521]

The statute offers no assistance as to the manner in which the sentence may be mitigated (can it merely changing the severity of a penalty, or the nature of it too?), the methodology which ought to be followed, nor the extent to which the sentence ought to be reduced. In this way, this factor is similar to the assessment of aggravating factors noted above, and similar observations about the dearth of guidance so as to achieve an appropriate, and consistent result apply. The courts are once more forced to look to the CACD and the SC for further assistance.

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520 For a discussion of the two regimes see Richardson (n 466), § 5-132 and the decisions in *R. v A* [1999] 1 Cr.App.R. (S.) 52 and *R. v P; R. v Blackburn* [2007] EWCA Crim 2290; [2008] 2 All E.R. 684.

521 *R. v P; R. v Blackburn* [2007] EWCA Crim 2290; [2008] 2 All E.R. 684 and more recently, *Re Loughlin* [2017] UKSC 63; [2017] 1 W.L.R. 3963.

Guilty plea

The reduction in sentence for a guilty plea is a mandatory factor which reduces the severity of a sentence. By virtue of section 144 of the Criminal Justice Act 2003 the court:

> *"…must take into account (a) the stage in the proceedings for the offence at which the offender indicated his intention to plead guilty, and (b) the circumstances in which this indication was given."*[522]

But parliament has provided no guidance as to the extent to which a guilty plea should be reflected in the sentence: it is unclear how the various stages at which a plea may be entered should impact the sentence imposed, similarly it is unclear the circumstances which may be relevant to the issue, and the nature and extent of the reduction. This absence of guidance from parliament clearly risks of inconsistency.[523]

Simply following the statute (excluding non-statutory guidance for the time being), a court may award any discount upon a plea of guilty.[524] Although this point applies to, for example, the discount for providing assistance to the prosecution, and to aggravation and mitigation, the risk of disparity is more pronounced in the context of guilty pleas. This is due to the sheer scale of the guilty plea as a factor reducing the severity of a sentence, both in terms of its frequency and the extent of the reduction.[525]

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522 Interestingly, this is in stark contrast to Scotland. Leverick notes that "In England and Wales, sentencers are required to start from the presumption that a discount will be awarded, whereas in Scotland there now exists a presumption against a discount unless there are convincing reasons to justify it." See Leverick (n 519), 338.

523 See above in relation to the wider application of Ashworth's criticism of s.142 of the Criminal Justice Act 2003.

524 Subject to the mandatory sentences for which Criminal Justice Act 2003 s.144 is modified.

525 The coalition government (2010-2015) explored permitting reductions of up to 50% (up from 33%) though they were later dropped: 'Ken Clarke forced to abandon 50% sentence cuts for guilty pleas', *The Guardian* (London, 21 June 2011) <https://www.theguardian.com/law/2011/jun/20/ken-clarke-abandon-sentence-cuts> visited 26 April 2018.

Totality and multiple offences

The sentencing of multiple offences should not be overlooked. In their recent work on multiple offences, Roberts et al note that the SC estimate that 40% of sentencing decisions involve multiple offences.[526] Additionally, Jareborg regards the sentencing of the multiple offences as "*the most complicated topic in criminal law…*"[527] With such complexity and prevalence, the need for structure in the discretionary decision making of sentencing courts is all the more important. The sentencing of an offender for multiple offences requires a careful calibration of differing, perhaps overlapping, offences with inevitably varying degrees of seriousness. It is generally accepted in England and Wales that adopting an approach of establishing the proportionate sentences for each individual offence cumulating them may produce a result which is disproportionate to the entirety of the offending. For example, 10 rapes each worth, individually, 10 years' imprisonment will not be met with 100 years' imprisonment. Roberts et al note that the result would be simplistic sentencing policy which would see a "*crushing*" prison sentence imposed.[528]

This is where the principle of totality comes into play; totality provides that in a multiple offence case, it may be necessary to reduce the total of the otherwise proportionate sentences imposed on the individual offences to ensure overall proportionality with the totality of the offending. While beautifully simple, its application in practice (and too its theoretical

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[526] Julian V Roberts, Jesper Ryberg and Jan W de Keiser, 'Sentencing the multiple offender: Setting the stage' in Julian V Roberts, Jesper Ryberg and Jan W de Keiser (eds) *Sentencing Multiple Crimes* (OUP 2017), 1.

[527] Nils Jareborg, 'Why bulk discounts in sentencing?' in Ashworth and Wasik (n 281), 57

[528] Roberts, Reyberg and de Keiser (n 526), 3.

justification) is devilishly complex.[529] So, how to calculate the seriousness of multiple offences? Recourse must be made to the general principles concerning the determination of seriousness. Yet, (perhaps unsurprisingly) the vagueness of proportionality in relation to a single offence is compounded when considering multiple offences. For example, if the proportionate range for offence A is two to four years, and the proportionate range for offence B is 18 months to three years, then the range for the total sentence to be imposed is potentially widened from 18 months or two years, to two years six months.

Parliament recognises (though does not define) the principle of totality in section 166(1) and (3) of the Criminal Justice Act 2003, which states (so far as is relevant):

> *(1) Nothing in—*
> *(a) section 148 (imposing community sentences),*
> *(b) section 152, 153 or 157 (imposing custodial sentences),*
> *(c) section 156 (pre-sentence reports and other requirements),*
> *(d) section 164 (fixing of fines),*
> *(e) paragraph 3 of Schedule 1 to the Criminal Justice and Immigration Act 2008 (youth rehabilitation order with intensive supervision and surveillance), or*
> *(f) paragraph 4 of Schedule 1 to that Act (youth rehabilitation order with fostering),*
> *prevents a court from mitigating an offender's sentence by taking into account any such matters as, in the opinion of the court, are relevant in mitigation of sentence.*
> *[...]*
> *(3) Nothing in the sections mentioned in subsection (1)(a) to (f) prevents a court—*
> *[...]*
> *(b) in the case of an offender who is convicted of one or more other offences, from mitigating his sentence by applying any rule of law as to the totality of sentences.*

It can be seen that the concept is not defined and there is no indication as to how this ‘rule of law’ should be applied. The court is left to consider other avenues for guidance as to

[529] This depends on the basis on which the principle is sought to be defendant. Roberts, Reyberg and de Keiser note that for desert theorists, two bases have been advanced. First, overall proportionality, namely that no number of less serious offences can be as serious as a single incident of an offence of a more serious type. Secondly, the concept of mercy or humanity. See Roberts, Reyberg and de Keiser (n 526), 6-9.

whether, and if so, the extent to which, a sentence should be reduced to account for the principle of totality. This presents difficulties for the consistent application of this principle; while in a loose sense, sentencers may adopt the same approach by trying to apply the principle, the approach to its application in a specific case is likely to be inconsistent from case to case as there is no limitation nor guidance provided by parliament. Sentencers are left to their own devices.

Minimum and mandatory sentences

Minimum and mandatory sentencing provisions – requiring the imposition of a particular sentence type or type and length – operate as a limiting measure upon the discretion generally afforded to sentencing courts by prescribing that certain cases are disposed of in a particular fashion. In some cases, discretion is removed entirely, in others it is merely constrained. There are three variables: (1) the nature of the sentence; (2) the severity of the sentence; and (3) whether there exists what might be termed an 'escape clause' which enables the court to avoid imposing the sentence ordinarily required by the statute.

It is helpful to place the statutory provisions which mandate the imposition of a particular sentence into two categories: (1) where the nature and length of the sentence is mandated by the statute ('minimum sentences'); and (2) where the nature of the sentence is mandated by the statute ('mandatory sentences'). It is possible to sub-divide the second category into those orders which include an escape clause and those which do not.

Minimum sentences

There are nine sentences currently in force in England and Wales that fall into the description of 'minimum sentences' above.[530] The provisions require the imposition of a sentence of a prescribed nature (custody) for a prescribed period (from four months to seven years, depending on the provision, the plea and the age of the offender).

These provisions can be sub-divided once more: there are provisions which apply to single offences, i.e. where a conviction for a single offence is sufficient to attract the minimum sentence, and there are those which apply to repeat offenders, i.e. where the offender is convicted of an offence in circumstances where they have a previous conviction for a relevant offence at the time of the commission of the new offence. Falling into the former category are offences of possession of prohibited firearms, possession of a bladed article in a public place, threatening with a bladed article in a public place or on school premises, threatening with an offensive weapon in a public place.[531] Falling into the latter category are third domestic burglary, third Class A drug trafficking offence, possession of an offensive weapon in a public place where the offender has previously been convicted of a relevant offence, and possession of a bladed article or offensive weapon on school premises where the offender has been previously convicted of a relevant offence.[532]

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[530] This figure is correct at 1 July 2019. There is another minimum sentence provision in relation to the possession of corrosive fluid which is enacted but not yet brought into force.

[531] Firearms Act 1968 s.51A (prohibited weapons); Violent Crime Reduction Act 2006 s.29 (minding weapons); Criminal Justice Act 1988 s.139 (possession of bladed article in a public place), s.139AA (threatening with bladed article or offensive weapon in public place or on school premises); and Prevention of Crime Act 1953 s.1A (threatening with offensive weapon in public place).

[532] Powers of Criminal Courts (Sentencing) Act 2000 s.110 (drugs) and s.111 (burglary); Criminal Justice Act 1988 s.139A (possession of bladed article or offensive weapon on school premises where previously convicted of relevant offence); and Prevention of Crime Act 1953 s.1 (possession of offensive weapon in public place where previously convicted of a relevant offence).

The objection to such minimum sentences in a proportionality-based system is that, by design, they require the imposition of a disproportionate sentence. Where a minimum sentence applies, there are three potential scenarios: (1) the proportionate sentence exceeds the minimum; (2) the proportionate sentence is equal to the minimum; and (3) the proportionate sentence is beneath the minimum. In the first and second scenarios, the minimum is therefore ineffective, not (in theory) having any impact upon the determination of the proportionate sentence. Only in the third scenario does the minimum have such an impact, and that impact is to require the imposition of a sentence in excess of that which is proportionate. Minimum sentences therefore undermine the principle of proportionality and in a manner adverse to the offender.

Now turning to the details, the regimes vary slightly in their operation. For instance, the majority permit a reduction in sentence for a guilty plea (to a figure not less than 80% of the required sentence length). However, the prohibited weapon minimum sentence does not permit a reduction for a guilty plea and the bladed articles and offensive weapons minimum sentence permits any sentence to be imposed where a 16 or 17 year old pleads guilty to such an offence.[533] This causes problems for proportionality; accepting that for a limiting retributivist, a guilty plea is a factor which operates to mitigate sentence severity,[534] limiting the discretion of the sentencer to reflect the fact of a guilty plea may produce a disproportionately severe sentence. Where otherwise an offender may receive a discount of 33%, the limiting nature of this element of the minimum sentence regime may reduce that to a

[533] See the Criminal Justice Act 2003 s.144 and the Firearms Act 1968 s.51A.

[534] For example, see Hough and Jacobson (n 506), 43.

very small percentage indeed.[535] While there may be consistency with offences of the same type and with co-defendants convicted of the same offence, the approach taken by parliament creates inconsistency between those convicted of these offences and those who plead guilty, and those who plead guilty to these offences and those who plead guilty to other offences.

Another crucial difference is that while all of these minimum sentence provisions include an escape clause, the statutory test differs. The majority require the presence of particular circumstances which would make the imposition of the minimum sentence 'unjust' before the court is released from the obligation to impose the required sentence; however, the prohibited weapons minimum sentences requires the presence of 'exceptional circumstances'. Neither exceptional nor particular circumstances making the imposition of the sentence unjust are defined by the statute. Wasik notes that in addition to the difference in language, each has been construed differently by the courts, with the latter being interpreted to be a more stringent test.[536]

Further, there is significant variance between the minimum sentences when they are considered as a proportion of the maximum sentence. Some offences which attract the minimum sentence under Powers of Criminal Courts (Sentencing) Act 2000 s.111' have maximum sentences of life imprisonment, whereas some have a maximum of 14 years' imprisonment.[537] This of course makes the imposition of a minimum 7-year sentence inconsistent dependent upon the offence of conviction. By contrast, the bladed article and

[535] For instance, a guilty plea in a case to which the three-year minimum sentence for a third domestic burglary may result in a discount of *circa* 7 months.

[536] Wasik (n 472).

[537] See Powers of Criminal Courts (Sentencing) Act 2000 s.111 and Proceeds of Crime Act 2002 Sch.2 para.1.

offensive weapons minimum sentences (encompassing both the 'single offence' provisions and the 'repeat offender' provisions) all apply to offences carrying a maximum of four years' imprisonment. The minimum sentence of 6 months for an adult therefore represents 12.5% of the maximum sentence (out of step with the 50% figure for some of the Class A drugs provisions). Here however, there is no distinction between the 'single offence' and 'repeat offender' provisions.[538] The three-year minimum sentence for a third domestic burglary offence operates at just over 21% of the maximum sentence of 14 years. This is again, inconsistent with the others. This very brief exposition of the inconsistencies among the various minimum sentences reveals that the provisions present challenges – to say the least – for a proportionate approach to sentencing.[539] That causes, in consequence, inconsistency inter- and intra-offences and inter-and intra-individual cases.

Returning to the thrust of this chapter, minimum sentences provide some structure to the court's discretion at sentencing by limiting the range of sentences which are available to it. Wasik noted the decision of the Canadian Supreme Court in *Nur* held that:

> *"mandatory minimum sentences … function as a blunt instrument that may deprive courts of the ability to tailor proportionate sentences [and] they may, in extreme cases, impose unjust sentences, because they shift the focus from the offender during the sentencing process in a way that violates the principle of proportionality."*[540]

[538] This chapter does not explore potential justification for such disparity however, prima facie, it appears that it is not capable of justification.

[539] One might consider that in fact, minimum sentences operate as a correction to cardinal proportionality in that parliament has told the courts how serious particular offences are. The better view appears to be that minimum sentence provisions trump the principle of proportionality as the principles of sentencing in s.142 of the Criminal Justice Act 2003 are disapplied to minimum sentence provisions (see s.142(2AA)).

[540] [2015] 1 R.C.S. 773 at [44], cited in Wasik, (n 472), 206.

Is the 'trade-off' between principles and structure provided by the limiting measures of minimum sentences worth it? The inevitable conclusion this chapter draws, in light of the earlier focus upon principles and a definition of consistency which permits individualisation, is 'no'.

Mandatory sentences

Mandatory sentences – those which prescribe the imposition of a particular sentence type – exist at various levels in the hierarchy of disposals available to a sentencing court. These sentences fall into one of three categories: (1) those for which the imposition of the sentence is mandatory where the relevant conditions (objectively assessed) are met; (2) those for which the imposition of the sentence is mandatory where the relevant conditions (objectively and subjectively assessed) are met; and (3) those where the sentence is mandatory where the relevant conditions are met subject to an 'escape clause' to prevent manifestly unjust results.

The mandatory life sentence for murder is the only sentence which falls into the first category. Where an offender is convicted of murder, the only sentence available is one of life.[541] The sentencer has no discretion as to the nature of the sentence but may determine the length of the minimum term imposed in conjunction with the sentence.[542] Before 2003, the trial judge would suggest a minimum term to be imposed alongside the mandatory life sentence. This would then be reviewed by the Lord Chief Justice before passing to the Home Secretary who would finally impose the sentence. Following a challenge to the lawfulness of political

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541 The nature of the sentence is determined by the age of the offender at conviction and/or sentence, see Lyndon Harris and Nicola Padfield, 'Age of offender and availability of sentences' in *Thomas' Sentencing Referencer 2018* (Sweet and Maxwell 2018), 5.

542 See Criminal Justice Act 2003 s.269 and Sch.21.

actors involving themselves in the determination of specific criminal cases, parliament enacted Schedule 21 to the Criminal Justice Act 2003 which set out a sentencing guideline of sorts for murder cases. The Schedule provided a series of 'starting points' which would "*normally*" apply to cases of a type described in each paragraph. One view is that this increased the discretion afforded to sentencing judges as they have the final determination of the minimum term to be imposed. However, one would be forgiven for considering Schedule 21 to be parliament overstepping the mark by providing a sentencing guideline in all but name, albeit a rather rudimentary guideline at that.

Into the second category falls the discretionary life sentence for dangerous offenders, the special custodial sentence for offenders of particular concern and the referral order. It is unnecessary to delve into the details of each order; suffice to say that each relies not upon a discretion but on a judgement as to an aspect of the order. All require a determination of the seriousness of the offence (as to which see earlier in this chapter) prior to its imposition. Upon the resolution of that determination, the order is either mandatory, or does not apply.[543]

Into the final category falls the 'two strikes' life sentence which requires a determination of the seriousness of the offence to establish whether the provision applies to a particular case but is also subject to an 'escape clause' whereby the court is released from its obligation to impose the sentence where it considers that do to so would be unjust.[544] This provision can require a life sentence to be imposed where neither the previous offence nor the new offence warrant, on proportionality grounds, a life sentence and even in circumstances

[543] See the Criminal Justice Act 2003 ss.225, 226 and 236A, and the Powers of Criminal Courts (Sentencing) Act 2000 s.16.

[544] See the Criminal Justice Act 2003 s.224A.

where neither offence carry life as a maximum.[545] This is a significant limitation of discretion. While it would be entirely possible for a court to determine in such a case that it would be unjust to do so and apply the escape clause, it cannot have been parliament's intention that that would be the approach in every case. If that were the intention it would have been simple to draft an exclusion for those offences not having life as a maximum sentence.

The effect upon consistency is thus. The first category relies upon an interpretation of the law and therefore the risk of inconsistency is limited as it should be possible to establish whether the criteria are met by reference to provable facts such as the existence of a conviction for a particular offence. The second and third categories rely upon the proper (and therefore consistent) interpretation of the criteria required to establish whether the conditions are met before the mandatory sentence is to be imposed. The risk of error or inconsistency is manifest in the absence of further guidance provided by parliament. Mandatory sentences therefore risk inconsistency as parliament has provided the limiting measures but not provided guiding measures to inform the element of discretion and subjective judgement inherent in the second and third categories.

Another provision worthy of mention is s.101(1) of the Powers of Criminal Courts (Sentencing) Act 2000 which prescribes the length of a detention and training order to be imposed on an offender aged 10-17 at conviction.[546] The section provides that the length of a DTO must be one of the following: 4, 6, 8, 10, 12, 18 and 24 months. The effect of this is to

[545] *Attorney General's Reference (No.27 of 2013) (R. v Burinskas)* [2014] EWCA Crim 334; [2014] 2 Cr.App.R. (S.) 45 at [8].

[546] The statute provides that the order is available for those aged 10-17 but availability for those aged 10-11 is contingent upon an order made by the Secretary of State which has not yet been made. Availability for those aged 12-14 is contingent on a finding of the court that the offender is a "*persistent offender*".

remove a degree of the court's discretion. At the lower end of seriousness, this is of little consequence as there it is generally accepted that proportionality is not precise as to differentiate with any appreciable degree of accuracy between 4 months and 5 months. However, at the upper end, the difference is greater. If a court decided that 24 months was too much, but 18 was too little, then the lower amount must be imposed.[547]

Mandatory sentences limit or remove discretion from the court in determining the nature of the disposal. Most of the provisions are concerned with public protection. The penal element of the sentence is subject to ordinary proportionality principles, with the court determining the length of the minimum term of the life sentence, or the determinate term of the offender of particular concern order, and the nature of the sentence dictated by parliament prescribing a particular release provision. The court is therefore provided with a degree of structure, by virtue of the duty to impose a sentence of a particular type, but the severity of the sentence remains at their discretion. This relies upon the general provisions relating to offence seriousness which, as noted above, provide insufficient guidance so as to consistency achieve a proportionate outcome.

There are also provisions which include a duty to consider making a particular order, or to explain why a particular order was not made, and other orders such as financial orders which are mandatory upon conviction. For reasons of space and due to the limited effect they have upon the overall sentencing decision, these are not considered in this chapter.

[547] David A Thomas, 'Detention and training orders' (2000) 4 Sentencing News 7, 9.

Conclusion

The extent to which judicial discretion is structured by parliament

There are numerous statutory provisions which structure judicial discretion. This chapter has reviewed the principal provisions across the different stages of the sentencing decision as undertaken by sentencing courts. This has included such considerations as the initial assessment of the seriousness of the offence, any amendment to that initial assessment by reference to the aggravating and mitigating factors, and the effect of the increasingly prevalent mandatory and minimum sentences.

It is clear from this review that the statutory provisions tend to fall into one of two categories. Some provisions are general in nature, providing limited guidance on the exercise of discretion, such as those concerning the principles of sentencing and the assessment of seriousness. Whereas others are very prescriptive, limiting the exercise of discretion which has the ability to produce absurd results (usually) at the lower end of the spectrum of seriousness. Examples of the latter might be low seriousness offences attracting a minimum sentence (such as under s.51A of the Firearms Act 1968 which applies to strict liability offences[548]), a mandatory sentence (such as an offence of murder where it is a true mercy killing[549] or where there is an oblique intention to cause serious harm[550]).

It is also clear that while these provisions, whether prescriptive or general in nature, assist in answering the questions mentioned at the beginning of the chapter – whether to punish and if so, how much? – the assistance provided is insufficient. None of the provisions discussed

548 Richardson (n 466), § 24-30.

549 See for example *R. v Inglis* [2010] EWCA Crim 2637; [2011] 1 W.L.R. 1110.

550 See for example *R. v Woolin* [1999] 1 A.C. 82; [1998] 3 W.L.R. 382.

above, in isolation nor in concert, operate to provide a structure to the sentencing court's decision as to what disposal(s) to impose upon a person convicted of a criminal offence which is sufficient to ensure consistency: more structure is needed.

Parliament – with its sovereign power – has defined its own role as regards the extent to which it legislates in relation to the exercise of judicial discretion and created other bodies to assist in the provision of guidance as to the determination of sentence and therefore structuring judicial discretion at sentencing. Traditionally, it has limited itself to providing the outer-limits of sentencing powers and left the details and the way in which those powers are to be exercised to the courts. This has, as has been demonstrated, changed over the latter part of the 20th century and into the early part of the 21st century. Parliament has seen fit to legislate in areas where before it would have been considered inappropriate to do so. The landscape is now cluttered with many procedural provisions which operate to restrict or otherwise structure the discretion which a sentencing court is afforded. This is done in overt ways such as mandatory sentences but also by more subtle devices such as principles and purposes of sentencing which operate to guide (rather than require or dictate) action on the part of the sentencer. It is clear that parliament's role is only one piece of the puzzle.

Chapter 7: Structuring judicial discretion through the Court of Appeal (Criminal Division)

Given the looseness of the statutory framework for the exercise of sentencing discretion, any hope of achieving consistent sentencing practices depends on the ability of the judiciary to regulate itself.[551]

Introduction

In addition to parliament, the Court of Appeal (Criminal Division) ("CACD") was, for almost the entirety of the 20th century, the only other institution responsible for producing guidance on sentencing and structuring the discretionary sentencing decisions of first instance courts.[552] The court's involvement in the structuring of judicial discretion at sentencing has varied over time, dependent on both the legislative scheme within which it must operate and the court's attitudes towards its role as an appellate court.

This chapter explores the court's role in this regard, considering how the court acts to structure discretion and assessing the relative effectiveness of each method employed. Beginning with a consideration of the history of a criminal appellate court, the chapter explores the development of the court's powers and how that shaped its attitude to its role as a court of review. Next, the chapter considers the different methods the CACD employs to structure judicial discretion. An analysis of these methods feeds into a consideration of the political pressures of the early to mid-2000s to establish a sentencing guidelines body to, among other things, achieve greater consistency in the sentencing system in England and Wales. The chapter

551 David Thomas, 'Judicial Discretion' in Lorraine Gelsthorpe and Nicola Padfield (eds) *Exercising Discretion Decision Making in the Criminal Justice System and Beyond* (Routledge 2011), 64.

552 The Divisional Court has played a minor role in dealing with sentencing appeals on the grounds that a sentence imposed by the magistrates' court was oppressive, harsh or '*Wednesbury*' unreasonable (i.e. so far outside the range of the normal sentence so as to involve an error of law). See for example, *R. v St Albans Crown Court ex parte Cinnamond* [1981] Q.B. 480; [1981] 2 W.L.R. 681.

then concludes by considering whether or not the combination of parliament and the CACD's involvement in the structuring of discretion is sufficient to achieve consistency at sentencing, or whether other methods (such as sentencing guidelines) are required to meet that important aim.

History

Legislative history of a criminal appellate court

The origins of the CACD lie in the Court of Criminal Appeal. The Criminal Appeal Act 1907 brought about the creation of a specific criminal appellate court to which offenders convicted on indictment had a right to apply for leave to appeal conviction and/or sentence for the first time.

Prior to 1907, there existed the Court for Crown Cases Reserved, a court which heard only points of law and to which referral from assize courts or quarter sessions was discretionary only.[553] At the time there was a commonly held belief that review of criminal trials should be sparing. The Court for Crown Cases Reserved had no power to review sentences until in 1892 the Council of Judges passed a resolution in favour of establishing an appeal court with a power to review sentences.[554] Handler observed that at this time, "consistency took second place to pragmatism in judicial minds" and that despite the 1892 proposal, no reform was forthcoming

553 Crown Cases Act 1848. For more information about the Court for Crown Cases Reserved, see Phil Handler, 'The Court for Crown Cases Reserved 1848-1908' (2011) 29(1) Law and History Review, 259.

554 Handler (n 553), 267.

and the widespread inconsistencies continued into the 20th century.[555] Discretion at sentencing was wide and there was a "*distrust of generalising principles*".[556]

Two high profile miscarriages of justice[557] (among others) helped shape public opinion about the British justice system and led to the creation of the Court of Criminal Appeal. Handler stated that the court "*came to occupy a central position in the criminal justice system and viewed as an indispensable safeguard against injustice.*"[558] Though much of the focus was on conviction appeals, this was a dramatic change for sentencing.

For the first time, there was a right to apply for leave to appeal against any sentence imposed following a conviction on indictment (save for any sentence which was fixed by law).[559] The Act gave the court the power to "*…quash the sentence passed at the trial, and pass such other sentence warranted in law by the verdict (whether more or less severe)…*" in circumstances where the court thought "*…a different sentence should have been passed…*".[560] This gave the court a significant degree of power, both to reduce but also to increase sentences on appeal.

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555 Phil Handler 'Judges and the criminal law in England 1808-1861' in Paul Brand and Joshua Getzler (eds), *Judges and Judging in the History of the Common Law and Civil Law: From Antiquity to Modern Times*, (CUP 2012), 155.

556 Handler (n 555), 147.

557 See for example The Open University, 'George Edalji' (The Open University), <http://www.open.ac.uk/researchprojects/makingbritain/content/george-edalji> accessed 12 July 2019.

558 Handler (n 553), 287.

559 This is a defined term and remains in the current law, referring only to the mandatory life sentence for murder.

560 Criminal Appeal Act 1907 s.4(3). Prior to its enactment, there was debate in parliament concerning an amendment to remove the power to increase sentences with some MPs opining that the power would operate as a deterrent to appeal one's sentence and that it was not a "*fair way of dealing with prisoners*", HC Deb 29 July 1907, vol 179, cc663. The amendment was voted down 91 votes to 44.

In relation to the role of the court, Pease and Wasik noted that:

> *"At least since 1909 that Court has accepted as part of its legitimate function 'the revision of sentences…to harmonise the views of those who pass them and so ensure that varying punishments are not awarded for the same amount of guiltiness' (Woodman, 1909)."*[561]

This suggests that the court took it upon itself to address the concerns of the public and the judiciary as to the inconsistent sentencing practices reportedly prevailing at that time. This prompted the court to proffer, in effect, two methods of structuring discretion, revision of sentences (thereby informing the particular first instance court of its 'error') and to set down "*a few*" basic sentencing principles.[562] Few sentences were appealed (perhaps because of the risk of an increased sentence) and the court's impact upon sentencing was said to be limited.[563] Thomas noted that few sentencing decisions of the Court of Criminal Appeal were reported[564] and there was "*little interest among the judges who sat in the court in the idea of developing principles or guidelines on sentencing for judges in the lower courts.*"[565]

The Criminal Appeal Act 1966 abolished the Court of Criminal Appeal, created the Court of Appeal (Criminal Division), transferred jurisdiction to hear criminal appeals from the former to the latter, and merged the two courts, to create a Court of Appeal with a civil and a

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561 Wasik and Pease (n 407), 2.

562 Thomas (n 551), 64.

563 Thomas (n 551), 64.

564 These came in the form of "*rudimentary*" reports in the Criminal Law Review from 1954 onwards. See Thomas (n 551), 65.

565 Thomas (n 551), 65.

criminal division.[566] The powers of the CACD largely replicated those vested in the Court of Criminal Appeal, save for the newly inserted prohibition on "*treating the defendant more severely*" than they had been treated at first instance – effectively removing the power to increase a sentence on an appeal.[567] The powers of the court have remained the same since. The lack of interest in the development of jurisprudence on sentencing continued into the 1960s when, so Thomas suggests, the interest in the use of the CACD as a means of promoting consistent sentencing practices grew.[568] Thomas attributes this to a number of factors including an increased academic interest in criminal law generally and more specifically sentencing reports beginning to appear in journals.[569] At this juncture it is necessary to note Thomas' important work in his analysis of the sentencing decisions of the CACD from 1962-1969.[570] After Thomas' many articles, chapters and books on the practice of sentencing and in particular on the practice of the CACD in relation to sentencing, references to appellate sentencing decisions both in the CACD and at first instance became commonplace. The inception of practitioner texts in relation to sentencing such as Current Sentencing Practice ("*Thomas*") and latterly Banks on Sentence ("*Banks*"), in addition to the Criminal Appeal Reports (Sentencing), cemented sentencing as a topic in its own right; as Thomas notes, an interest in the principles and practices of sentencing, once considered to be inappropriate, is now encouraged.[571]

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[566] A single Court of Appeal had been created in 1873 by the Judicature Act 1973, however this court could only hear appeals in civil cases.

[567] After the imposition of the restriction, the number of applications for leave predictably grew: from the mid 2,000s in 1963-1965, to 4,403 in 1966, 5,798 in 1967 and 7,898 in 1968. Figures taken from John R Spencer, *Jackson's Machinery of Justice* (8th ed) (CUP 1989), 208, figure 5.

[568] Thomas (n 551), 65.

[569] Thomas (n 551), 65.

[570] David Thomas, *Principles of Sentencing* (London, Heinemann 1970).

[571] Thomas (n 551), 65.

This change in the perception of, and interest in, sentencing is responsible for the CACD's increased involvement in the structuring of judicial discretion. To a degree, the courts are self-regulating. The shift from, for example, it being considered to be inappropriate to cite previous sentencing decisions of the CACD[572] to it being positively encouraged, stemmed from judicial practice at the CACD and fed down to the first instance courts. The CACD therefore drove a change in its role. This coincided with an increase in parliament's interest and involvement in sentencing and legislating to structure judicial discretion.[573] As noted in the previous chapter, parliament legislated to provide a greater number of sentencing powers, creating new thresholds for the imposition of custodial sentences and latterly the creation of provisions setting out principles and purposes.

This, as was suggested in the previous chapter, envisaged the CACD playing a more active role in the structuring of judicial discretion. Fortunately, the CACD did so. By way of example, *Archbold* 2018[574] lists in its sentencing guidelines supplement a section reproducing a list of cases originally produced by the Sentencing Guidelines Council which it considered to provide guidance on either sentencing principles or in relation to offences in the previous 30 years. There are cases listed under some 69 topics, spanning two and a half pages. This clearly demonstrates the CACD's engagement with the issue and its role in providing guidance and structured discretion at sentencing.

572 See for example *R. v Rees* [1978] Crim LR 298, 299 for an example of this practice where the court commented that "*keeping sentences in step was a matter for judges, not for counsel*".

573 As to which, see the previous chapter.

574 P J Richardson (ed) (n 466).

Ashworth notes that the CACD began to give guideline judgments in the 1970s, though this was relatively rare and covered only a small number of offences by the late 1990s.[575] The Crime and Disorder Act 1998 ss.80 and 81 introduced the Sentencing Advisory Panel which would draft guidelines, conduct a consultation exercise and then revise them and advise the CACD on the form such guidelines should take. This simultaneously limited the CACD's ability to give guideline judgments to areas on which it had received guidance from the Sentencing Advisory Panel. This issue will be explored fully in the following chapter. However, for present purposes it suffices to observe that it was seen as necessary to limit the CACD's ability to issue guideline judgments in light of the creation of the Sentencing Advisory Panel but that parliament had seen the continued need for such sentencing guidance and additional structure to the discretionary sentencing decision. The way in which this was achieved and the effect it has had on the role of the CACD will be considered in Chapter 9.

This section has sought to illustrate the way in which the CACD's role (and its attitude) evolved from its inception in 1907 to the latter parts of the 20th century and the early parts of the 21st century; it is clear that the CACD has taken on the role ascribed to it by parliament (as identified in the previous chapter), namely to provide additional structure around the more skeletal sentencing framework provided by the legislation. It now falls to consider the way in which the CACD provides such guidance and structure and its efficacy.

[575] Ashworth (n 3), 23 and Rosemary Pattenden, *English Criminal Appeals 1844-1944: Appeals against Conviction and Sentence in England and Wales* (Clarendon Press 1996), 270. A discussion of guideline judgments and their effect can be found later in this chapter (see n 625 and accompanying text).

The types of guidance given by the Court of Appeal (Criminal Division)

The power of precedent

The term 'guidance' in the context of sentencing is now generally understood to refer to a judgment of a higher court made in respect of an individual case in which the court uses the case to enunciate principles or make statements or observations of more general application.[576] This guidance has been an increasingly common feature of sentencing law in England and Wales. But what is its status?

In *Young v Bristol Aeroplane Company, Limited*[577], the court held that the Court of Appeal is bound to follow its own decisions except where (1) there are two conflicting decisions; (2) a decision of its own which, though not expressly overruled, cannot, in its opinion, stand with a decision of the House of Lords (or the Supreme Court); and (3) a decision of its own where the court is satisfied that the decision was given *per incuriam*. The CACD provides guidance to other constitutions of the court and to lower courts on a range of issues relevant to sentencing. This, in conjunction with the doctrine of *stare decisis* – to stand by things already decided – generally requires lower courts to follow decisions of higher courts, and today's court to follow yesterday's court of an equal level. According to the US Supreme Court, *stare decisis* "*promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process*"[578] and though not an "*not an inexorable*

[576] Wasik and Pease (n 407), 2.

[577] [1944] K.B. 718.

[578] *Payne v Tennessee* (1991) 501 U.S. 808, 827.

command"[579] it is "*a principle of policy and not a mechanical formula of adherence to the latest decision.*"[580]

There has been dispute as to the flexibility of the rule; in *Lewis v Attorney General of Jamaica*[581] Lord Hoffman was, for example, particularly critical of the majority opinion of the Judicial Board of the Privy Council in circumstances where the Board had reversed the decision of the Court of Appeal of Jamaica, declining to follow two earlier decisions of the Privy Council, stating that:

> *"If the Board feels able to depart from a previous decision simply because its members on a given occasion have a "doctrinal disposition to come out differently", the rule of law itself will be damaged and there will be no stability in the administration of justice in the Caribbean."*[582]

For present purposes it is sufficient to note that decisions of the CACD providing guidance will be followed by lower courts and, in the case of subsequent constitutions of the CACD, will be followed unless one of the exceptions identified in *Young* exists. The constitution of the court – including the number of judges and their relative seniority, position or perceived expertise – has the ability to influence the weight given by lower courts and practitioners to a particular decision. For instance, a decision of a five-judge court presided over by the Lord Chief Justice[583] is going to be considered to be a 'stronger' decision than that of a two-judge court in which the judgment was given by a circuit judge sitting with a puisne

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579 *Payne v Tennessee* (1991) 501 U.S. 808, 828.

580 *Helvering v Hallock* (1940) 309 U. S. 106, 119.

581 [2001] 2 A.C. 50; [2000] 3 W.L.R. 1785.

582 [2001] 2 A.C. 50; [2000] 3 W.L.R. 1785, 90.

583 For example, as was the case in *R. v Forbes* [2016] EWCA Crim 1388; [2017] 1 W.L.R. 53.

judge.[584] There is room for debate (though not in this thesis) on whether, *de jure*, that is correct, however as a matter of practice, it is clear that the impact of a decision is influenced by the constitution of the court. The power of the CACD to influence decisions of lower courts is therefore manifest. It stands as a very strong influence upon the practice of the Crown Court (but less so in respect of the magistrates' courts, given the type of case which comes before them).

While there may be an academic argument as to the jurisdiction to provide such guidance and the status of the guidance, the practice of the court in giving guidance has been adopted for some considerable time and continues unchallenged in practice. Decisions of the CACD providing such guidance are routinely cited in first instance and appellate courts and are treated as binding.[585] As is explored below, this guidance can take many forms and operates to limit and guide the exercise of judicial discretion at sentencing.

In a recent review of English and Welsh sentencing guidance, Ashworth considered the relationship between what he described as the two primary sources of sentencing guidance, the Sentencing Council of England and Wales and the CACD.[586] In so doing he identified six main classes of case coming before the CACD following a review of the reported decisions in the Criminal Appeal Reports (Sentencing). They were:

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584 A judge of the High Court.

585 In brief, the argument would be that the court's responsibility is to determine the case before it and any comments which purport to be guidance for future cases (and therefore not part of the *ratio decidendi*) are *obiter dicta* and do not have to be followed by lower or future courts under the doctrine of *stare decisis*. A recent example of courts effectively legislating through *obiter* is *Ivey v Genting Casinos UK Ltd (t/a Crockfords Club)* [2017] UKSC 67; [2018] A.C. 391, a civil case involving cheating in which the Supreme Court stated that the subjective element of the test for dishonesty in criminal law in *R. v Ghosh* [1982] Q.B. 1053 did not correctly represent the law and that directions in cases where dishonesty was in issue should not accord with *Ghosh*.

586 Ashworth (n 403).

a) application and interpretation of definitive guidelines;
b) assessing departures from definitive guidelines;
c) creating or developing offence-specific guidance;
d) creating or developing guidance on general principles (including sentencing procedure and "policy" cases);
e) interpreting sentencing legislation;
f) 'common law' sentencing (by which Ashworth refers to offences for which the Sentencing Council has not issued a definitive guideline).

Ashworth notes that the first two categories recognise the increased prominence of the sentencing guidelines but that the third and fourth categories demonstrate the power of the CACD to create guidelines and issue guidance in order to "*fill in gaps*" left by the definitive guidelines.[587]

At this juncture it is worth noting that the present inquiry is narrower than that which Ashworth undertook in his article; while he considered each of the six categories he identified, this chapter will explore only those relevant to the CACD's role in structuring judicial discretion. It will be recalled that Chapter 6 engaged in a discussion of the vague nature of the terms used by parliament in prescribing the courts' approach to sentencing. As will become evident, the CACD has acted to remedy this lack of clarity in certain areas of sentencing law.

In Chapter 5, it was posited that a discretionary sentencing decision existed where:

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587 This represents something of an expansion from the four categories Ashworth identified in earlier work: Ashworth (n 3), 39-41. This point is also made by O'Malley, who additionally notes that this extends to interpreting and amplifying sentencing guidelines: Tom O'Malley (n 299), 388.

a) the decision maker is required by law to make a decision;
b) principles (or standards) exist which guide the making of the decision; and
c) the proper application of those principles does not produce a single, obviously correct, result.[588]

Accordingly, cases which for instance concern a decision which does not meet this test (the obvious example being the determination of dangerousness under the Criminal Justice Act 2003) will not feature in the discussion contained in this chapter.

For the purposes of the present inquiry, it is convenient to modify Ashworth's six categories, and to consider the role of the CACD in providing guidance and structured discretion under the following headings:

a) General principles of sentencing (e.g. the meaning of totality, or when a sentence may be legitimately increased to account for the fact it is particularly prevalent in the local area)
b) Offences
    i. Guidance as to approach of sentence in cases where there is no guideline (e.g. where the court sets out factors to consider or a loose methodology to adopt)
    ii. Review of sentence imposed in specific case (where there is or is not a guideline) (e.g. where the court considers whether a sentence is manifestly excessive)

[588] That chapter also argued for a four-part test to establish whether or a not a discretionary decision was taken in a proper manner. That is not reproduced here as it is not relevant to the point at hand.

iii. Traditional guideline judgment (e.g. A category 1 offence will attract a sentence of between 3 and 5 years)

c) Interpretation

   i. Of terms of sentencing guidelines (e.g. the meaning of "*vulnerable victim*" within the guideline)

   ii. Of statutory provisions (e.g. the interaction of particular legislative provisions or the meaning or effect of a particular phrase or provision)

d) Procedure (e.g. the approach to dangerousness, the procedure to be followed in cases in which a mental health disposal may be relevant, or the interaction between minimum sentence provisions and the sentencing guidelines)

Principles of sentencing and other general concepts

The provision of guidance on general principles is a challenging task. As has already been noted in Chapter 5, limiting, rather than guiding methods of providing structure to the discretionary sentencing decision are easier to interpret and apply. The same is true when the CACD attempts to provide guidance on amorphous topics such as general principles. It is far easier to say "*the sentencing range in a case such as [X] is 5 to 10 years*". It is more difficult to describe the intricacies of a principle in a way which is both clear and easy to apply but not so heavily caveated that it becomes meaningless. This element of the CACD's guidance is therefore one which has had a varied impact upon the practices of lower courts.

As was demonstrated in the previous chapter, the statutory regime has set down numerous principles of sentencing such as the principle of offence seriousness, encapsulating the concept of retributive proportionality, modified by prescribed purposes of sentencing

thereby creating a limiting retributivism model. Additionally, there are provisions which require adherence to the principle of parsimony, a recognition of the principle of totality and the acknowledgement of a hierarchy of sentencing disposals. Yet as was noted in that chapter, parliament legislates in such a way as to be seemingly inviting (or at least envisaging) the courts to expand upon such provisions where it considers it to be necessary.

Here it is necessary to note that the term "*principle*" is used in a rather looser sense than may be expected, intending to capture concepts at sentencing which are generally relevant to the sentencing exercise. It is used, for example, in a manner which encompasses rules, doctrines and concepts. Gardner notes that although Ashworth – a strong proponent of principles in the criminal law and in sentencing – speaks of principles, contrasting them with rules, doctrines, values and policies, he does not define what a principle is.[589] For present purposes therefore, this chapter speaks of principles in the wider sense than merely referring to principles such as proportionality and parsimony and instead includes totality (which appears to be a rule of law[590]), the concept of prevalence of an offence in a particular locality as an aggravating factor and the relevance of release arrangements to the determination of sentence.[591]

In *R. v Bondzie*[592] the court gave guidance as to the manner in which the prevalence of a particular offence-type in a particular locality could aggravate the seriousness of an offence,

[589] Gardner (n 2), 4.

[590] Criminal Justice Act 2003 s.166(3)(b).

[591] To borrow the words of Lord Atkin in *Liversidge v Anderson* [1942] A.C. 206 at 243, one might think that this is to adopt a Humpty Dumpty method of the construction of the meaning of words; however it allows this chapter to deal with concepts which apply generally to sentencing hearings in one section, rather than split across several. This is convenient for the purposes of the present inquiry.

[592] [2016] EWCA Crim 552; [2016] 1 W.L.R. 3004.

in the context of a drugs offence to which the Sentencing Council's *Drug Offences Definitive Guideline* applied:

> *10. Sentencing levels set in guidelines such as the Drugs Guideline take account of collective social harm. In the case of drugs supply this will cover the detrimental impact of drug dealing activities upon communities. Accordingly offenders should normally be sentenced by straightforward application of the guidelines without aggravation for the fact that their activity contributes to a harmful social effect upon a neighbourhood or community. It is not open to the judge to increase sentence for prevalence in ordinary circumstances or in response to his own personal view that there is "too much of this sort of thing going on in this area".*
>
> *11. First, there must be evidence provided to the court by a responsible body or by a senior police officer. Secondly, that evidence must be before the court in the specific case being considered with the relevant statements or reports having been made available to the Crown and defence in good time so that meaningful representations about that material can be made. Even if such material is provided, a judge will only be entitled to treat prevalence as an aggravating factor if:*
>
> *a) he is satisfied that the level of harm caused in a particular locality is significantly higher than that caused elsewhere (and thus already inherent in the guideline levels);*
> *b) that the circumstances can properly be described as exceptional; and*
> *c) that it is just and proportionate to increase sentence for such a factor in the particular case before him.*
>
> *It is clear therefore, that a court should be hesitant before aggravating a sentence by reason of prevalence. Judges will be only too well aware of the types of harm which are caused by drug dealing and will not be assisted by statements of the obvious. Only if the evidence placed before the court demonstrates a level of harm which clearly exceeds the well understood consequences of drug dealing by a significant margin should courts be prepared to reflect this in sentence. If judges do so, they must clearly state when sentencing that they are doing so.*[593]

This guidance goes to both procedure and substance. It is both guiding and limiting. The procedural aspect (concerning the receipt of evidence etc., phrased in definitive language) operates as a limiting measure requiring the court to receive evidence. By contrast, the

593 [2016] EWCA Crim 552; [2016] 1 W.L.R. 3004 at [10] and [11].

"*exceptional circumstances*" threshold is guiding, with a wide discretion clearly resting with the judge with little by way of assistance from the court as to the type of case in which the threshold might be passed. In addition to the overarching points made in relation to the extent to which a sentence might be increased to account for its prevalence, the court is also commenting upon the sentencing guidelines. The court makes clear that there is an element to which the factor is accounted for in the drugs guideline and therefore a new approach to sentencing in this area is required.

This is an issue on which the CACD has been inconsistent (at least, prior to *Bondzie*). The Sentencing Guidelines Council's *Overarching Principles; Seriousness Definitive Guideline*[594] requires supporting evidence for an increase in sentence length based on the prevalence of the offence. However, the CACD in *R. v Stockdale*[595] questioned the propriety of that approach and, more importantly, suggested that a judge was entitled to increase the sentence to account for the prevalence of the offence based on his or her own local knowledge. While such comments were *obiter* (and there was a statutory duty to have regard to the guideline[596]), this was clearly likely to result in inconsistent practice. Even more so, given that the guidelines were a new creation and the precise relationship between the CACD and the guidelines council was still being established. This is, in fact, what resulted, with a number of other cases on the issue taking different approaches.[597]

[594] At para.1.39.

[595] [2005] EWCA Crim 1582 at [15].

[596] Criminal Justice Act 2003 s.172.

[597] See for example *R. v Oosthuizen* [2005] EWCA Crim 1978; [2006] 1 Cr.App.R. (S.) 73; *R. v Racman* [2014] EWCA Crim 2133; [2015] 1 Cr.App.R. (S.) 18 and *R. v Tatomir* [2015] EWCA Crim 2167; [2016] Crim. L.R. 503.

The status of the guidance offered in *Bondzie* is that of *obiter*, but powerful *obiter*. This power comes from the constitution of the court, the decision being a judgment of a senior Lord Justice of Appeal and the Chair of the SC, on a topic which required a strong judgment to bring clarity to the issue. In this instance, the CACD delivered such clear guidance as was necessary, effectively overruling the cases to the contrary (though perhaps only as a matter of practice but not law).

Offences: Guidance on the approach to sentencing

Guidance in relation to specific offences can be divided into two categories: (a) guidance as to the general approach in cases for which there is no existing guidance (i.e. consistency of approach); and (b) a review of the sentence(s) imposed in a particular case (i.e. consistency of outcome).

Taking them in order, the court has from time to time provided general guidance as to the approach to cases for which there is no extant guidance. This involves the court, in a descriptive manner, setting out the way it suggests courts should approach the sentencing exercise. For instance, in *R. v McKay*[598] the court gave guidance regarding the factors that might be relevant when assessing the appropriate sentence in a case of arson:

> *"18. [...] We agree with the judge that there is a dearth of relevant authority to provide guidance.*
>
> *19. It seems to us that in setting sentence the sorts of considerations that might be relevant (without wishing to set out an exhaustive list) would include the following: (i) whether the arson was committed recklessly or intentionally; (ii) the amount of time that the risk continued for; (iii) whether there were medical or mental health issues*

[598] [2017] EWCA Crim 2299; [2018] 1 Cr.App.R. (S.) 36.

which played a part in the setting of the fire; (iv) whether there were other aspects of personal mitigation to be taken into account; (v) the nature and level of the risk posed by the fire to life and property; (vi) the extent of any damage actually caused to property and/or to person's health; (vii) the conduct of a defendant upon realising that a fire had started; and (viii), importantly, whether the fire was connected to some other unlawful activity and whether that was pursued for personal gain or otherwise."[599]

This structure is descriptive as opposed to numerical and guiding as opposed to limiting. It is suggestive of a qualitative assessment on the part of the sentencer but gives no indication of: any relative hierarchy of importance; the existence or extent of any limitation on the effect of the presence of any of the listed considerations; the manner in which the presence of the listed considerations should be assessed; or the effect of the presence of the listed considerations (some manifestly being solely mitigating factors for example). Further, the list is heavily caveated – "*without wishing to set out an exhaustive list*". The guidance acknowledges its incompleteness and that it merely provides a checklist of considerations which may be relevant to sentencing in cases of arson (an offence which involves a wide range of offence seriousness[600]). Finally, with guidance of this nature, it is likely that much of it will be obvious: e.g. the risk posed will be relevant to the assessment of the seriousness of the offence of arson. That does not act to extinguish its utility – it is useful to have that statement of guidance – but it perhaps diminishes it somewhat, as examples may tend towards the obvious rather than the unusual.

A further example of such guidance is the decision of the CACD in *R. v Tunney*[601] in relation to an offence of perverting the course of justice in circumstances where evidence is concealed or false alibis are provided:

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599 *R. v McKay* [2017] EWCA Crim 2299; [2018] 1 Cr.App.R. (S.) 36, at [18] and [19].

600 *R. v McKay* (case comment) [2018] Crim LR 492.

601 [2006] EWCA Crim 2066; [2007] 1 Cr.App.R. (S.) 91.

"In our judgment the sentence which is appropriate for offences of this nature depends effectively on three matters. Two of those were referred to by the judgment of this court in Rayworth [2004] 1 Cr.App.R. (S.) 75 in which two-and-a-half years were upheld on a plea for perverting the course of justice. The particular factors which the court must have regard to are, first, the seriousness of the substantive offence to which the perverting of the course of justice relates. Here the offence in question, murder/manslaughter, was at the most serious end of the spectrum. The second matter which the court must have regard to is the degree of persistence in the conduct in question by the offender. Here there was a degree of persistence, although ultimately the appellant ceased to persist in his lies. Thirdly, one must consider the effect of the attempt to pervert the course of justice on the course of justice itself. Here it was unsuccessful. Nonetheless, the substantive offence of murder or manslaughter could scarcely have been more serious."[602]

The court provides factors which, it states, the court must have regard to, thereby providing a framework for the assessment of the seriousness of the offence. Again, it does not provide a methodology or metric by which the impact or importance of those factors are to be evaluated and the same observations as made in relation to *McKay* above apply.

The provision of loose guidance requiring qualitative assessment on the part of individual sentencers as method of structuring discretion at sentencing is a move in the direction of more consistent sentencing, but it is of limited utility: there is no guidance as to the means of weighing the particular factors, or indeed whether (as with the guidelines issued by the SC[603]) some factors are to be given more prominence than others. In fact, one might consider that the guidance given here is merely stating the obvious factors of relevance and therefore provides little by way of structure at all for the majority of cases or sentencers.

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602 [2006] EWCA Crim 2066; [2007] 1 Cr.App.R. (S.) 91 at [10].

603 As to which see the following chapter.

Offences: Reviewing sentences in specific cases

The second category of offence-based structured discretion provided by the CACD is by virtue of appellate review. That is to say, the 'ordinary' cases which come to the CACD which raise no point of principle but require the court to determine whether a sentence is manifestly excessive or wrong in principle. In these cases, the court provides guidance by virtue of a statement as to the propriety of the sentence(s) imposed by the first instance court and any alteration to it. These cases are either appeals against sentence or Attorney General's references.

Appeals against sentence by the defendant are not as of right but by virtue of permission given by a judge having reviewed the papers in the case. 'Appeals' is therefore perhaps the wrong term, yet this is a convenient label for present purposes. If an application is refused, and no further action is taken by the defendant, nothing further occurs. However, such a defendant may renew the application, thereby forcing a full hearing before the full court, at which the court may give leave and hear the substantive appeal or refuse leave.[604] If the Registrar of Criminal Appeals considers there to be merit in an application, the Criminal Appeal Office has identified a legal error, or where there is a degree of urgency due to the length of the sentence or personal characteristics of the applicant, the application can be referred to the full court for a hearing.[605] Otherwise, in cases where permission is given, there will be a full hearing. Section 11(3) of the Criminal Appeal Act 1968 provides the court's powers on an appeal against sentence:

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604 If leave is refused, the defendant is exposed to a 'loss of time direction' under Criminal Appeal Act 1968 s.29, which has the effect of disqualifying a number of days from being credited against the sentence.

605 Alix Beldam and Susan Holdham, *Court of Appeal Criminal Division: A Practitioners' Guide* (Sweet and Maxwell 2012), § 5-083.

> *On an appeal against sentence the Court of Appeal, if they consider that the appellant should be sentenced differently for an offence for which he was dealt with by the court below may—*
> *(a) quash any sentence or order which is the subject of the appeal; and*
> *(b) in place of it pass such sentence or make such order as they think appropriate for the case and as the court below had power to pass or make when dealing with him for the offence;*
> *but the Court shall so exercise their powers under this subsection that, taking the case as a whole, the appellant is not more severely dealt with on appeal than he was dealt with by the court below.*[606]

At a full hearing, the practice of the court has been to consider two tests in the determination of such appeals: is the sentence (a) manifestly excessive or (b) wrong in principle?[607] This test has developed from the common law and was an attempt by the CACD to impose a more tangible test upon the broad discretionary power granted by section 11(3) quoted above. Indeed, David Thomas described this as the CACD placing limitations upon its "*broad powers*".[608] 'Manifestly excessive' has been interpreted in a common-sense fashion to mean more than merely excessive, thus creating a seemingly high bar. The CACD has said that it will not "*tinker*" with sentences.[609] Here, there may be a disconnect with the rhetoric and reality; anecdotally, Crown Court judges have criticised the CACD for tinkering with sentences, often a claim made when the CACD makes a small adjustment to the sentence.[610] Such a measure of whether the CACD has "*tinkered*" or not may be misconceived, however. If a Crown Court judge imposes a sentence of 32 months, and on appeal, the CACD decide the

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[606] Criminal Appeal Act 1968 s.11(3).

[607] Lucraft (n 260), § 7-135.

[608] Thomas (n 570), xlvii.

[609] See for example *R. v Planken* [2017] EWCA Crim 1807; [2018] 1 Cr.App.R. (S.) 24, *R. v Khan (Mohammed Gulnawaz)* [2016] EWCA Crim 125 and *R. v Leader* [2014] EWCA Crim 300. For older examples dating back to the 1960s, see Thomas (n 570), xlix.

[610] See Ashworth (n 190), 47.

upper limit of the proportionate range is 30 months, then a reduction will be necessary, and may only be one of 2 months. Further research on this point would be needed before any conclusions could be drawn. In practice then, the court ought only to intervene when the sentence falls outwith the permissible range of sentences; the court is a court of review, and appeals are not *de novo* sentencing hearings.[611]

An Attorney General's reference enables the Attorney to ask the CACD to increase a sentence he or she thinks is unduly lenient. The process is as follows. Under Criminal Justice Act 1988 Part IV, the Attorney General may, in cases of indictable only offences and certain limited triable either way cases, apply for permission to refer sentences which he or she considers to be unduly lenient. The court then may give or refuse leave; in cases where leave is granted, it then considers whether or not the sentence is unduly lenient, and if it is, it then considers whether or not to increase the sentence. Section 36 of the Criminal Justice Act 1988 states:

> *(1) If it appears to the Attorney General—*
> *(a) that the sentencing of a person in a proceeding in the Crown Court has been unduly lenient; and*
> *(b) that the case is one to which this Part of this Act applies,*
> *he may, with the leave of the Court of Appeal, refer the case to them for them to review the sentencing of that person; and on such a reference the Court of Appeal may—*
> *(i) quash any sentence passed on him in the proceeding; and*
> *(ii) in place of it pass such sentence as they think appropriate for the case and as the court below had power to pass when dealing with him.*

This test is different to the test which applies to defence appeals against sentence, by virtue of the 'unduly lenient' requirement, though this perhaps mirrors the common law test of

[611] As is the case from the magistrates' courts to the Crown Court.

‘manifestly excessive’ that the CACD imposed upon itself. However, the two tests may not be directly equivalent; the CACD has suggested that the test for increasing a sentence is high one:

> *“It cannot, we are confident, have been the intention of Parliament to subject defendants to the risk of having their sentences increased—with all the anxiety that that naturally gives rise to—merely because in the opinion of this Court the sentence was less than this Court would have imposed.”*[612]

Further, a plain English approach to construction of the two terms would suggest that in an appeal against sentence, the error must be *manifest* – that speaks not to the degree of the error but of its discernibility; it must be obvious. By contrast, in an Attorney General’s reference, the sentence must be *unduly* lenient – that speaks to the degree to which it is below that which other sentencers would have imposed; the sentence must be more than just lenient.

Through these two processes, the court can give guidance and structure to the discretionary sentencing determination via three methods: (a) a declarative judgment, i.e. stating that the sentence imposed was or was not within the permissible range; (b) a range-setting judgment, i.e. in addition to (a), describing the permissible range in the individual case; and (c) a limiting judgment i.e. in addition to (a), identifying one end of the permissible range.[613]

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612 *Attorney General’s Reference (No.4 of 1989)* 11 Cr.App.R. (S.) 517 per Lord Lane.

613 It will be recalled that the description of the sentencing scheme in England and Wales, namely a limiting retributivism model which sees desert set the outer-limits of the proportionate sentence with other considerations governing the decision as to where within that range the final sentence falls. Earlier in this thesis it was said that it is not possible to identify a single correct sentence for a particular offence. Here, I contrast ‘correct’ with ‘not wrong’ to represent the view that when an individual court imposes a sentence, they think it is ‘correct’, i.e. the most appropriate disposal of the case. For instance, with a permissible sentencing range of 2-4 years, and in accordance with s.142 of the Criminal Justice Act 2003, the court considers that a deterrent sentence should be imposed, a sentence towards the top of the range is merited. Where the appeal court considers that a deterrent sentence is not merited but that the sentence imposed was within the permissible range of 2-4 years, the court should not intervene. In such circumstances, the sentence is not wrong but perhaps not ‘correct’. An example of the court expressly

I now turn to three types of judgment in this category and draw upon examples of appeals against sentence and Attorney General's references: (a) a declarative judgment, (b) a range-setting judgment, and (c) a limiting judgment..[614] The vast majority of cases fall within the first band, namely the declarative judgment in which the court states that the sentence was or was not manifestly excessive or wrong in principle and declines to provide any further guidance, merely, in the case of a successful appeal, reducing the sentencing accordingly. The CACD routinely dismisses appeals (after a discussion) by holding that the sentence was, or was not, manifestly excessive. In the case of the former, the sentence will be reduced accordingly. This provides no indication of (a) the width of the permissible range of sentences for the offence(s) subject to appeal; (b) the location of the sentence(s) within or without that range; or (c) whether or not the CACD felt that the sentence imposed was the correct sentence (as opposed to merely not being wrong).[615] While this may provide feedback to the specific judge whose decision is subject to review, it provides little guidance to others. One may infer from the new sentence imposed the rough location of the range (substituting a sentence of 7 years for one of 2 years suggests the judge erred in a gross manner). However, this is imprecise and wide open to error. As this is the most common device used by the CACD, its lack of utility is only compounded by its inefficacy as a device to provide guidance and structure discretion.

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acknowledging that they would have imposed a different sentence to that imposed at first instance but, in light of the sentence imposed not being outwith the permissible range of sentences, the appeal would be dismissed can be seen in *R. v Quick* [2017] EWCA Crim 66; [2017] 1 Cr.App.R. (S.) 54 where the court accepted that a suspended sentence order could have been imposed but that the immediate custodial sentence imposed by the sentencing judge was not manifestly excessive. The court may not increase the sentence or alter it so that the defendant is treated more severely than at the Crown Court.

[614] The following paragraphs provide examples of these devices evidenced by decisions from the CACD, with a description of the prevalence of the practice. The assessment of the prevalence of the device is based on a qualitative assessment of the published case law from the CACD in sentencing cases from 2011 to present, however support for these conclusions can be found in Lyndon Harris and Nicola Padfield (n 456).

[615] As to which see the discussion above in relation to "*not wrong*" sentences.

Rarely, the court will provide a range-setting judgment. An example is the decision of the court in *Attorney General's Reference (No.16 of 2014) (R. v Gill)*, involving an offence of 'one-punch' manslaughter, in which Treacy LJ stated:

> *"It seems to us that after a trial, taking account of all the circumstances, including the offender's age and his offending on bail and during the period of a suspended sentence, a sentence of the order of six to seven years would have been appropriate."*[616]

A slight variation on this range-setting judgment is where the court provides comment as to the location of the sentence in the range when dismissing the appeal. The court may, for instance, note that a sentence imposed is "*severe but not manifestly excessive*" (or a variation thereof).[617] This provides guidance in the form of an indication that the sentence was towards the top of the sentencing range for the particular offence. Another example would be where the court acknowledges that a different (typically lower) sentence would have fallen within the permissible range, but that the sentence imposed did not exceed the range and so the appeal will fail. The case of *Quick,* referred to above provides a particularly complex example of this, where the court observed:

> *"We appreciate that a suspended sentence could have been imposed in this case, and we would observe that it would have been of assistance if the recorder had directly referred to that part of the guidelines which sets out the stepped approach to this issue, and stated his reasons for deciding that a suspended sentence could not be*

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[616] [2014] EWCA Crim 956 at [31].

[617] See for example, *R. v AP* [2018] EWCA Crim 1701; *R. v Price* [2018] EWCA Crim 1528; *R. v Smith* [2018] EWCA Crim 1621; and *R. v Jones* [2018] EWCA Crim 1499. And for examples of this as a practice in older cases, see *R. v Hatfield* [2009] EWCA Crim 1589; *R. v Maka* [2005] EWCA Crim 3365; [2006] 2 Cr.App.R. (S.) 14; *R. v Simmon*s (1995) 16 Cr.App.R. (S.) 801 and *R. v Freeman* (1989) 11 Cr.App.R. (S.) 398.

justified. However, we do not consider that the imposition of an immediate sentence of imprisonment was outwith the reasonable range of sentences open to the recorder, particularly bearing in mind that the appellant had been convicted after a trial and had persisted in his denial of the offence to the author of the pre-sentence report. In these circumstances, we consider that the sentence was justified, and we dismiss the appeal."[618]

While this does in fact provide a steer as to the range, it is, once more, of limited utility as it neither expresses the upper or lower limits of the range, nor does it identify the location of the sentence imposed in that range. The case of *Quick* provides an additional complication; although the imposition of a suspended sentence order is certainly a discretionary sentencing decision (it not really having a legal test for imposition, amongst other reasons), the ability to change the nature of the sentence from immediate to non-immediate custody does not fit comfortably within the hierarchy of sentencing options available to a court. While an offender may well prefer a 12-month suspended sentence to a 3-month immediate sentence, the process by which a suspended sentence must be imposed – determination of the period of custody by reference to the severity of the offence, and only then a consideration of whether or not it can be suspended – rather conflicts with that view.[619]

Finally, the court may provide a limiting judgment, indicating that the appropriate sentence in a given case should or not have exceeded a particular level. A recent example can be seen in *R. v Moriaty*[620] in which the court considered that a sentence of four years'

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[618] [2017] EWCA Crim 66; [2017] 1 Cr.App.R. (S.) 54 at [9].

[619] See the Criminal Justice Act 2003 s.189 and the Sentencing Council's *Imposition of Community and Custodial Sentences Definitive Guideline*. Additionally, support for the notion that a suspended sentence is always less severe than an immediate custodial sentences comes from the decision of a five-judge court in *R. v Thompson* [2018] EWCA Crim 639; [2018] 2 Cr.App.R. (S.) 19 in which the court placed emphasis on the time spent in custody (not merely the time liable to recall) in the context of Criminal Appeal Act 1968 s.11(3).

[620] [2018] EWCA Crim 1590.

imprisonment imposed for breach of a criminal behaviour order and failing to provide a non-intimate sample was manifestly excessive and "*should have been no more than 40 months*".[621] Use of judgments of this kind remains comparatively rare however.[622]

Such devices provide assistance to judges and practitioners who are able to compare future cases with comparable facts to the CACD case and infer from the judgment the likely range in their case. Such an exercise is naturally imprecise, involving subjective assessments of the factors present in both cases and a computation of their effect on the new case. Each differs in its utility, but all are limited. The first, the declarative judgment, provides almost no guidance or structure, merely stating that a sentence was or was not manifestly excessive. Additionally, this very limited utility is compounded by the high frequency with which this device is used by the CACD. The second, a range-setting judgment is perhaps the most useful, particularly when it is accompanied by a comment as to the location of the sentence imposed relative to the range. When unaccompanied, it provides little steer as to how the process of determining sentence was in error and where the sentence imposed fell within the permissible range. Regrettably, this is fairly uncommon. It therefore has a minimal impact upon the structure of the sentencing decision. The third, the limiting judgment is useful, but less so than the range-setting judgment as it provides an incomplete view of the proportionate sentencing range and therefore there remains a degree of interpretation and guesswork in the determination of the proportionate range. It is used comparatively rarely, however, and therefore as a structural device, its impact on the structure of the discretionary sentencing decision is limited.

[621] [2018] EWCA Crim 1590 at [19].

[622] Other examples include *R. v Wright and Bing* [2017] EWCA Crim 1195 and *R. v Foster* [2015] EWCA Crim 916; [2015] 2 Cr.App.R. (S.) 45.

A further point, however, is that cases which facilitate a comparison with other factual scenarios fly in the face of the conception of consistency advanced in Chapter 2; it will be recalled that there it was argued that such an exercise (in pursuit of establishing whether or not a particular sentence is 'consistent', or as an aid in determining the appropriate sentence in a given case) proceeds on the fallacious basis that the case with which the comparison is being made is 'correct'. It was subsequently argued that it is necessary to concentrate on the consistent application of principle in order to pursue consistency in a more accurate and conceptually sound manner. Accordingly, though many may find the rough comparison with a "*like*" case useful, this type of guidance or structure proffered by the CACD can only be of limited utility.

Offences: Traditional guideline judgment

Another method of structuring judicial discretion employed by the CACD is through the traditional guideline judgment.[623] The court surveys previous case law and relies upon the experience of the members of the particular constitution, or the Lord Chief Justice may convene a special court of members with experience of a particular area to produce a judgment that indicates the level of sentence expected for cases of differing levels of seriousness. Often this will come in form of factual examples accompanied by a sentencing range. The CACD is supported by the Criminal Appeal Office: a small team of lawyers directed by the Registrar of Criminal Appeals who conduct research in relation to the cases coming before the court. The

[623] An example would be the decision of the CACD in *R. v Aramah* (1983) 76 Cr.App.R. 190 which is generally accepted to be the first guideline judgment. The Lord Chief Justice provided comprehensive guidance on drugs offences, setting out factors and sentencing ranges for a variety of offences.

time for in depth research is limited, however, given the workload of the court and the pressure on resources.[624]

Although traditional guideline judgments are now rare, as the Sentencing Council has issued guidelines for the major and most frequent criminal offences to come before sentencing courts, the CACD has, on occasion, seen a need to step in and fill a perceived gap. A recent example of this is in *Attorney General's Reference (R. v Kahar); R. v Ziamani.*[625] The court considered a number of otherwise unconnected appeals and applications, along with a reference from the Attorney General under the unduly lenient sentence scheme, following convictions for offences of preparation of terrorist acts.[626] The court provided a lengthy and comprehensive judgment setting out guidance on the factors which would be relevant in such cases, particular issues which might arise in the sentencing of such cases, considerations of the type of offender which would typically fall to be sentenced for such an offence, and, crucially for this point, a sentencing guideline. The guideline identified six levels covering a wide range of offence seriousness. The court provided descriptions of conduct (supplemented by examples of real cases) which would fall into each category, along with a sentencing range (e.g. 5-10 years) and an indication of the nature of that sentence (e.g. whether determinate or indeterminate).

This is as comprehensive as (if not more than) an SC guideline,[627] providing detailed guidance in addition to the sentencing levels and broad descriptions of conduct which falls within each category. Although it is not as nuanced as an SC guideline (there being no step-by-step process for determining the category for instance), it provides very clear guidance to

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[624] Judiciary of England and Wales, *The Lord Chief Justice's Report 2016*, (Judicial Office, 2016), 14.
[625] [2016] EWCA Crim 568; [2016] 2 Cr.App.R. (S.) 32.
[626] Contrary to s.5 of the Terrorism Act 2006.
[627] As to which see Chapter 8.

sentencers; though guiding (rather than limiting) in nature, as it requires the sentencer to engage with the guideline and interpret the descriptive categories, the doctrine of *stare decisis* means that, in practice, the guideline will be followed. Any scope for inconsistency therefore comes from a sentence misinterpreting or misapplying the guideline. This therefore operates as an effective way of structuring the sentencing decision so as to bring about both consistency of approach and outcome. It will be noted however, that that relies upon judges and practitioners being aware of the decision, which may, in some cases, limit its effectiveness. There is a role for judicial education, here. The Judicial College, which is responsible for the delivery of judicial training, is able to draw to the attention of judges (of all levels) particular decisions and their effect.[628]

Interpretation: Terms in sentencing guidelines

In recent years, the CACD has given far more consideration to the interpretation and application (beyond that in a specific case) of the sentencing guidelines. Consideration of caselaw will illustrate the way in which the CACD has provided guidance and structure to the discretionary sentencing decision in relation to the application of sentencing guidelines.

First, the SC's *Sexual Offences Definitive Guideline*. A commonly listed aggravating feature is that the offence involved an abuse of trust.[629] As is standard practice, the guideline

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[628] This can be achieved through training courses or via the delivery of newsletters or bulletins ensuring that members of the judiciary are aware of the latest developments relevant to the area(s) in which they sit.

[629] See for example the Sentencing Council's *Sexual Offences Definitive Guideline* (Sentencing Council of England and Wales 2014) and specifically the guideline for offences of rape of a child under 13, at page 29.

omits to provide guidance as to what amounts to "*abuse*" and who would be considered to be in a position of "*trust*". In *R. v Forbes*[630] the court stated:

> *"16. It is evident from the appeals that one issue that has caused difficulty is "abuse of trust" as an express aggravating factor and as used in respect of culpability extensively in the Definitive Guideline.*
>
> *17. Whilst we understand that in the colloquial sense the children's parents would have trusted a cousin, other relation or a [...] to behave properly towards their young children, the phrase "abuse of trust", as used in the guideline, connotes something rather more than that. The mere fact of association or the fact that one sibling is older than another does not necessarily amount to breach of trust in this context. The observations in [54] of H should be read in this light.*
>
> *18. The phrase plainly includes a relationship such as that which exists between a pupil and a teacher [...], a priest and children in a school for those from disturbed backgrounds [...] or a scoutmaster and boys in his charge [...]. It may also include parental or quasi-parental relationships or arise from an ad hoc situation, for example, where a late night taxi driver takes a lone female fare. What is necessary is a close-examination of the facts and clear justification given if abuse of trust is to be found."*[631]

The court appears to provide some limitations on the application of the term "*abuse of trust*" but does so in a non-binding manner; by providing a non-exhaustive list (at paragraph [18]) of the types of scenarios which would "*plainly*" fall within the term, the court proffers an illustrative list which future sentencers can then use and apply. Without being prescriptive, the court structures the discretionary decision as to whether a particular case falls within the term used in the guideline. This has obvious benefits, such as the narrowing of the term and the use of an illustrative list plainly aids interpretation and application as more information is provided to the sentencer as to what is meant by the term. This approach, however, retains the breadth of discretion afforded to sentencing courts by doing so in a manner which is guiding rather than

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630 [2016] EWCA Crim 1388; [2017] 1 W.L.R. 53.

631 At [16]-[18]. The quoted passage has been edited to remove references to the specific cases under consideration by the court so as to aid comprehension.

limiting. The drawbacks on the other hand, are also manifest. The illustrative list contains the 'obvious' types of case which consist of abuse of trust, and so the court has not drawn the outer limits of the term, merely the core, leaving open the possibility for future guidance when sentencers apply this guidance to cases which fall on or around the outer limits of what (the court thinks) was meant by the term.

A second illustration would be the term "*injury which is less serious in the context of the offence*" in the *Assault Offences Definitive Guideline* ("*the assault guideline*") which indicates that an offence consists of lesser harm (rather than greater harm) for the purposes of determining the offence category.[632] A point often taken on appeal is whether or not a particular offence was correctly categorised as one consisting of greater harm by virtue of the injury not being one which can properly be said to be less serious in the context of the offence.[633] The court, in *R. v Smith (Christopher)*[634] observed:

> *"14. First, with regard to the injury, the question is whether the injury was serious "in the context of the offence". It is axiomatic that all violence within the context of a s.18 offence is serious, but some violence is more serious than others. The purpose behind the words "which is serious in the context of the offence" in the guidelines is to distinguish between that level of violence which is inherent or par in a standard s.18 offence and that which will, by definition, go beyond what may be viewed as par for the course. In our view, given that there is such a marked disparity in the starting point between Categories 1 and 2, the sorts of harm and violence which will justify placing a case within Category 1 must be significantly above the serious level of harm which is normal for the purpose of s.18."*[635]

[632] See for example the Sentencing Council's *Assault Offences Definitive Guideline* (Sentencing Council of England and Wales, 2011) and particularly the section 18 wounding or causing GBH with intent guideline at page 4.

[633] See for example *R. v Beaumont* [2015] EWCA Crim 2334; [2016] 1 Cr.App.R. (S.) 58 and *R. v Thompson* [2015] EWCA Crim 1575; [2016] 1 Cr.App.R. (S.) 26.

[634] [2015] EWCA Crim 1482; [2016] 1 Cr.App.R. (S.) 8.

[635] At [14].

By explaining the purpose of the use of that term in the guideline, sentencers are instructed as to the focus of the exercise and the way to approach the assessment of the injury in question. This context aids comprehension of the terms in the guideline and goes some way to address the lack of guidance on such points in the guidelines themselves. Again, this requires a qualitative assessment and the structure provided by the court is guiding as opposed to limiting; it is instructive of the way in which the court ought to resolve the issue, rather than being determinative. Such is inevitable in an exercise which requires the qualitative assessment of something which relies heavily on interpretation.

The court's efforts in providing guidance and structure in relation to terms used in sentencing guidelines result in greater consistency in the application of the guideline: it is clear, for example, from *R. v Thompson*[636] that a bite resulting a portion of flesh being removed from above the victim's eyebrow is unlikely to be properly regarded as an injury which is serious in the context of the offence. The guidance is however, limited in that it requires the application of what is, at most, rather loose guidance, to different factual scenarios. In certain cases, this will be comparatively easy and will result in greater consistency of application of the guideline (which ought to result in greater consistent of outcome, *ceteris paribus*[637]); whereas in others, perhaps where the case to be decided falls towards the limits of, or even beyond, the guidance given by the court. Again, therefore, we can see that such guidance is of limited use.

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[636] [2015] EWCA Crim 1575; [2016] 1 Cr.App.R. (S.) 26.

[637] As to which see Chapter 2.

Interpretation: Statutory provisions

The CACD has, on occasion, interpreted statutory provisions (or parts thereof) and while not all of these decisions fall into the category of structuring judicial discretion, some will. Those falling within the definition will be decisions interpreting a provision of a statute which conveys a discretion. Ashworth, in his review of English and Welsh sentencing guidance, proffered two examples:[638] first the approach to the five statutory starting points which normally apply to offences of murder contingent on their particular features[639] and second, the approach to "*exceptional circumstances*" in relation to the mandatory minimum sentence for a specified firearms offence.[640] There are other examples but these two are undoubtedly the best, not least because each encompasses a significant discretion and there is a vast body of case law providing such guidance.

Taking Sch.21 to the Criminal Justice Act 2003 first, there are a series of decisions interpreting the provisions, many of which occurred, as is perhaps to be expected, shortly after the coming into force of the new regime. Since then, there have been periodic advancements in the application and understanding of the schedule. Here, I take two of the most important decisions in relation to a particular issue which arises in relation to the application of Sch.21

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638 Ashworth (n 403), 517. He also provides two further examples in relation to the determination of 'dangerousness' for the purposes of the availability of extended determinate sentences and life sentences under the Criminal Justice Act 2003. However, I discount these as the 'dangerousness' test fails the metric to determine whether a decision at sentencing is a discretionary decision, as set out earlier in this thesis. As the 'dangerousness' test is the application of a legal test, with a binary outcome, for the purposes of this thesis it is not a discretionary decision.

639 See Sch.21 to the Criminal Justice Act 2003.

640 See s.51A of the Firearms Act 1968 and s.29 of the Violent Crime Reduction Act 2006 which require the imposition of a minimum five-year custodial sentence (or in the case of an offender aged 16-17 at conviction, a three-year sentence) unless there are "*exceptional circumstances*" which exist which would justify not doing so.

as a typical example of the CACD's approach to the provision of guidance and structure in relation to sentencing in murder cases.

Paragraph 5A of Schedule 21 to the Criminal Justice Act 2003 provides for a 25-year starting point which is "*normally*" the starting point for offences of murder in which the offender (aged 18 or over at the time of the offence) took a knife or other weapon to the scene intending to (a) commit any offence, or have it available to use as a weapon and used the knife or other weapon when committing the murder. The application of the provision therefore largely turns on the interpretation of the term "*took a knife or other weapon to the scene*".

In *R. v Kelly*[641] the court cautioned against a literal interpretation of the provision, relying upon the potential injustice which would result, demonstrated by two examples:

> *"12. If a man makes up his mind to kill his partner and walks back to their home, and there picks up a knife in the kitchen and kills her with the knife, he will not have taken the knife to the scene. On the face of it this offence would not fall within para.5A. If a man in exactly the same frame of mind walks home and buys a knife on the way and kills his partner in the kitchen in exactly the same circumstances, then on the face of it para.5A would apply. We doubt whether anyone would believe that justice would be represented by the assessment of the starting point for respective minimum terms for each of these defendants at 15 years and 25 years respectively. The culpability levels are the same: the consequences are similarly catastrophic. Yet, unless examined in the context of the decisions of this Court about the way in which the provisions of Sch.21 should be approached, a literal interpretation of para.5A might produce this disparate result.*
>
> *13. The second of these examples forcefully underlines that para.5A is not confined to murders committed with the use of a knife which has been taken out onto and used on the streets. It does not follow that a murder committed with a knife in the offender's home, or for that matter in the victim's house, automatically falls outside the ambit of para.5A.*

[641] [2011] EWCA Crim 1462; [2012] 1 W.L.R. 5.

14. Further problems arise in the context of what is meant by "the scene". If the victim is in the kitchen, and the defendant takes a knife from a drawer and kills him or her, for the purposes of para.5A that knife was not taken "to the scene". If in the same example the kitchen is at one end of the living room with no partition between the two, the victim is in the living room and the defendant takes a knife from the kitchen drawer and kills her, then again for the purposes of para.5A this knife was not "taken to the scene". The situation will be additionally complicated if one of the doors in the premises through which the assailant went with the knife had been open, or closed, or locked. The present group of cases demonstrates the difficulties."[642]

This guidance instructs sentencers to guard against too strict an approach which would, it was said, lead to injustice. The guidance however stopped short of providing more concrete instruction, thereby preserving a significant degree of discretion in the interpretation and application of the provision.

There were a number of cases which followed and the guidance in *Kelly* was developed in *R. v Dillon,*[643] another case involving paragraph 5A in which the court reviewed the authorities and attempted to provide clearer guidance as to the application of the provision. The court said at [32]:

"32. We consider that the following emerges from the cases cited to us:

*(a) a knife taken from a kitchen to another part of the same flat or house, including a balcony (*Senechko*), will not normally be regarded as having been taken to the scene, even if a door is forced open (*Kelly*);*

*(b) conversely, if the knife is taken out of the house or flat into the street (*Bowers*), or into another part of the premises (*Balraj Singh*), or on to a landing outside a flat (*Folley*), it will normally be regarded as having been taken to the scene; and*

(c) however, a starting point is not the same thing as a finishing point. The judgment in Kelly *emphasises the importance, in cases of similar culpability, of avoiding major differences in sentence based on fine distinctions. As the Lord Chief Justice*

[642] [2011] EWCA Crim 1462; [2012] 1 W.L.R. 5 at [12].

[643] [2015] EWCA Crim 3; [2015] 1 Cr.App.R. (S.) 62.

> *observed by way of example in the passage cited above, to make a distinction of 10 years in the minimum term between the case of a man who kills his partner with a knife from the kitchen of their home and a man who kills his partner with a knife which he bought on the way home would not represent justice in anyone's assessment. If a case is only just within para.5A, because a knife was taken from a kitchen and used to inflict a fatal wound a short distance outside the door of the flat or house, this principle may well lead to a minimum term of less than 25 years (*Bowers, Balraj Singh*)."*

This attempt at collating the relevant decisions of the CACD and attempting to identify a consistent and coherent approach provides sentencers with a more tangible piece of guidance; it provides statements of the "*normal*" interpretation and application while retaining the necessary discretion (as intended by parliament). One can certainly criticise paragraph 5A for its lack of clarity and potential for creating a bright line in circumstances where nuance is key. This guidance is therefore all the more important, as it seeks to avoid such inconsistency by the imposition of some structure to the discretionary decision. It enables the CACD to control (to a limited degree) the cases to which courts and practitioners refer when seeking guidance on a particular topic, informing them as to the way in which those decisions ought to be interpreted. This identification of a general rule (set out in paragraphs (a) and (b) in the above quotation from *Dillon*) provide a clear starting point for a sentencer, adding context to the sparse words of paragraph 5A. As with the example of *Smith (Christopher)* above, this device is capable of providing great assistance. An explanation of the purpose underlying a word, phrase or provision in circumstances where the guidance cannot (or should not) be prescriptive such that the sentencer is required to interpret and apply it enables the individual to adopt a purposive approach and is likely to result in a more accurate outcome (as compared with no such guidance). The CACD's guidance provides a clear indication of how a court should apply the vague words used by parliament. This guides the exercise of discretion to determine whether or not a knife or other weapon was taken to the scene for the purposes of paragraph

5A and thereby reduces the risk of inconsistent application. This relies upon the clarity of the CACD's judgment, of course.

As such there is now a more common approach to the interpretation of paragraph 5A. The focus upon the crossing of the threshold between the property and other communal/public areas seems clear, but I would suggest that it remains an incoherent policy: If I stab my neighbour who has stepped momentarily across the threshold into my property, I have not taken the knife to the scene, but if I step momentarily across the threshold, I have taken the knife to the scene. The need to retain some discretion is therefore manifest, which necessarily limits the efficacy of the guidance.

The second example is another which has plagued the courts. The minimum sentence for certain firearms offences includes a provision which allows the court to 'disapply' the minimum sentence provisions where exceptional circumstances exist which in the court's view justify not imposing the minimum sentence ('the escape clause').[644] In *R. v Rehman; R. v Wood*[645] the court considered the interpretation of s.51A of the Firearms Act 1968 and, in particular, the meaning of the term "*exceptional circumstances*" in relation to the escape clause. The court observed:

> *"11. [...] A holistic approach is needed. There will be cases where there is one single striking feature, which relates either to the offence or the offender, which causes that case to fall within the requirement of exceptional circumstances. There can be other cases where no single factor by itself will amount to exceptional circumstances, but the collective impact of all the relevant circumstances truly makes the case exceptional."*[646]

644 See s.51A of the Firearms Act 1968 and s.29 of the Violent Crime Reduction Act 2006.

645 [2005] EWCA Crim 2056; [2006] 1 Cr.App.R. (S.) 77.

646 [2005] EWCA Crim 2056; [2006] 1 Cr.App.R. (S.) 77 at [11].

This guidance assists the court in so far as it instructs the court that the approach to the determination is one considering all the circumstances and arriving at a balanced conclusion, rather than considering each factor in isolation. This provides structure to the decision-making process by adding some consistency to the way in which the decision is approached. However, it is notable that the court does not engage with the issue of how to determine whether a factor is "*exceptional*", or the types of factor which may or may not be "*exceptional*". Later decisions of the CACD engaged with this issue, however they did so on a fact-specific basis, deliberately not restricting future constitutions of the court. Reliance was placed on the fact that no two cases are the same and that the CACD could only give general guidance in relation to this issue.[647] Nevertheless, the case law developed. For instance, in *R. v Edwards*[648] the CACD emphasised that strong personal mitigation on its own was unlikely to be sufficient to amount to exceptional circumstances; in *R. v Boateng*[649] the CACD found that a genuine absence of knowledge of the contents of a bag subsequently found to contain a firearm and ammunition could amount to an exceptional circumstance; in *R. v Zehkov*[650] the CACD found that possession of a stun gun by a Bulgarian lorry driver, when driving in the UK, in circumstances where he genuinely did not know that possession of such items were illegal amounted to an exceptional circumstance. Again, it is clear that the guidance, while advancing matters by virtue of the provision of structure around the discretionary sentencing decision, preserves a degree of discretion in the decision and therefore there is scope for inconsistency. As a method of structuring judicial discretion at sentencing, the CACD in interpreting provisions of statute

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[647] For example, see *R. v Tuka* [2017] EWCA Crim 2210 at [12] and *Attorney General's Reference (R. v Parish)* [2017] EWCA Crim 2064 at [34].

[648] [2006] EWCA Crim 2833; [2007] 1 Cr.App.R. (S.) 111.

[649] [2011] EWCA Crim 861; [2011] 2 Cr.App.R. (S.) 104.

[650] [2013] EWCA Crim 1656; [2014] 1 Cr.App.R. (S.) 69.

are able to effectively impact upon the approach to sentencing in cases where the particular statutory provision applies.

What is evident, however, is that given the understandable reluctance to be overly prescriptive (which risks inadvertent egression into judicial discretion and potentially 'bright line' distinctions as identified above in relation to murder), the guidance remains fairly general in nature and is often iterative. The court may, over a period of time, develop existing guidance as new issues emerge and thinking advances. This is of course a strength, as the court can react to developments, though as discussed below, there is a limit to this ability to react.

This type of structure provided by the CACD is particularly valuable and does much to limit the risk of inconsistency of application of parliament's words and, in turn, the principles of sentencing. As noted, however, it relies upon the CACD having the opportunity, willing and ability to provide such structure in a clear and comprehensible way.

Sentencing procedure

The final category concerns cases in which the court provide structure of guidance as to the application of sentencing procedure. Such decisions by a sentencing judge typically fall short of the account of judicial discretion as proffered in Chapter 5 on the basis that they do not involve the application of principles or standards (perhaps requiring the exercise of judicial judgement) or because the application of such principles or standards produces a single, correct result.

This would preclude decisions such as the determination of dangerousness within the meaning of Criminal Justice Act 2003, as this produces an obviously correct result: the offender is, or is not, dangerous and the court will not entertain a submission that the permissible range of sentences straddles this threshold. By contrast, in theory at least, the custody threshold – the fictional line between cases which are, and are not, seriousness enough to warrant a custodial sentence – is a discretionary decision. The distinction between those two examples is the existence of a scale in the case of the latter which does not exist in the case of the former. Imagine a scale from 1-10, where the custody threshold sits at 4; as the determination of seriousness is not so precise that one can pinpoint the single point on the scale where a given offence falls, the range may, in theory, straddle the custody threshold, notwithstanding the fact that the decision appears to be binary. The focus on the binary decision is a red herring; the result of the binary question in this instance is a result of the determination of the non-binary question ('where is the offence on the scale of seriousness?'). In the case of the determination of dangerousness, no such scale exists and the choice is binary. It is therefore not a discretionary decision.

One example of a discretionary decision pertaining to sentencing procedure is the extent to which sentencing decisions should be explained. Section 174 of the Criminal Justice Act 2003 states:

> *(1) A court passing sentence on an offender has the duties in subsections (2) and (3).*
> *(2) The court must state in open court, in ordinary language and in general terms, the court's reasons for deciding on the sentence.*
> *(3) The court must explain to the offender in ordinary language—*
> *(a) the effect of the sentence,*
> *(b) the effects of non-compliance with any order that the offender is required to comply with and that forms part of the sentence,*
> *(c) any power of the court to vary or review any order that forms part of the sentence, and*

(d) the effects of failure to pay a fine, if the sentence consists of or includes a fine.

In *Attorney General's Reference (No.96 of 2009) (R. v F)*[651] where there was concern over the ability of the offender to follow proceedings, the CACD held that the judge had been entitled to keep sentencing remarks (in accordance with section 174) short and to have reduced them to writing, but that they should have been delivered in open court. Section 174 is plainly open to interpretation as to the level of detail a judge is bound to provide; here the CACD provided guidance as to the extent to which the remarks could be abbreviated, but that the requirement to deliver them in open court was inviolable. This guidance provides some, limited, structure to this aspect of sentencing procedure though makes clear that it is an exercise of judgement as to the extent to which, for example, the remarks might be abbreviated. A similar example is seen in *R. v Bourke*[652] in which the court commented that it would have been "*of assistance*" had the judge dealt with the suitability of a determinate sentence in circumstances where the judge had found the offender to be "*dangerous*" within the meaning of the Criminal Justice Act 2003.[653] This, again, provides an indication of the way in which such decisions should be approached. This is both guiding, in that it presents as non-binding, but is in fact a polite but clear instruction that this is the way in which matters should be approached.

651 [2010] EWCA Crim 350.

652 [2017] EWCA Crim 2150; [2018] 1 Cr.App.R. (S.) 42.

653 At [41] and [42].

Limitations on the CACD's ability to provide guidance and structure

The limitation of the CACD's ability to provide guidance and structure is well-rehearsed. The Halliday Report, in 2001, noted that although the CACD had been developing guideline judgments since the 1980s, many gaps remained.[654] Additionally, the report noted that guideline judgments were not particularly accessible to the public which it thought was particularly problematic. Notwithstanding the CACD's unique position to provide guidance on sentencing, the Halliday Report noted that the membership was not particularly "*broad*".[655] Additionally, the usual arguments may be made as to why the CACD is perhaps not the most appropriate body to devise and issue guidelines and guidance; the CACD is ill-equipped to produce guidelines or guidance in most cases owing to its high case load,[656] inability to conduct research and collect data[657] and the fact that it may deal with a particular topic only when an appropriate case comes before it.

Each of these raises particular issues. In relation to the work load of the CACD, the Lord Chief Justice reported in 2016 that despite a slight decline in number of cases received, the workload had in fact increased owing to the fact that the cases coming before the court were more complex than previously.[658] This inevitably places a strain on the court and its staff with attendant pressures to hear cases and hand down judgments promptly, so as to reduce (or limit) any delays. In turn, there is little if any time for additional, lengthy research prior to the

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[654] Halliday (n 108), 54.

[655] Halliday (n 108), 56.

[656] Judiciary of England and Wales (n 624), 6.

[657] Ashworth (n 3), 60-61 and Sentencing Commission Working Group, *Sentencing Guidelines in England and Wales: An Evolutionary Approach* (Ministry of Justice 2008), 41.

[658] Judiciary of England and Wales (n 624), 4, 6.

writing and handing down of a guideline or guidance judgment. This has been recognised by other jurisdictions: in Victoria, Australia, a report of the Sentencing Advisory Council noted that reliance on an appellate court to issue guidance "*...places a responsibility on the court and institutional parties to invest time and resources into monitoring systematic issues.*"[659]

The CACD, like all courts, is restricted in the cases that comes before it. If it appears that a guideline judgment on a particular offence or set of offences, or guidance on a particular topic is desirable, the court must wait for a case to come before it which raises the point.[660] Young and King note that appellate guidance tends to be confined to the more serious offences and atypical cases, arguing that such guidance can "*only ever be a partial answer to the inconsistency problem.*"[661]

The 'suite' of guidelines which an appellate court can therefore provide is only ever going to be incomplete. This limitation is two-fold: not only can an appeal court not control the cases coming before it, but it cannot plan for issuing guideline judgments. For instance, if two cases came before the court the same month raising two issues on which it was desirable to issue guideline judgments, that places a strain on the court's resource.

Moreover, the guidelines which are able to be issued by an appellate court are not tested – or at least not tested in any robust or controlled manner. They may be subject to informal discussions with others but can in no way be tested and revised in a manner similar to that

659 Sentencing Advisory Council, *Sentencing Guidance in Victoria: Report* (Sentencing Advisory Council 2016), 145.

660 Warren Young and Andrea King, 'The Origins and Evolution of Sentencing Guidelines: A Comparison of England and Wales and New Zealand' in Andrew Ashworth and Julian Roberts (eds), *Sentencing Guidelines* (OUP 2013), 204; O'Malley (n 299), 378.

661 Young and King (n 660), 204.

adopted by the SC (as to which, see Chapter 8). Finally, the composition of the court, the way in which it is staffed and funded is to operate as an appellate court and not as a quasi-guidelines body.

An additional point relates to the propriety of the CACD giving guideline judgments. Although this has long been recognised at common law,[662] there is perhaps a question over the propriety of the court purporting to give such guidance. A court's jurisdiction is to decide the case before it; the judgment of the court comprises of the *ratio decidendi* – the rationale for the decision – and *obiter dicta* – words said 'by the way', i.e. they could be removed from the judgment and the same decision still be reached. The former is binding whereas the latter is merely persuasive for future cases. It might be argued therefore, that comments as to future cases can only ever properly be considered to be *obiter*; views as to the way in which future courts should approach the determination of sentence are not necessary for determining the sentence in the instant case. Therefore, the guidance provided by the CACD is only ever persuasive. In practice, even if such guidance is merely *obiter*, it will be followed, not least because it is persuasive and authoritative.[663] The point has been acknowledged by the Australian High Court[664] and Ashworth.[665] Whether or not this argument is correct, it would at least seem arguable and therefore it raises a question as to the propriety of such guidance.[666]

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662 See for example Ashworth (n 3), 23 and Crime and Disorder Act 1998 s.80.

663 Support for this might be taken from the first guideline case, *R. v Aramah* (1983) 76 Cr.App.R. 190, in which the Lord Chief Justice stated "*All these are matters which we have to take into consideration, but before we deal with this particular case, it may be of assistance if we make some general observations about the level of sentences for drug offences, since our list, as will have been observed, is entirely composed of such crimes*.".

664 *Wong v The Queen* (2001) 207 CLR 584 at [147] per Kirby J.

665 Ashworth (n 3), 63.

666 An alternative argument would be that such guidance is part of the *ratio* as it forms the basis of the court's assessment of seriousness, i.e. it is necessary to set out the various levels in order to determine the one into which the instant offence falls within. This point would need further work and it is not for

These points taken together ought not to be read as criticism of the court in discharging its function in providing guidance and structure in sentencing; on the contrary, it is evident that the court provides useful and effective structure and guidance despite the challenges which have been identified in the preceding paragraphs. These points do, however, call into question the suitability of the CACD as the sole provider of structure and guidance.

Conclusion

This chapter has sought to survey the current provision of sentencing structure and guidance by the CACD. Through a systematic analysis of the decisions of the CACD, it has been demonstrated that the CACD provides structure and guidance to the discretionary sentencing decision through a variety of means, with varying degrees of efficacy. In some cases, as with general principles and the general approach to sentencing, the court has provided structure by guiding comments, at a rather vague and high level. These require more input from the recipient of the guidance than more prescriptive forms of structure. While this preserves the wide discretion afforded to sentencers, which, in theory, enables courts the freedom to achieve consistency,[667] the loose structure leaves greater scope for error or inappropriate or inadvertent departure. In other cases, the court has provided more concrete guidance such as the more traditional guideline judgment. While this still requires a degree of engagement from

this thesis to embark upon such a task. It is merely sufficient to raise the question of the basis on which such guidance is given.

[667] As defined in Chapter 2. As to the wide discretion, this is clearly an historical feature of the sentencing system in England and Wales. O'Malley notes that the need for prescriptive guidance is jurisdiction specific and, as will be seen in Chapter 8, the guidelines scheme adopted in this jurisdiction respects and reflects that culture of sentencing being a discretionary field of law. See Tom O'Malley, 'Living without guidelines' in Andrew Ashworth and Julian V Roberts (eds) *Sentencing Guidelines: Exploring the English Model* (OUP, 2013), 227.

the sentencing judge (with the inevitable risk of inconsistency), this provides a greater degree of structure.

The different means of providing such structure results in varying degrees of consistency. In giving such guidance, the CACD plays the role envisaged by parliament. Yet there remain barriers to the effective and efficient provision of such structure and guidance; as explored in this chapter, the CACD is not equipped to conduct research and obtain and interpret data. Similarly, the ability of the court to provide structure and guidance where necessary is severely limited by the fact it may only deal with the cases which come before it and it has no influence over that case load. Additionally, there is a question surrounding the legitimacy of the provision of such guidance.

It is important to consider the provision of guidance by the CACD in the context of the account of consistency proffered in Chapter 2. A focus upon principles and their proper and consistent application does not naturally lend itself to much of the guidance given by the court. Where an appeal against sentence or Attorney General's reference states that a particular sentence was too high or too low, the focus is on the outcome and not (or not necessarily) on the approach to determining the sentence. The provision of that type of guidance is limited and is outweighed by the many appeals in which the court indicates the appropriate outcome only. Despite the CACD appearing to have plenty of opportunity to provide such guidance, in practice this is somewhat limited.

Taken together, we must conclude that the combination of the CACD and parliament is an insufficient means of providing structure to the sentencing decision and that more is required. There is an insufficient degree of consistency achieved through the provision of

structure of these two institutions. The CACD performs an important function in the provision of guidance and structure which is effective in influencing the approach of sentencing courts to the determination of sentence. However, the inescapable reality is that the CACD is limited in its effectiveness as a provider of structure at sentencing.

Chapter 8: Do the Sentencing Council's guidelines promote greater consistency?

In recent years, many jurisdictions have introduced reforms designed to restrict and guide judicial discretion at sentencing…however formal guidelines are the most promising and well-studied innovation.[668]

Introduction

There can be no doubt that sentencing guidelines have revolutionised sentencing in this jurisdiction. But have they achieved their primary aim: to promote consistency in sentencing? It will be recalled that this thesis has adopted a definition of consistency which focuses upon the application of principles, rather than a more traditional account of the concept which looks to compare outcomes to measure consistency. It was argued in Chapter 2 that this produced a purer, more theoretically sound conception of consistency. Accordingly, in testing the efficacy of the Sentencing Council's ("*SC*") guidelines as a means of promoting greater consistency in sentencing, the following definition is used:

> *Achieving consistency in sentencing requires sentences to be determined only by the application of established principles, having regard to legally relevant factors, in a manner which follows an established fair procedure.*
>
> *In a principally retributive framework, this entails the production of a range of sentences proportionate to the seriousness of the offence.*[669] *A particular sentence within the range can then be chosen with reference to other established principles, secondary to proportionality, and imposed following an established fair procedure.*

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[668] Julian V Roberts and Wei Pei, 'Structuring Judicial Discretion in China: Exploring the 2014 Sentencing Guidelines' (2016) 27 Criminal Law Forum 3, 3-4.

[669] Incorporating harm and culpability.

In exploring whether the SC's guidelines do promote greater consistency in sentencing, this chapter is broken down into five parts: first, there are some brief introductory remarks about the SC and its guidelines. Secondly, the chapter considers the requisite features of sentencing guidance which is designed to structure judicial discretion as a means of promoting greater consistency. Thirdly, the guidelines produced by the SC are examined in detail against what has been argued to be the fundamental features of sentencing guidance. Fourthly, the chapter considers the degree of constraint guidelines impose upon a sentencing court. Fifthly, the empirical research and the extent it has explored the SC's success in promoting greater consistency is examined. Finally, the chapter draws conclusions as to whether the SC's guidelines achieve their stated aim, namely to promote greater consistency in sentencing.

The Sentencing Council's guidelines

Background

It is unnecessary for the purposes of this chapter to provide 'chapter and verse' on the history of the SC, the way in which it produces its sentencing guidelines, the SC's composition or indeed the history of sentencing guidance in England and Wales leading to the creation of the SC and the current approach to structuring judicial discretion at sentencing.

For present purposes, it suffices to note the following:

(1) The SC identifies a multi-step process for their workflow:

a. Priorities (identifying work plan priorities);
b. Research (policy and legal investigations are carried out and a draft guideline is produced, including evaluating current sentencing practice);
c. Scoping paper (preliminary draft setting out various options to be discussed by the Council);

d. Skeleton guideline (including road testing of the preliminary draft);
e. Revision (the Council discusses the draft guideline and agree a broad structure for the consultation);
f. Consultation (usually a 12-week period during which statutory consultees and members of the public are invited to comment on the proposed documents);
g. Responses (analysis of responses and revision of the draft guideline);
h. Publication (guideline issued and judicial training offered); and
i. Monitoring (the operation of the guideline, once in force, is monitored).[670]

(2) The SC is supported by an office of staff including researchers and economists;

(3) Draft guidelines are subject to 'road testing' with sentencers and practitioners;

(4) As a default, the SC's guidelines are generally anticipated to be neutral in their effect upon the prison population;[671]

(5) The SC is made up of judicial and non-judicial members, with the former being in the majority; and

(6) The aim of promoting consistency in sentencing focusses upon consistency of approach.

The SC's guidelines can be placed into one of two categories: (1) offence-specific guidelines; and (2) overarching guidelines. The former adopt a similar step-by-step process for the determination of sentence; the latter are more descriptive and vary in their structure and format. The approach taken by both is explored in detail below.

670 Sentencing Council, 'About us: Our work', <https://www.sentencingcouncil.org.uk/about-us/our-work/> accessed 12 July 2019.

671 Lord Justice Colman Treacy, 'Letter to the Editor' [2016] Crim LR 489, 490.

The constituent elements of sentencing guidance

Before considering whether the SC's guidelines do in fact promote consistency as defined in Chapter 2, it is necessary to consider what characteristics a guideline must have in order to achieve that aim. I suggest that two distinct qualities are necessary: guidelines must (1) contain substantive guidance; and (2) constrain the court's exercise of its discretion.

Dealing with the first, what is meant by 'substantive guidance'? In essence, it must inform as to the way in which sentencing is to be approached, in contrast to merely dictating without explanation. It would, for instance, provide little to no guidance if the guideline merely stated what the guiding principle was, without further explanation. The Scottish Sentencing Council's *Definitive Guideline on Principles and Purposes of Sentencing (2018)* provides a useful example; it purports to provide guidance as to the approach to sentence, but for instance, merely states:

> *1. Sentences in Scotland must be fair and proportionate.*
> *2. This principle requires that:*
>
> - *all relevant factors of a case must be considered including the seriousness of the offence, the impact on the victim and others affected by the case, and the circumstances of the offender;*
> - *sentences should be no more severe than is necessary to achieve the appropriate purposes of sentencing in each case;*
> - *reasons for sentencing decisions must be stated as clearly and openly as circumstances permit;*
> - *sentencing decisions must be made lawfully and sentencers must have regard to any sentencing guidelines which are applicable;*
> - *people should be treated equally, without discrimination; and*

- *sentencing decisions should treat similar cases in a similar way, assisting consistency and predictability.*[672]

This is representative of the approach taken by the guideline and is, I suggest, practically devoid of guidance: while the guiding principle (is it one, or two?) is stated, there is insufficient detail to enable a courts to apply it with any degree of consistency.[673] One is left wondering what a fair and proportionate sentence is and how to achieve such a result. Put simply, the accompanying text contains assertion without explanation.

So far as treating "*similar cases in a similar way*" – potentially crucial for consistency – the guideline defines "*similar*" as follows:

> *"In the context of sentencing, "similar" means having features or factors in common. The aim of individual guidelines will be to identify where cases should be treated as similar. Treating cases similarly does not mean that similar cases should be dealt with in exactly the same way."*[674]

This is little more than a dictionary definition and does not assist in the application of the principle(s) of fairness and proportionality. It is true that there is *some* guidance: it is clear that sentences must be fair and proportionate, but the explanation of that is vague at best, referring to concepts without further elaboration or definition. The only conclusion is that it is highly unlikely that this guideline will promote greater consistency in a meaningful way, as the risk of disparate understanding of the terms used is significant.

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672 Scottish Sentencing Council, *Definitive Guideline on Principles and Purposes of Sentencing* (Scottish Sentencing Council 2018),

<https://www.scottishsentencingcouncil.org.uk/media/1964/guideline-principles-and-purposes-of-sentencing.pdf> accessed 12 July 2019, 3.

673 Lyndon Harris, Rory Kelly, Julian V Roberts and Leila Tai, 'A response to Scottish Sentencing Council's consultation on the Principles and Purposes of Sentencing Draft Guideline' (2017) 3 Sentencing News 9-13, 10.

674 Harris, Kelly, Roberts and Tai (n 673), 3.

Substantive guidance requires detail as to what underlies the principle described and how it is to be applied. The more detail, the greater the likelihood that the principle will be understood and its application will be consistent.

Compare that with guidance from the SC as to the principle of totality:

"The principle of totality comprises two elements:

1. *All courts, when sentencing for more than a single offence, should pass a total sentence which reflects all the offending behaviour before it and is just and proportionate. This is so whether the sentences are structured as concurrent or consecutive. Therefore, concurrent sentences will ordinarily be longer than a single sentence for a single offence.*
2. *It is usually impossible to arrive at a just and proportionate sentence for multiple offending simply by adding together notional single sentences. It is necessary to address the offending behaviour, together with the factors personal to the offender as a whole."*[675]

The guideline begins to explain the principle and provides further detail about how it is to be applied in practice. What follows (though not reproduced here, for reasons of space) is detailed guidance as to the use of concurrent and consecutive sentences, and examples of the proper application of the principle in various different scenarios. This provides a degree of substantive guidance as to the principle and crucially its application, enabling a user to better understand the principle and its proper application. That position should not be overstated, however; the principle of totality remains insufficiently defined (for example, principle 2 is particularly vague) to produce a meaningful degree of consistency, though perhaps this is understandable given the amorphous nature of the concept. That said, it is axiomatic that the

[675] Sentencing Council of England and Wales, *Offences Taken Into Consideration and Totality Definitive Guideline* (Sentencing Council of England and Wales 2012), 5.

use of examples in conjunction with a narrative explanation of the principle makes it more likely that users will understand how to apply the principle than if the guidelines includes just a bare statement of the principle. It therefore seems uncontroversial to say that the guideline provides substantive guidance which promotes consistency.

The second requirement, that the guideline imposes some constraint upon the sentencer, is equally important. Without this, the efficacy of a guideline is likely to be limited. A non-binding guideline leaves the decision *whether* to apply it to the individual and therefore the risk of inconsistent use of the guideline is manifest. An absence of constraint provides no control and no method of enforcement: advisory guidelines may be ignored and defendants are likely to have little recourse in the appellate courts as a result. The Gage report argued for guidelines to be presumptively binding, noting that a balance must be struck between preserving discretion to avoid injustice and a high(er) degree of constraint to produce "*the necessary consistency*".[676] A minority of the working party felt that the constraint did not need to be as extreme as argued by the majority; their primary fear was unjust sentences caused by insufficient discretion to 'do justice'.

Should guidelines therefore be binding and if so, to what extent? I conclude they should be binding but with a degree of flexibility to allow for individualisation. Without such a presumption, the application of guidelines is unpredictable and it follows, I suggest, that the degree of consistency achieved will be lower than under a presumptively binding scheme. But does the lack of flexibility limit the ability to individualise a sentence? If so, this would be incompatible with the argument presented in Chapter 4, namely that a conception of consistency based on principles relies upon and is congruent with individualisation and

[676] Sentencing Commission Working Group (n 657), para.7.14-7.21.

accordingly there is a need for a degree of flexibility in structured sentencing discretion. As was demonstrated in Chapter 6, inflexible rules produce inconsistency. The balance is therefore between constraint and flexibility. Too much constraint and the nature of the guideline becomes directing, rather than guiding. Too much flexibility and there the guideline will produce insufficient consistency. This issue is discussed at length later in this chapter, when the current regime is examined in detail.

I argue that through substantive guidance and constraint of discretion, guidelines will promote greater consistency and that these two elements are vital to any guideline regime intending to promote consistency.

The Sentencing Council's offence-specific guidelines

General

The offence-specific guidelines are designed to promote consistency as regards the assessment of the seriousness of the offence in question. The format of all offence-specific guidelines is narrative – in stark contrast to the American 'grid' style guidelines. O'Malley considers the narrative nature of the guidelines to facilitate a more nuanced judicial evaluation of key factors.[677] As will be seen, the greater degree of flexibility certainly requires greater judicial involvement in the process. The form of the offence-specific guidelines is as follows:

Step 1 (entitled "*determining the offence category*") concerns retributively significant factors which are structured into numerous categories.[678] The list of factors deemed to be

[677] Tom O'Malley (n 299), 377.

[678] Some guidelines divide Step 1 into "*higher*" and "*lower*" culpability and "*greater*" and "*lesser*" harm, whereas others adopt an approach which sees multiple levels of each.

relevant to the assessment of the culpability and harm present in an offence at Step 1 is exhaustive; only those factors listed may be considered for the determination of culpability and harm at Step 1. This provides a high degree of constraint over the assessment of the seriousness of the offence at Step 1; it allows the SC, in devising its guideline, to more accurately control the application of the guideline as the risk of inconsistency is limited to incorrect interpretations of the guideline (rather than reference to other factors which are not listed).

The assessment of culpability and harm is in effect a two-dimensional matrix involving various categories of each depicted by numbers or letters (e.g. Culpability A, or Harm 2). Step 2 (entitled "*starting point and category range*") contains a table, displaying various categories and users perform a similar task to that required of a mileage chart, using the culpability and harm categories produced by the analysis at Step 1 to identify the appropriate cell in the table. Each cell contains a starting point and a category range.

Step 2 contains a non-exhaustive list of factors which aggravate and mitigate the seriousness of the offence. Reference to these factors allows for movement from the category starting point. These factors are those which most commonly arise in cases of the offences in question (e.g. location and timing of offence for an offence of assault) or those which are of general relevance to the assessment of seriousness (e.g. presence of previous convictions). Some have argued for factors in guidelines to be exhaustive,[679] however such a prescriptive approach would risk excluding a factor which may be relevant to sentence, thereby limiting the ability of the court to impose a proportionate sentence. The decision to make Step 2 non-exhaustive allows for an appropriate balance between keeping the guidelines at a manageable

[679] See for example Mandeep K Dhami, 'Sentencing Guidelines in England and Wales: A missed opportunity?' (2013) (76) Law and Contemporary Problems 289, 294.

length (obviating the need to identify every possible factor of relevance, however infrequently relied upon, and providing sufficient guidance as to the factors commonly warranting a movement from the starting point).[680]

Bottoms and Parsons criticised the SC for its approach to the construction of Step 2 of the guidelines, recommending that caution is exercised to ensure the inclusion of mitigating factors which correspond to aggravating factors. An example is given of "*leading role*" as an aggravating factor in a group offence, but playing a minor role is not listed as a mitigating factor. While there may be some specific circumstances where the point has purchase, as a general point this observation seems problematic. The presence of a factor may be aggravating but its absence does not necessarily constitute mitigation, for instance, the use of a weapon may be aggravating but the absence of a weapon is not mitigating. Such an approach is to undermine the 'baseline' offence upon which the starting points are predicated. I argue that this approach is sound where the factor operates on a scale (such as the extent of the role played by the defendant) but does not withstand scrutiny where the factor is binary (such as the use of a weapon). Additionally, as Step 2 is non-exhaustive, the sentencer is permitted to take account of a factor not listed, in appropriate circumstances. This however risks inconsistency as it relies upon the identification and quantification of non-listed factors by the advocates or the court. There could well be disagreement as to the relevance of a particular non-listed factor which would create an inconsistency of approach and potentially an inconsistency of outcome. As with Ashworth's criticism of s.142 of the Criminal Justice Act 2003, allowing sentencers to determine which factors are relevant (as distinct from determining if factors are present in a

[680] There is research to demonstrate that sentencers consider guidelines to be too long in their current form and that overly long documents are likely to be under-utilised. See Dhami (n 679), 299.

case) may invite inconsistency.[681] It therefore appears particularly important that Step 2 lists as many of the commonly occurring or usually relevant factors as possible (while maintaining a concise and useable length). One option for the SC would be for guidelines to consider the issue of the 'baseline' and indicate what the 'baseline' is for an offence, for example, an assault without the use of a weapon (thereby prohibiting taking account of the absence of a weapon).

Step 3 onwards (depending on the particular guideline) concerns other adjustments to the sentence, such as reductions for a guilty plea, totality, time spent on remand and other steps which the sentencing court *must* take, such as explaining the reasons for the sentence imposed. By employing this same step-by-step format, the SC attempts to ensure a consistent approach across each offence-type. It also attempts to ensure that adjustments to sentence are made at the same stage; with reductions for assistance to the prosecution and for a guilty plea, the stage at which the discount is applied can have an effect on the outcome.[682]

Listing (even non-exhaustively) factors undoubtedly provides some substantive guidance; by bringing them to the attention of the sentencer, the SC has identified factors which ought to be taken into account and has prescribed the stage at which they are considered. At Step 1, they are placed into one of a number of categories, and therefore the SC has provided further substantive guidance as to the weight to which they are to be given in the assessment of seriousness. This ought to be of great assistance to sentencers, and ought to produce consistency of approach (and indeed, outcome) as the SC have narrowed down the range of

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[681] Ashworth (n 3), 82.

[682] For instance, from a starting point of 6 years, 10% credit for a guilty plea reduces that to 5 years 6 months, and a further 6 months reduction for good character reduces the sentence to 60 months or 5 years. However, a different process produces a different result: 5 years, minus 6 months for good character, produces a sentence of 4 years 6 months. From that, a reduction of 10% produces 50 months, or four years and 2 months.

sentences which will be considered to be proportionate for a particular offence based on the factors present. For example, in cases of assault, every offence involving an injury which is less serious in the context of the offence will be one featuring "*lesser harm*" and therefore either fall into Category 2 or 3 (depending on the determination of culpability). That produces a sentencing range of 3-9 years (that being the bottom of Category 3 to the top of Category 2) rather than a range of 3-16 years.

As regards the division between the factors to be considered at Steps 1 and 2, the guidelines suggest that Step 1 contains consideration of factors relevant to culpability and harm, and Step 2 concerns aggravating and mitigating factors. I suggest that a better view is that Step 1 contains primary factors driving the severity of a sentence, i.e. those which are most influential in that determination, and Step 2 to contain factors of secondary importance. For example, the assault guideline lists the nature and extent of the injury, whether the attack was sustained and whether a weapon was used, at Step 1, whereas Step 2 lists the timing of the offence, the ongoing effect of the injury to the victim and whether the offender is a primary or sole carer for dependent relatives. This also illustrates that the factors at Step 2 are not exclusively retributively significant (in contrast to Step 1) but also that the factors at Step 1 are more influential as to the determination of the seriousness of the offence in the context of a retributive scheme.[683]

The process required by the offence-specific guidelines is linear (Step 1, then Step 2 and so on) and so departures from the broad structure (intended or inadvertent) will often be

683 For instance, the nature and extent of the injury is always going to be highly relevant to the determination of the seriousness of an offence of assault in a principally retributive scheme as it concerns a constituent element of the offence. The location and timing of the offence, however, may not be as they are ancillary to the elements of the offence.

manifest; for instance, if the court does not apply Step 1 and consider the factors which illustrate the various levels of harm and culpability relevant to the particular offence in question. It is likely to be rare that a case is sentenced otherwise than in accordance with the approach provided by the guideline, not least because the SC's step-by-step methodology follows (and develops upon) the approach to the assessment of seriousness set out in s.143 of the Criminal Justice Act 2003. Therefore, even where a guideline is not explicitly being complied with, the looser approach required by the Criminal Justice Act 2003 should provide a degree of consistency of approach, notwithstanding an absence of consistency of outcome ensured by following the guideline. The guideline provides far greater detail and therefore a greater degree of constraint.

An ancillary issue, noted at the outset of this chapter, is that the SC's guidelines are generally intended to be "*neutral*" as regards the prison population, thereby continuing with current sentencing practice and maintaining current sentencing levels. There are exceptions to this (for instance where the SC expressly stated they wished to reduce levels for so-called 'drug mules' in the 2012 Drugs Offences Guideline). A broader question that has hitherto not been considered in detail is whether it is appropriate (in the current regime or in a modified regime) for the SC to have what is akin to a policy making role (like the CACD) in the determination of sentencing levels, passing in effect moral judgement on the level of penalties imposed for particular offences. For reasons of lack of space, this is not considered in this thesis (save to a very limited extent in Chapter 9) however, it is a question which ought to be considered. Should they be able to do so? If so, what test should be met, or arguments must be satisfied before a guideline makes such a significant substantive change?

Interpreting offence-specific guidelines

The interpretation of terms used in offence-specific guidelines risks generating inconsistency; two different judges may reasonably arrive at a different conclusion as to the meaning of a term used and whether a particular factor justifies moving outside of the category range, just as they may arrive at different conclusions as to the presence of a factor listed at Step 1.

While Step 1 is prescriptive in its form, there remains a degree of flexibility as the terms used at Step 1 are not defined, nor are they accompanied by illustrative examples. The product is therefore a highly prescriptive process which produces an outcome. Although this is more likely than not to produce a more consistent outcome, is open to abuse and error in its subjective interpretation. For example, what is meant by "*injury significant in the context of the offence*" in the assault guideline? The guideline provides no definition and therefore the sentencer is left to apply that term to the facts of the offence before them according to their own view. Where one might consider, for example, an attack in which four blows were delivered to be an offence involving a "*sustained or repeated assault on the same victim*" (a Step 1 factor indicating greater harm), others may not. The Court of Appeal (Criminal Division) discussed this in *R. v Smith (Christopher),*[684] observing at [18]:

> *"Thirdly, was the assault sustained or repeated, again as required by the guidelines? The phrases "sustained" and "repeated" may imply different things. An assault may be sustained because it continued over the course of a significant period of time, even though it did not necessarily involve a substantial number of blows. An assault may be repeated because it involves multiple blows over a short period of time. In one sense, the present case involves a repeated offence in that there were two blows, though only one of them was charged under s.18. We have doubts whether a*

[684] [2015] EWCA Crim 1482; [2016] 1 Cr.App.R. (S.) 8.

> *difference between one blow and two blows could justify moving the starting point from a Category 2 (six-year) level to a Category 1 (12-year) level. If this were so, there would be very few attacks that were not Category 1. The concept of sustained or repeated, in our view, imports some degree of persistent repetition. These concepts must be read in the light of the major difference in starting point between the two categories. In order for a sentence to be compliant with the test of proportionality, the facts warranting the higher sentence should reflect the difference in the guidelines. In our judgement, two blows, one of which is not said to amount to a s.18 offence, would not at least normally amount to a sustained or repeated assault. We do not wish to be more specific or precise than this because we acknowledge that each case will entail a very fact-specific assessment."*

A further example is provided by the case of *R. v Teklu.*[685] The case concerned a sexual assault committed on the street in circumstances where the offender approached a female student who was walking home at night. The CACD concluded that the term "*significant*" as regards the culpability factor "*significant degree of planning*" in the *Sexual Offences Definitive Guideline* was not an "*absolute concept*"; rather whether the factor applied was contextual. While there may be absolute consistency of approach (in a broad sense), this approach to the guidelines clearly creates a risk of their disparate application, leading to inconsistent approaches and outcomes.

The SC could provide guidance on such factors. Illustrative examples may provide outer limits of such factors which inform and constrain (in a soft sense) the application of these factors. This is more likely to result in consistency of approach and outcome if the term used in the guideline is defined (or at least amplified) in the same document, rather than waiting for the CACD to consider the issue in an appropriate case and provide some guidance. It is also more likely that the term is given its intended meaning. I suggest this would provide greater

[685] [2017] EWCA Crim 1477; [2018] 1 Cr.App.R. (S.) 12.

consistency. There are, no doubt, challenges to such an enterprise, though as was demonstrated in the previous chapter, the CACD has begun to provide such guidance.

In relation to this point, at the time of writing the SC has issued a consultation exercises on "*expanded definitions*".[686] Accordingly, this matter is dealt with briefly in this chapter. The draft guideline provides further information for Step 2 factors only; the SC state that it concluded that it would be unhelpful to provide further guidance on Step 1 factors as those factors are tailored to each specific guideline. That, in my view, represents a missed opportunity.

Moving on to Step 2, the offence-specific guidelines do not 'weight' the factors set out at Step 2, nor do they provide a standardised approach to assessing the weight to be properly accorded to such factors. Some suggest that the SC should provide such guidance.[687] It could be said that the *Reduction in Sentence for a Guilty Plea* guideline (which provides a percentage figure by which the sentence ought to be reduced) is an example of how this can work in practice. This argument is misconceived as a guilty plea, as a factor reducing sentence, is *sui generis*. It is neither an offence nor offender-related factor; instead a guilty plea is transactional, predicated upon the measurable effect a plea has on proceedings (e.g. avoiding trial preparation or a witness coming to court). By contrast, whether the offender has previous convictions is not so easily objectively quantifiable in terms of its seriousness and the impact it ought to have on sentence as the principle by which to assess this is more amorphous. That said, it is clear that the subjective weighting of aggravating and mitigating factors presents a problem for

[686] Sentencing Council of England and Wales, *Expanded Explanations in Sentencing Guidelines Consultation* (Sentencing Council of England and Wales 2019).

[687] See Dhami (n 679) above and Pina-Sanchez and Linacre (2014) (n 28), 733.

consistency. Jacobson and Hough found that there was significant variation in the way in which sentencers applied factors relevant to personal mitigation and concluded that there should be guidance from the SGC (then the relevant guidelines body) on the principles of personal mitigation relevant to sentence.[688]

While one could operate a crude measure by reference to the number of convictions and offences,[689] such would be woefully inadequate, being blind to the circumstances of the offender (e.g. is the offending increasing or decreasing in seriousness, are the number of convictions and offences significant for a person of the offender's age or has there been a gap in offending prior to the instant offence), or the offence (e.g. are the offences related to the offence in question and do they show a pattern of offending) or the overall circumstances. It is therefore the case that such Step 2 factors cannot be quantified in the abstract. What might be possible, however, is to provide guidance on the way in which such an exercise is to be undertaken; this could take the form of indicating limits (maximum and minimum increases or decreases) and listing factors which are relevant to each factor. Such guidance would clearly be directed at consistency of approach but as is widely accepted, that would also promote consistency of outcome. At present, factors such as personal mitigation and previous convictions afford the sentencer with a wide discretion to impose sentence within the wide offence-ranges. This degree of discretion could be reduced to better promote consistency.

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688 Jessica Jacobson and Mike Hough, *Mitigation: The role of personal factors in sentencing* (Prison Reform Trust 2007) <http://www.prisonreformtrust.org.uk/uploads/documents/FINALFINALmitigation%20-%20small.pdf> accessed 22 May 2019.

689 Such as that employed by some US sentencing grids.

As noted above, the SC is consulting on providing further guidance on Step 2 factors. By way of example, in relation to the concept of 'planning' an offence, the SC draft guideline provides the following 'expanded' guidance:

- *Evidence of planning normally indicates a higher level of intention and pre-meditation which increases the level of culpability.*
- *Planning may be inferred from the scale and sophistication of the offending.*
- *The greater the degree of planning the greater the culpability.*[690]

This example typifies the approach adopted by the SC. I suggest that this provides little further structure by way of guidance. The first is obvious from its inclusion in the offence-specific guideline; the third explains that the factor is relevant to culpability and again, I suggest, is obvious from the offence-specific guideline and common sense. The second does provide some assistance, obvious though it is. This amplification of the factors, though a step in the right direction, is insufficient. What is lacking is assistance in determining when offending behaviour ought to be considered to include a significant degree of planning. Illustrative examples of specific scenarios which are, and are not, intended to fall within the term would no doubt assist. The definitive guideline (providing further guidance on Step 2 factors) is expected later in 2019 and it remains to be seen whether consultees encourage the SC to provide more assistance. Presently, this draft guideline does not appear to advance matters further.

In assessing the extent to which the SC's offence-specific guidelines contain substantive guidance, it is helpful to consider one of the guidelines in detail.

[690] Sentencing Council (n 686), Annex A, 13.

Robbery Offences Definitive Guideline

The *Robbery Offences Definitive Guideline* ("*the robbery guideline*") is a typical example of an offence specific guideline, containing within it three guidelines: (1) street and less sophisticated commercial; (2) professionally planned commercial; and (3) dwelling. The first point to note, therefore, is that the sentencer has to decide which guideline to apply. As there is only one offence of robbery contained in section 8 of the Theft Act 1968, the offence charged is unlikely to assist. This can be contrasted with the burglary offences guideline which contains three guidelines, (dwelling, non-dwelling and aggravated burglary); which guideline applies is clear from the indictment, as there are two offences of burglary, burglary and aggravated burglary, but in the case of the former, whether the offence is one of dwelling burglary must be stated on the indictment.[691] The decision as to which guideline applies should therefore be determined prior to sentence. In the case of robbery, courts are often faced with submissions as to whether a robbery is less sophisticated or professionally planned. The CACD has commented that the guideline provides little by way of assistance to sentencers who are required to determine which guideline applies:

> *"14. The two kinds of robbery which were discussed in this case are defined to some extent in the sentencing guidelines. A street or less sophisticated commercial robbery, is said to refer to robberies committed in public places including those in taxis or involving public transport. It also refers to unsophisticated robberies within commercial premises or targeting commercial goods or money. A professionally planned commercial robbery is said to refer to robberies involving a significant degree of planning, sophistication or organisation.*
>
> *[…]*

[691] Richardson (n 466), § 21-110.

16. In this court's view, this robbery sits on the line between two types of robbery which we have described. We conclude that we are not greatly helped by the guidelines."[692]

The risk of inconsistency here is manifest; if courts are unclear as to which guideline should be applied in particular circumstances, then the guideline does little to ensure consistency of approach, let alone consistency of outcome.[693]

The following paragraphs consider the street and less sophisticated commercial robbery guideline ("*street robbery guideline*").

Step 1

The exhaustive list of factors requires the sentencer to determine, for instance, whether the offence involved the "*use of a weapon to inflict violence*". This involves consideration of the meaning of "*weapon*" and "*use of a weapon*" and "*violence*". While it is clear that a shod foot is a weapon (or equivalent) in the context of assault offences[694], the same is not as clear in the case of robbery offences; further, it is unclear whether the offender showing the victim that they are in possession of a weapon is "*using*" a weapon; and finally, there is no guidance as to

[692] *R. v Noel* [2017] EWCA Crim 782; [2018] 1 Cr.App.R. (S.) 5.

[693] Another criticism, particularly in relation to the robbery guideline, is that the single offence of robbery encompassing a wide range of criminal behaviour creates a difficult sentencing exercise in many cases. While the SC has sought to identify different types of robbery offence, it forces the sentencing court to make the decision as to which to apply. Separate offences would force the CPS to choose which offence it charged. It is however right to recognise that this may serve to shift the responsibility (and cause of inconsistency) from the court to the CPS. In the SC's consultation in relation to the robbery guideline, the issue of the distinction between different types of robbery was not the subject of any specific questions, Sentencing Council of England and Wales, *Robbery Guideline: Consultation* (Sentencing Council of England and Wales 2014).

[694] A shod foot is an example of a weapon provided in the assault guideline in the section dealing with higher culpability.

the meaning of "*violence*" and whether a simple assault (without a battery) is sufficient. Similarly, in relation to harm, it will be for the court to determine whether there is "*serious*" harm caused, with no guidance as to whether that is to be interpreted in the context of a robbery offence, or whether this is to be interpreted in accordance with the case law on offences against the person, to refer to grievous bodily harm.[695] The presence or absence of one of these factors can, for example, mean the difference between a starting point of 5 years and 8 years, or 2 years and 4 years. The risk of inconsistency here is relatively high in terms of outcome; while there is a degree of consistency of approach in so far as the court will have adopted the same methodology for the determination of sentence, the opportunity for disparate outcomes is manifest from the very first stage of the guideline as there is heavy reliance upon the interpretation.

Step 2

There is, once again, no guidance as to the interpretation of particular terms, such as "*significant planning*" or "*prolonged nature of the event*" used at Step 2. This is recognised by Ashworth, who posits that the lack of guidance on these matters is no accident, suggesting this is designed to preserve discretion and the ability to individualise.[696] This gives rise to a real risk of inconsistency. While the current approach may promote consistency, further structure in the form of illustrative examples may be even more effective. The question then, is which approach is to be preferred? That must depend on one's view of consistency. There appear to be two camps: first, that a consistent approach may legitimately result in disparate applications of the guideline and accordingly no guidance ought to be given (the point made by Ashworth);

[695] Richardson (n 466), § 19-258.

[696] Ashworth (n 3), 454.

or secondly, that consistency of approach requires more than mere observance of the process, and therefore further guidance should be given. The CACD clearly, as discussed above and in the previous chapter, regard the latter to be preferable. That too was the position adopted in Chapter 2 of this thesis: consistency predominantly means the consistent application of principle. We should therefore not accept an absence of guidance on points such as this.

The risk of inconsistency identified above as regards the lack of guidance as to the weighting of Step 2 factors is perhaps tempered somewhat by the fact that the use of category ranges suggests that a relatively modest adjustment (within the category range) is likely to be made at Step 2 (as compared with Step 1 which generally appears to feature more significant factors). This is indicated by the following words included in the guideline at Step 2:

> *"In some cases, having considered these factors, it may be appropriate to move outside the identified category range."*

One might conceive of an approach which sought to provide a percentage increase for each factor; for instance, an increase of 10-25% for the offender having played a leading role in the group. Yet this would risk being overly prescriptive and unduly limiting the court's discretion: such factors are contextual and their impact (both in terms of the importance of the factor to a case but also the strength of the factor) can vary significantly. The ranges provided would have to be sufficiently wide to cater for the majority of cases which would of course limit the effect of the guidance; alternatively, this element of the guideline could be subject to a discretion to depart from it. The former would suffer from a lack of substantive guidance whereas the latter would suffer from a lack of constraint. Accordingly, the status quo appears to be the appropriate approach.

Conclusion

The robbery guideline balances affording the sentencer with discretion with constraining the extent to which the exercise is subjective. The offence range in the guideline for street robbery extends from a community order to 12 years. This wide range enables a sentencer impose a proportionate sentence, with a strong indication as to where in that range the offence should be. The categorisation of offences, with starting points and ranges, provides a clear and strong structure, however this is compromised by the reliance upon the subjective interpretation of the terms used in the guideline.

The Sentencing Council's overarching guidelines

The need for substantive guidance

The overarching guidelines do not each adopt the same format. While they are all narrative, with descriptions of concepts and principles, the approach differs from guideline to guideline. What does remain constant, however, is that each guideline contains an explanation of the relevant principle (sometimes with reference to the primary law) followed by illustrative examples demonstrating the proper approach and outcome. For example, the *Imposition of Community and Custodial Sentences Definitive Guideline*[697] contains a section on the imposition of suspended sentence orders. Following an explanation of the law (the statutory test to be imposed and the procedure to be followed), there is a table containing factors which the guideline states would tend towards a sentence either being suspended or not being suspended. Further, the *Totality Definitive Guideline* ("*the totality guideline*")[698] provides

[697] Sentencing Council of England and Wales, Imposition of Community and Custodial Sentences Definitive Guideline (Sentencing Council of England and Wales, 2017).

[698] Sentencing Council, *TICs and Totality Definitive Guideline* (Sentencing Council of England and Wales, 2012).

illustrative examples of cases in which a concurrent sentence would be imposed, and cases in which a consecutive sentence would be imposed.

This combination does provide substantive guidance, enabling sentencers to better understand the wider object of the principle in question and to see the circumstances in which it is to be applied, and the way in which it is to be applied. This would appear highly likely to have a positive effect upon consistency. Perhaps a rather crude example would be attempting to put together a piece of flat pack furniture with, and without the instruction guide and pictorial explanations. One is more likely to achieve the correct result with the illustrations.

There are multiple overarching guidelines on topics as diverse as offence seriousness,[699] allocation[700] (i.e. which level of court in which a particular case to be heard), domestic abuse,[701] imposition of custodial and community sentences[702] and the approach to sentencing children and young persons.[703] Therefore the overarching guidelines provide guidance on sentencing principles (both the principle of proportionality and the purposes of sentencing) as well as more practical tasks such determining the venue for a trial and the approach to imposing a suspended sentence order. Each of these primarily concern the *approach* to sentencing rather than particular outcomes (though as has been repeatedly stated, the former leads to the latter). For instance, the children and young persons guideline provides material as to the factors which

[699] Sentencing Guidelines Council, *Overarching Principles: Seriousness Definitive Guideline* (Sentencing Guidelines Council 2004).

[700] Sentencing Council of England and Wales, *Allocation Definitive Guideline* (Sentencing Council of England and Wales 2016).

[701] Sentencing Council of England and Wales, *Domestic Abuse Definitive Guideline* (Sentencing Council of England and Wales2018).

[702] Sentencing Council, *Imposition of Community and Custodial Sentences Definitive Guideline* (Sentencing Council of England and Wales 2017).

[703] Sentencing Council of England and Wales, *Children and Young Persons Definitive Guideline* (Sentencing Council of England and Wales 2017).

will be relevant when considering a sentence to be imposed on a person aged under 18. This, naturally, makes empirical research into the effect of overarching guidelines more challenging as the output is not as easily measured. The SC does not provide guidance on the imposition of preventive orders and other collateral consequences (save for in the domestic abuse guideline where the basic operation of the restraining order regime is provided). It is unclear why this is so. One could debate whether or not such orders are part of the 'sentence' of the court (the legislation broadly considers that they are) but irrespective of that, as demonstrated in Chapter 7, it is clear that there is a need for guidance. Should that guidance be provided by the SC? That question is not to be resolved in this thesis, however, there appears to me to be a strong argument to answer in the affirmative.

Allen's 2016 review of the SC and its guidelines suggested that some users found the offence-specific guidelines complex and elaborate, recommending that consideration is given to the production of more overarching guidelines to alleviate the volume of material in the offence-specific guidelines.[704] It is difficult to see how the offence specific guidelines could be simplified. Additionally, there would be a legitimate concern that removing material from offence specific guidelines and placing it in overarching guidelines would result in sentencers approaching the offence-specific guidelines in a way which was unthinking and superficial. Indeed, Bottoms and Parsons' research revealed that "*...while [sentencers] will of course read and absorb overarching guidelines when they are first promulgated, most will not regularly refer to them thereafter*".[705] Whether this is true is an empirical question which is as yet unanswered.

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[704] Rob Allen, The Sentencing Council for England and Wales: brake or accelerator on the use of prison? (Transform Justice 2016), 10.

[705] Bottoms and Parsons (n 457), 14.

Interpretation of overarching guidelines

The interpretation of overarching guidelines presents similar challenges to those identified with offence-specific guidelines. As the overarching guidelines describe and expand upon principles and other factors of sentencing, there is heavy reliance upon the accurate interpretation and application of those principles to particular cases. Some guidelines, such as the totality guideline, provide examples of the application of the principles. For instance, when making provision for the imposition of concurrent sentences, the guideline provides:

> *Concurrent sentences will ordinarily be appropriate where*
>
> *a) offences arise out of the same incident or facts.*
> *Examples include:*
> - *a single incident of dangerous driving resulting in injuries to multiple victims;*[706]
> - *robbery with a weapon where the weapon offence is ancillary to the robbery and is not distinct and independent of it;*[707]
> - *fraud and associated forgery;*
> - *separate counts of supplying different types of drugs of the same class as part of the same transaction.*[708]

This provides additional guidance to the sentencer to assist in the application of the rule which is described in the abstract ("*Concurrent sentences will ordinarily be appropriate where…offences arise out of the same incident or facts*"). In the absence of a definition of "*same incident or facts*", illustrative examples provide additional guidance as to the application of the principle, thereby increasing the likelihood of consistency of approach and outcome.

[706] *R. v Lawrence* (1989) 11 Cr App R (S) 580 (footnote in source material).

[707] *R. v Poulton and Celaire* [2002] EWCA Crim 2487; *Attorney General's Reference No 21 & 22 of 2003* [2003] EWCA Crim 3089 (footnote in source material).

[708] Sentencing Council of England and Wales, *Offences Taken Into Consideration and Totality Definitive Guideline* (Sentencing Council of England and Wales 2012), 6.

This implicitly limits or structures the application of the principle by drawing to the attention of the sentencer factors which are particularly relevant, and also encouraging the sentencer to consider whether the case at hand is congruent with the given example. This, I suggest, operates in a similar way to principles of statutory interpretation, where for instance, a list in a statute preceded by the word "*includes*" (or something similar) is to be interpreted, thereby structuring the exercise of discretion without imposing a hard limit.[709] It is notable that this guidance is in stark contrast to the more opaque wording in relation to the principle of totality discussed earlier in this chapter.

In everyday language, where the definition of a word is not fully or properly understood, its use may be inconsistent or inaccurate. The same, I suggest, applies to terms used in the guidelines. Where terms are misunderstood, their application is more likely to result in the incorrect application of the principle or concept referred to in the guideline. Using the above example, where "*same incident or facts*" is misunderstood or insufficiently defined, there is a risk that a concurrent sentence will be imposed in a circumstance where the SC intended consecutive sentences to be imposed. The result being a clear inconsistent approach and outcome.

Reduction in Sentence for a Guilty plea Definitive Guideline

The SC's *Reduction in Sentence for a Guilty Plea Definitive Guideline* ("*the guilty plea guideline*") came into force in 2017 and regulates the discounts which are made to sentences in recognition of a plea of guilty. The guideline therefore applies to all cases in which a guilty

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[709] *Bennion on Statutory Interpretation* (7th ed) (Lexis Nexis 2019), § 18.3.

plea is entered.[710] In one sense, the guilty plea guideline is *sui generis*; whereas the offence-specific guidelines feature sentencing starting points and ranges defining the suggested sentencing outcome, the overarching guidelines (almost without exception) leave the user with a little more work to do. Both are descriptive in nature requiring a qualitative assessment on the part of the user, as outlined above. The guilty plea guideline, in that regard, is different as it requires a qualitative assessment but then *does* provide numerical reductions which are to be deducted from the sentence which would otherwise be imposed. Notwithstanding this difference, it provides a useful example with which to consider the effectiveness of overarching guidelines, not least because it is likely to be the most commonly used overarching guideline (and, one might speculate, the most commonly used guideline of all).

The guilty plea guideline operates in conjunction with s.144 of the Criminal Justice Act 2003 which requires the court to take account of the stage in proceedings at which the offender indicated an intention to plead guilty and the circumstances in which that indication was given. In contrast to the many mandatory aggravating factors,[711] guilty plea is the only mandatory *mitigating* factor.[712]

Key principles

The first substantive section concerns "*key principles*"; this in essence explains the rationale for the reduction in sentence for a guilty plea, citing the reduction in impact of the offence(s) on victims, the avoidance of a trial (and the attendant cost-saving) and the avoidance

[710] And, arguably, some in which no plea of guilty is entered; see *R. v Markham and Edwards* [2017] EWCA Crim 739; [2017] 2 Cr.App.R. (S.) 30.

[711] See for example s.4A of the Misuse of Drugs Act 1971; s.6 of the Psychoactive Substances Act 2016 and s.30 of the Counter-Terrorism Act 2008.

[712] Under s.73 of the Serious Organised Crime and Police Act 2005 the court *may* make a reduction to reflect any assistance given to the prosecution.

of requiring victims and witnesses to attend court and give evidence. This section also explains the staggered approach (as to which, see below) to making reductions to sentences for guilty pleas (pleas produce benefits and earlier pleas produce greater benefits) and a list of factors which should not be taken into account in determining the appropriate reduction. These include admissions at interview and the strength of the prosecution's case. This section also clarifies that the guilty plea guideline applies only to punitive elements of a sentence and not to ancillary orders, which tend to have a consequentialist purpose.[713]

The inclusion of the rationale for making reductions provides background and an explanation for the content of the guideline.[714] This is in contrast to the approach the SC has taken with other guidelines where the content of the guideline is justified in the consultation paper (or response to consultation paper) rather than in the guideline itself. By providing this explanation, the guideline provides context to the approach taken and the principles underpinning the guideline, but one might wonder how this assists the sentencer? The guideline requires a qualitative assessment of, for instance, the point in time at which the offender pleaded guilty (and the concomitant benefits derived as a result) in order to determine the appropriate reduction to the sentence that would otherwise be imposed; this context is important and enables sentencers to make a more informed, principled and consistent decision. A response to that point may be that as the guideline has relatively 'fixed' figures for the reduction to sentence which are determined from the point in time at which the plea of guilty

[713] The express exclusion of driving disqualification could be said to be at odds with the common law position that driving disqualifications serve both a punitive and preventive purpose, however.

[714] It is worth noting that this was the third iteration of this guideline and there had previously been issues with some sentencers wishing to withhold (or reduce) a discount for offenders caught 'red-handed'. This may explain the expanded guideline and inclusion of detailed rationale. This may be regarded as similar to the lack of substantive guidance provided by the Scottish Sentencing Council's first guideline. This will be explored later in this chapter.

was entered, there is limited scope for such context and background to influence the determination of sentence.

On balance, while there is certainly some force in the latter point, the context does appear to assist with making the decision as to the reduction of sentence. The guideline affords sentencers with a degree of discretion; it therefore follows that information as to the reason for the reduction in sentence enables a sentencer to make a more informed assessment in the cases which do not fall 'squarely' into a particular description, or those in which an exception is said to apply. That is more likely than not to be in accordance with the intentions of the SC and therefore it follows that not only does this aspect structure the discretionary decision as to the appropriate sentence, but in doing so, it is more likely than not that there will be inter-judge consistency as a result of the guideline.

The approach

The next section of the guideline prescribes the approach to be taken in determining the reduction. There are five steps which the guideline states must be followed in sequence[715]; this is key to the promotion of consistency for two reasons. First, it ensures a consistent approach in a broad sense of the term. Secondly, taking the steps in a different order can result in different outcomes. For example, taking a starting point of 10 years, making a reduction of 25% for the guilty plea and then making a reduction for 1 year spent on remand, produces a sentence of 78 months, whereas taking a starting point of 10 years, making a reduction for 1 year spent on remand and then making a 25% reduction for the guilty plea produces a sentence of 81 months.

[715] 1. Determine the appropriate sentence before a reduction for a guilty plea in accordance with any offence-specific guideline; 2. Determine the appropriate reduction in accordance with the guilty plea guideline; 3. State the amount of the reduction; 4. Apply the reduction to the sentence; 5. Follow any further steps in any applicable offence-specific guideline.

The consistency of approach ensured by an application of the guideline therefore directly impacts consistency of outcome in this instance.

Determining the level of reduction

The guideline states the level of reduction is indexed to the stage in proceedings at which the guilty plea was indicated. There follows a description of each of those stages, with a degree of discretion as to what the "*first stage of proceedings*" is and therefore what reduction applies. Additionally, there is a degree of discretion as to the level of the reduction. The guideline provides that a plea indicated at the first stage should attract a maximum reduction of one-third, but when entered after that stage, it should attract a reduction of between 10 and 25%. That provides the court with a discretion to determine the figure in accordance with the principles underpinning the guideline, as discussed above. There is, therefore, a loose structure within which a sentencer may move. The illustration of the principles underpinning the guideline (for example, the description of how the first stage of proceedings would "*normally*" be interpreted) encourages sentencers a) to think closely about whether the case before them truly fits that description, and if not, why not; b) to give reasons if not adopting the "*normal*" approach; and c) places a soft limitation on the interpretation of the guideline, encouraging interpretations consistent with the illustrative examples, rather than wild departures.

Applying the reduction

The section concerning the application of the reduction includes an explanation of some statute law (such as the limitations on sentencing powers in magistrates' courts) as well as guidance from the SC about the application (such as the fact that the court can apply a reduction by changing the nature of the sentence). The examples provided illustrate the way in which the

SC intended the guideline to be applied, thereby influencing a sentencer's application of the guideline in a similar way to the 'soft' limits of the category ranges. As is noted elsewhere in this chapter, the reliance on subjective interpretation here creates an obvious risk of inconsistency of outcome, however the risk is limited by the exposition of the underlying rationale and examples provided.

Exceptions

The guideline provides for a number of exceptions to the general guidance contained earlier in the guideline. This, again, includes a mixture of descriptions of the relevant statute law (such as the minimum sentence provisions and the extent to which the sentence could be reduced in respect of a guilty plea) and guidance (such as the approach where circumstances exist in which may be unreasonable to expect a plea to be indicated sooner than in fact it was[716]). This guidance is, again, general in nature leaving the sentencer to determine whether the exceptions apply and therefore the extent to which the remainder of the guideline should be applied. The focus is therefore overwhelmingly on the consistency of approach. The result is that a greater degree of consistency of outcome could be achieved, if the SC wanted to adopt a different, more detailed approach as to the explanation of the various exceptions. This is because it seems axiomatic that the greater the number of examples provided, the clearer the scope of the exception and the less scope there is for departure from it.[717]

[716] For instance, where psychiatric evidence was necessary to afford leading counsel to provide advice as to the availability of a medical defence in a case of intentional killing.

[717] The guilty plea guideline also features three appendices, each containing a flow chart illustrating the process to be adopted in cases of summary only, triable either way and indictable only offences. The flow charts bring together, albeit at a high level, the various the steps of the process prescribed by statute law and the guideline. This is clearly designed to ensure consistency of approach by controlling the steps taken by the court. Providing a sentencer follows the guideline as required, an extremely high degree of consistency of approach will result.

Conclusion

The guilty plea guideline combines guidance from the SC and summaries of primary law (both statute and case law) to prescribe a clear methodology for the determination of sentence, with guidance as to the way in which the guilty plea guideline interacts with any relevant offence-specific guideline. There remains a degree of discretion as to the reduction actually applied, arising from the interpretation of terms used in the guideline, which impacts upon (a) the decision as to the point in proceedings at which the plea was indicated; (b) the reduction to be made; and (c) whether one or more of the listed exceptions apply.

Additionally, the guideline does not define when a plea is "*indicated*"[718] or the limits of "*further assistance necessary*" in relation to the exceptions. This appears to have been left to the CACD.[719] This creates an obvious risk of inconsistency and demonstrates both the SC's view that sentencers need to retain a degree of discretion so as to ensure justice is done, but also that there remains a role for the CACD in interpreting and amplifying their guidelines. Roberts and Bradford found a high level of compliance with the previous guilty plea guideline and also that judicial interpretation remained a relevant factor in the application of the guideline.[720] This, I suggest, provides strong evidence that the guideline contained substantive guidance. The new guideline – based on its predecessor – develops that guidance.

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718 For instance, the CACD had to make a determination as to what constituted an indication for the purposes of the guideline, see *R. v Reid* [2017] EWCA Crim 1523; [2018] 1 Cr.App.R. (S.) 8.

719 For example, see *R. v Reid* [2017] EWCA Crim 1523; [2018] 1 Cr.App.R. (S.) 8 in which on an appeal against sentence, the appellant's counsel sought to rely on a series of emails indicating a plea of guilty in relation to a submission that credit for pleading guilty should have been higher than the 10% allowed by the judge. The CACD held that discussions regarding the possibility of the appellant considering pleading guilty did not amount to the sort of "*indication*" contemplated by the relevant guideline.

720 Julian V Roberts and Ben Bradford, 'Sentence Reductions for a Guilty Plea in England and Wales: Exploring New Empirical Trends' (2015) 12(2) Journal of Empirical Legal Studies, 187.

Do the SC's guidelines contain substantive guidance?

This section has considered the extent to which the SC's guidelines – both overarching and offence specific – contain substantive guidance. I have suggested that (a) each contain substantive guidance; (b) through a variety of devices, the guidelines assist the court in its determination of sentence by structuring the sentencing decision in such a way that judicial discretion remains; and (c) the process is informed by a consistent approach to the key questions a sentencer must consider. It now falls to consider the extent to which the SC's guidelines constrain a sentencer's discretion.

The degree of constraint provided by the guideline regime

Duty to "follow" sentencing guidelines

The Coroners and Justice Act 2009 s.125 regulates a sentencing court's relationship with the Sentencing Council's guidelines. The Coroners and Justice Act 2009 provided for a 'tighter' relationship between sentencing court and sentencing guidelines; previously, there was a duty to "*have regard*" to the guidelines, however with the creation of the SC came the seemingly more prescriptively worded duty to "*follow*" sentencing guidelines. Section 125 provides:

> *(1) Every court—*
> *(a) must, in sentencing an offender, follow any sentencing guidelines which are relevant to the offender's case, and*
> *(b) must, in exercising any other function relating to the sentencing of offenders, follow any sentencing guidelines which are relevant to the exercise of the function, unless the court is satisfied that it would be contrary to the interests of justice to do so.*
>
> *(2) Subsections (3) and (4) apply where—*

(a) a court is deciding what sentence to impose on a person ("P") who is guilty of an offence, and
(b) sentencing guidelines have been issued in relation to that offence which are structured in the way described in section 121(2) to (5) ("the offence specific guidelines").

(3) The duty imposed on a court by subsection (1)(a) to follow any sentencing guidelines which are relevant to the offender's case includes—
(a) in all cases, a duty to impose on P, in accordance with the offence specific guidelines, a sentence which is within the offence range, and
(b) where the offence-specific guidelines describe categories of case in accordance with section 121(2), a duty to decide which of the categories most resembles P's case in order to identify the sentencing starting point in the offence range;
but nothing in this section imposes on the court a separate duty, in a case within paragraph (b), to impose a sentence which is within the category range.

(4) Subsection (3)(b) does not apply if the court is of the opinion that, for the purpose of identifying the sentence within the offence range which is the appropriate starting point, none of the categories sufficiently resembles P's case.

A court must "*follow*" a relevant sentencing guideline unless it is contrary to the interests of justice to do so. This provision requires careful consideration. First, there will be offences to which the guideline expressly applies. Offence-specific guidelines state on their first page to which offences that particular guideline applies: sometimes that is a single offence (e.g. grievous bodily harm with intent contrary to s.18 of the Offences against the Person Act 1861) and sometimes that there are multiple offences (e.g. fraud contrary to s.1 of the Fraud Act 2006, false accounting contrary to s.17 of the Theft Act 1968 and conspiracy to defraud contrary to common law). Secondly, there are inchoate offences such as attempts to commit substantive offences or offences of conspiracy to commit a substantive offence to which guidelines for the substantive offences have been held to apply by common law.[721] Thirdly, there are analogous guidelines, where a court considers that although not directly applicable, a

[721] *R. v Laverick* [2015] EWCA Crim 1059; [2015] 2 Cr.App.R. (S.) 62 and *Attorney General's Reference (R. v Agolini and Others)* [2017] EWCA Crim 173.

guideline may provide assistance (e.g. in blackmail cases, depending on the nature[722]).[723] There is therefore a need for flexibility in the application of offence-specific guidelines to account for these differing circumstances.

Having determined that a guideline applies or may be relevant to the sentencing exercise at hand, the duty in s.125(3) is a duty to "*follow*" it.[724] The sentencer is therefore required to apply its contents. In the case of an offence specific guideline, s.125(3) states this requires the court to determine into which of the described categories the offence falls (i.e. Steps 1 and 2), though the duty clearly also means to follow the other steps in the guideline; in the case of an overarching guideline, it clearly means to apply whichever sections are relevant, though s.125 makes no provision for it. Roberts concluded that the new duty to follow guidelines would create a heightened expectation that a court would impose a sentence consistent with the sentencing guidelines.[725] This has been borne out by the data: in 2011 the SC conducted research into compliance rates, finding that only 2% of sentences were outside of the offence range, i.e. the court had not followed the guideline.[726]

Where the court considers it would be contrary to the interests of justice to do so, the court is released from its obligation to follow the guideline. Strictly this appears to no longer require the sentencer to follow the process, though it may be that the departure in fact comes

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[722] *R. v Murphy* [2019] EWCA Crim 438.

[723] *R. v Lewis* [2012] EWCA Crim 1071.

[724] Although, the former duty, a duty to "*have regard*", is, in my view, in practice indistinguishable from the new "*duty to follow*".

[725] Julian V Roberts, 'Sentencing guidelines in England and Wales: a review of recent developments' (2010) 82 Centre for Crime and Justice Studies, 41, 42.

[726] Sentencing Council of England and Wales, *Crown Court Sentencing Survey Experimental Statistics* (Sentencing Council of England and Wales 2011), 3.

in the form of departing from the figures provided at Step 2 of the offence-specific guidelines, rather than departing from the process and approach. Roberts notes that this combination of forceful language ("*follow*") and the interests of justice test focus the court's attention on the relevance of a particular guideline.[727] To that, I would add it also focusses the court's mind on the utility of the guideline – while e.g. the assault guideline will be relevant to an assault case, it may not provide much assistance where the facts of the offence are so unusual, or it is evident that the guideline was not drafted intending to cater for such a set of facts. The use of the phrase "*interests of justice*" suggests a high threshold, demonstrating an intention of parliament for departures to be rare.[728]

The SC have previously described this as requiring "*substantial and compelling reasons*" for departing from a guideline.[729] The limiting effect of the duty to follow provision is therefore entirely dependent upon the breadth of the range which in turn is influenced (but not dictated) by the statutory maximum sentence. Many offences involve a wide range of seriousness and therefore the offence ranges tend to be wide, although often not extending to the statutory maximum sentence. The use of wide offence ranges narrows the scope for the court to have to rely on the 'escape clause' in section 125(1), not following the guideline on the basis that the court is of the view that it is in the interests of justice not to do so. It is therefore no surprise that compliance rates are high.

727 Julian V Roberts (n 725), 42.

728 Andrew Ashworth, 'Coroners and Justice Act 2009: sentencing guidelines and the Sentencing Council' [2010] Crim LR 389, 394.

729 Sentencing Council of England and Wales, 'Sentencing guidelines and the Sentencing Council' <https://www.sentencingcouncil.org.uk/wp-content/uploads/Presentation_-_for_researchers_and_academics.pdf> accessed 9 April 2019.

Bottoms and Parsons note that compliance rates are "*frequently over 90%*" and "*not very meaningful*".[730] Given the wide ranges, the high compliance rate is to be expected and their conclusion as to its meaning is sound. They reject an alternative approach of measuring compliance by category range (rather than offence range) by reference to the fact that the category is determined prior to the later adjustment by reference to the aggravating and mitigating factors (and Step 3 et seq.). Both points appear to be misconceived. First, the high compliance rate is meaningful because it illustrates the usage of the guideline and the extent to which the guidelines are capable of catering for the full range of offences coming before the courts within a particular offence type. A 90% compliance rate – i.e. 90% of sentencing decisions result in a sentence within the offence range – suggests that the guidelines cater for 90% of offences coming before the courts. That is a highly relevant statistic (and one which the SC should arguably make more of). Inverting that, if the statistic was that the guidelines could not cater for 90% of cases, then it would seem reasonable to conclude that the guidelines were deficient in some way. To cater for 90% of cases seems like a prerequisite – though not a hallmark – for success. Secondly, Bottoms and Parsons are correct to reject the alternative approach of measuring compliance by category range – but only because category range alone is insufficient. Data as to the percentage of cases which are placed into each category at Step 2 does not inform us as to the success of the guideline, without knowing where the eventual sentence is located within the offence range. This requires further data collection of course, but the rejection of the notion of measuring compliance by reference to guideline category as a measure of success seems premature.

A consequence of guidelines has been that the nature of appeals to the CACD has changed. Formerly, a large number of appeals would be put on the broad ground that the

[730] Bottoms and Parsons (n 457), 12.

sentence was manifestly excessive; now, there is a large number put on the basis that the judge chose the incorrect guideline category.[731] Not only does this bring the CACD into a prominent position in relation to 'policing' compliance with the guideline, but it underlines the importance of the category range (rather than the offence range).

Offence range vs Category range

It is obvious that section 125(3) significantly softens the duty upon the court to "*follow*" a guideline.[732] A court is required, in following a guideline, to impose a sentence within the offence range – that is the range provided by all categories – not the category range. For an offence of rape that the court has determined falls with category 2A (starting point 10 years, range nine to 13 years), the duty is only to impose a sentence between four and 15 years.

One can therefore see why Ashworth described the duty as "*pitifully loose*".[733] Despite the seemingly prescriptive process which the court must adopt, including the exhaustive list of factors at Step 1, when the court reaches the stage at which it must impose sentence, the obligation is significantly less prescriptive. The duty is therefore one mostly directed at form rather than substance: the guidelines appear to be predominantly concerned with the observance of the process rather than the outcome. This accords with the SC's agreed statement at its first meeting that the SC will "*promote a clear, fair and consistent approach to sentencing*" (emphasis added).[734] Of course it is right to observe, as noted in Chapter 2, that

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[731] Harris and Padfield (n 456).

[732] This was first noted by Ashworth, describing the duty to follow as having been "*diluted*" by other provisions in the Act: Ashworth (n 728), 394.

[733] Ashworth (n 728), 395.

[734] Sentencing Council of England and Wales, *Minutes of Meeting of the Sentencing Council, 22-23 April 2010* (Sentencing Council of England and Wales 2010), para.9.2.

greater consistency of approach is likely to lead to greater consistency of outcome; if sentencers are adopting the uniform process, referring to the same factors at Step 1, and beginning with the same starting points, the likelihood of movement from those starting points to a point which renders the sentence disproportionate to the seriousness of the offence is clearly reduced.

Step 1 of the offence-specific guidelines is more influential on the eventual sentence as it provides the greatest degree of guidance by narrowing down the range of proportionate sentences from the offence range down to the category range. Thereafter, at Step 2, the determination of the degree of movement from the starting point (either within or without the category range) is unlikely to be significant given the secondary importance of the factors listed at Step 2, as argued above.

Although the duty under s.125(3) is only to impose a sentence within the total offence range – not within the category range – the category ranges provide soft limits beyond which it will be more difficult and unusual for a sentencer to venture, thereby providing an additional degree of constraint. This is because the onus is upon the court to find, at Step 2, factors to justify moving outside of the category range (whether up or down), notwithstanding the absence of a duty upon the court to impose a sentence within the category range unless a certain test is met. This would appear to prey upon common sense; if the court has a duty to follow the guideline and to determine (where possible) the category into which an offence falls, and where the category includes a starting point and a range of sentences for offences within that category, then to move beyond the category range must be justified by reference to factors at Step 2 (or any other relevant factors). Without such justification, it would be unreasonable to impose a sentence outside of that category range. This structure therefore encourages the imposition of

sentences within the category range, though it does not require it. The product is therefore far greater consistency of outcome.

Empirical literature on the impact of guidelines

The preceding paragraphs have presented a picture of limited efficacy; despite the highly prescriptive nature of the duty and of Step 1 of the offence specific guidelines, Step 2 and the risk of differing interpretations places a limitation on the effect the guidelines can have on sentencing consistency. The overarching guidelines rely heavily upon interpretation and application, which has an attendant risk of inconsistency. This risk, however, is mitigated by the illustrative examples which constrain the application of the broad principles described by the guideline and encourage application of the principles in a manner consistent with the examples provided. Concomitantly, those without such examples contain a greater risk of inconsistency.

It is well recognised by the courts that the SC's primary objective is to promote greater consistency in sentencing – whether this refers to consistency of outcome or approach is unclear.[735] Academics have explored the content and structure of the guidelines and concluded that improvements can be made to the guidelines regime. A qualitative assessment can only take us so far, however. Ultimately, the question of whether the SC's guidelines have improved consistency is to be answered through empirical research. Such research is limited at present. For instance, Pina-Sanchez and Linacre found that after the introduction of the assault guideline, variation decreased (i.e. there was an improvement in consistency) which was partly

[735] See for example *Attorney General's Reference (R. v NC)* [2016] EWCA Crim 1141 and *Attorney General's Reference (R. v Kahar); R. v Kahar* [2016] EWCA Crim 568; [2016] 2 Cr.App.R. (S.) 32.

attributable to the implementation of the new guideline.[736] There are limits to what the empirical literature can tell us about the efficacy of guidelines, however. Pina-Sanchez and Linacre also explored inter-court consistency and the application of aggravating and mitigating factors and, although they found limited evidence of inconsistency, this was partly due to the limitations of the data; for instance they were unable to assess inter-judge disparity and had to exclude 38 of 47 sentencing factors.[737]

Additionally, there are problems in assessing consistency purely through an empirical lens. In a scheme predominantly reliant on a principle which is widely regarded to be imprecise, analysis of data exploring consistency can only be approximate; if the right result is imprecise, measuring it accurately is fraught with difficulties.

Moreover, an analysis of sentence lengths based on the presence of case characteristics recorded in the Crown Court Sentencing Survey ("*CCSS*") can only show consistency of sentence in cases where a particular factor was found to be present; it cannot show results in sufficient detail to be able to assess whether a particular offence received a sentence which was consistent with the applicable principles, rather it can only show the extent to which it was consistent with other offences with the same factors. For instance, if all Category 1 grievous bodily harm with intent offences (category range 9-16 years) received sentences of 20 years, that would be consistent, but not in accordance with the principle of proportionality. Thus, empirical literature – at present – cannot materially inform the consideration of consistency in sentencing where the definition of consistency adopted focuses on the application of principle.

736 Pina-Sanchez and Linacre (2014) (n 28).

737 Pina-Sanchez and Linacre (2013) (n 28).

As such, the empirical literature is an imperfect means through which to study consistency as conceived of in this thesis. The absence of a theoretical framework as regards the principles upon which the imposition is founded renders studies such as those based on CCSS data of limited utility.

Conclusion

This chapter has sought to examine how the SC's guidelines provide structure to the discretionary sentencing decision. It has been argued that there are two requisite components to sentencing guidelines which effectively promote consistency: (1) substantive guidance; and (2) constraint of discretion. Through exploring and critiquing both the overarching and offence-specific sentencing guidelines, this chapter has sought to expose the strengths and weaknesses of the guidelines, identifying the extent to which the guidelines regime provides substantive guidance and operates as a constraint on judicial discretion.

I have argued that it is clear that the SC's guidelines provide substantive guidance to promote consistency at sentencing but that there are elements which could be improved upon, not least the provision of further guidance and structure surrounding the elements of the process which rely upon the subjective interpretation of the sentencer. The guidelines are, I have concluded, concerned with a consistent approach to the application of sentencing principles. Most notably this is the principle of proportionality, with the structure delivered primarily (though not exclusively) through the offence-specific guidelines. Additionally, the overarching principles provide substantive guidance as to other principles and concepts which are relevant to the sentencing decision. There is limited empirical support for the proposition that the substantive guidance contained in the SC's guidelines has had a positive impact upon the pursuit of consistency.

The issue of constraint is perhaps slightly more contentious. At the creation of the SC, Ashworth noted the limited effect of duty imposed on sentencers:

> *"The whole idea of guidelines has been undermined. The purpose of guidelines is to steer judges along particular channels but the new legislation is destructive because it hardly binds judges at all. It is possible that the new legislation will lead to the sort of idiosyncratic sentencing that used to cause people such worry. It depends on how tightly the court of appeal polices things, but under the new statute as we now have it, that is a possibility."*[738]

This thesis has not found that cautionary view to be made out by the practice of the guideline. The degree of discretion afforded to sentencers is not an error by parliament and the SC; it is intentional. As Roberts and Rafferty (two former members of the Council) noted:

> *"…the guidelines in England and Wales promote consistency by prescribing a sequence of steps for courts to follow, while also allowing a significant degree of discretion…"*[739]

But does it strike the correct balance? On one view, the guidelines are insufficient to secure a desirable degree of consistency as the 'work' done at Step 1 is capable of being undone at Step 2 and the loose duty (effected by the wide offence ranges) renders the 'steer' provided gentle at best. The contrary view would be that the balance is well struck between being overly prescriptive and retaining an appropriate degree of discretion. The guidelines feature a high level of constraint at certain parts: for instance, the duty to follow provides a high degree of

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[738] Amelia Hill, 'Judges given free rein by 'pitifully loose' sentencing law' *The Guardian* (London 5 April 2010) <https://www.theguardian.com/uk/2010/apr/05/judges-sentencing-andrew-ashworth> accessed 9 September 2018.

[739] Julian V Roberts and Anne Rafferty, 'Sentencing guidelines in England and Wales: exploring the new format' [2011] Crim LR 681, 682.

constraint as there is a high threshold to meet before the guidelines may be departed from, and the flexibility is necessary to allow for necessary individualisation.

This chapter has concluded that there *is* a sufficient degree of constraint to have a positive effect on the pursuit of consistency. Of course, it could be more constraining, however that would undermine the need for individualisation, as explored in Chapter 4, and perhaps it could provide more substantive guidance to better promote consistency. The qualitative assessment undertaken in this chapter has, however, found that there is *prima facie* evidence that the SC's guidelines do promote consistency of sentencing as defined in Chapter 2. This question is one which requires further empirical research, and therefore to a degree, the jury is still out.

Chapter 9: Conclusion

Defining sentencing disparity as a situation in which similar offenders are treated differently or different offenders are treated the same is overly simplistic.[740]

Introduction

Consistency is widely regarded as a necessary component for a fair sentencing system. It is often described as the requirement to treat like cases alike, yet the simplicity of that maxim belies the complexity of a sentencers' task. What *is* consistency? How can it be achieved? And how well does the system in England and Wales promote consistent sentencing? This thesis has sought to answer those questions. Although consistency in sentencing may be regarded a desirable quality around the world, this thesis has a firmly domestic focus. The sentencing scheme in force in England and Wales represents a form of limiting retributivism. The governing principle is that of retributive proportionality, the application of which produces a range of proportionate sentences (as retributivism is accepted to be an imprecise concept). Within this range, there are other principles at play, including consequentialist considerations, which operate to inform the determination of the eventual sentence.

What is consistency in sentencing and what theoretical and practical problems does it pose?

Chapter 2 of the thesis examined the concept of consistency. First it was argued that a lack of clarity surrounding the concept prevented it from being used as a critical tool to evaluate the sentencing system in England and Wales. Second, it was argued that a normatively sound

[740] Cassia Spohn, How Do Judges Decide? The Search for Fairness and Justice in Punishment (2nd ed) (Sage 2008), 130.

definition of consistency had to comprise both substantive and procedural elements and focus upon the application of established sentencing principles. In England and Wales, this would firstly require the consistent application of the principle of retributive proportionality to produce in each sentencing exercise a range of proportionate sentences. Thereafter, it would require the consistent application of the purposes of sentencing (as prescribed by parliament) to determine where within the proportionate range a particular sentence ought to fall in a particular case. Additionally, Chapter 2 argued that a consistent sentence was one determined by the application of a fair and established procedure.

In arriving at this definition, the simplistic notion of 'treating like cases alike' was rejected for two principal reasons. First, there is a lack of clarity, in particular as to what 'like' and 'alike' mean. Secondly, the methodology it encouraged appears to envisage a comparison between one case and another (or others) – an approach which it was argued was flawed as it proceeds on the unverified (and perhaps unverifiable) basis that the case(s) with which the comparison is made is correctly decided. Instead, a definition which seeks conformity with established principles in a manner which is theoretically sound and both substantively and procedurally fair is to be preferred.

As retributive proportionality is an imprecise concept, sentences determined by the prescribed procedure and which fall within the permissible sentencing range (i.e. those which are "*not wrong*" to use Morris' formulation) will conform to both the substantive and procedural elements of the definition of consistency advocated. If a sentence is consistent with the governing principles and is imposed in a procedurally fair manner, it satisfies the requirement for consistency.

Does consistency pose a problem in practice, however? Chapter 3 examined the empirical literature in the field, concluding that there was strong, coherent evidence of inconsistency in sentencing. Although the literature provided various possible explanations as to the source of the inconsistency (e.g. racial bias, gender bias and geographical variation in crime rate), no single source is conclusively provided by the literature in the field as the sole or primary culprit. What was clear from the literature, however, was that it is judicial discretion which permits (or perhaps encourages) the inconsistent application of sentencing principles as discretion introduces the need for subjective interpretations of principles and subjective applications of those principles to individual cases.

Can consistency be reconciled with the concept of individualised justice?

The concept of individualised justice was then considered in Chapter 4. While the dominant view is that consistency and individualised justice are irreconcilable, I argued that this is based on a misconception of the concept of consistency and that if the account proffered in Chapter 2 were adopted, consistency and individualised justice may be reconciled. Individualised justice requires that the determination of sentence ought to consider both the features of the offence and the offender but placing a particular emphasis upon the characteristics of the individual. Is there scope within the scheme in England and Wales to permit the pursuit of the consistent application of sentencing principle while respecting the concept of individualisation?

It was suggested that a conception of consistency which placed an emphasis upon the proper – and therefore consistent – application of principle would, in fact, accord with an individualised approach to sentencing. This involved a rejection of the notion that

individualisation permits an "*anything goes*" approach to sentencing, in favour of the view that individualisation respects sentencing principles; in fact, there is a strong argument that the limiting retributivist model operative in England and Wales not only permits but arguably encourages an individualised approach to sentencing. While the sentence must be proportionate, that concept is imprecise and produces a range of sentences which are acceptable; therefore a sentence may be individualised by reference to other factors (defined in s.142 of the Criminal Justice Act 2003) which determine where in the proportionate range the eventual sentence falls.

What is a discretionary sentencing decision and how are such decisions in England and Wales structured?

It is evident that where the sentencing process involves the subjective interpretation of a principle, there is a risk that different individuals will arrive at different conclusions. That does not automatically produce an inconsistent result, but it makes inconsistency *prima facie* more likely. Accordingly, Chapter 5 considered the concept of judicial discretion and how it may be structured so as to limit the risk of inconsistency.

First, it was necessary to identify where discretion exists in sentencing. The concept of discretion was analysed and it was argued that a discretion exists where:

a) the decision maker is required by law to make a decision;
b) principles (or standards) exist which guide the making of the decision; and
c) the proper application of those principles does not produce a single, obviously correct, result.

Thereafter, it is necessary to determine whether a discretion has been properly exercised. It was argued that where:

a) the decision was not taken in pursuit of personal whim or on an arbitrary or legally irrelevant basis;
b) the decision was taken by an application of relevant principles;
c) the exercise was rational; and
d) the decision made was, in the decision-maker's opinion, likely to bring about the most appropriate outcome,

the discretion was properly exercised.

This enabled the identification of the decisions in the field of sentencing which are properly labelled "*discretionary*" decisions. Thereafter, the chapter considered different methods of structuring discretion, distinguishing between limiting and guiding measures. It was argued that limiting measures tended to be blunt tools which prescribe specific outcomes, requiring the sentencer to apply the measure to the case in question without much by way of analysis or judgement. By contrast, it was argued that guiding measures are evaluative in nature and require qualitative engagement by the sentencer who performs a more nuanced task.

How effectively does the current system in England and Wales promote consistency?

The whole ethos of sentencing reform in common law jurisdictions over the past 30 years has involved moving away from intuitive, "gut-feeling" sentencing. Encouraging sentencers to follow their intuitions and instincts is a recipe for inconsistent sentencing and is antithetical to attempts to achieve a consistent approach across courts and cases.[741]

This section brings together the analysis of the three institutions who provide that structure: parliament, the Court of Appeal (Criminal Division) and the Sentencing Council and considers the efficacy of their combined efforts in promoting consistency in sentencing.

The extent of the structure currently provided

Parliament provides the foundations of the sentencing scheme in England and Wales but as Chapter 6 established, it provides little more by way of guidance. For decades, it was the CACD who provided additional structure and guidance as explored in Chapter 7, however much of that structure is now provided by the SC. Can any one of the three institutions provide the requisite level of structure on its own, within the current scheme? The previous three chapters strongly conclude that they cannot.

The structure provided by parliament comes in the form of the identification of general principles and the limitations it places on the sentencing courts' powers. Chapter 6 concluded that this structure is insufficient to achieve any meaningful degree of consistency; the provisions are either guiding measures of a general nature and lack sufficient detail to provide any substantive guidance as to the application of the relevant sentencing principles, or they are

[741] Julian V Roberts, Mike Hough and Andrew Ashworth, 'Personal mitigation, public opinion and sentencing guidelines in England and Wales' [2011] Crim LR 524, 528.

limiting measures which are insufficiently flexible to enable the requisite individualisation needed to ensure the sentence imposed is in accordance with the principles underpinning the scheme. One exception to this is parliament's attempt at substantive guidance as to the application of the principle of proportionality in cases of murder in the form of Sch.21 to the Criminal Justice Act 2003. As Chapter 6 explored, although Sch.21 does provide more substantive guidance as to the principle of proportionality than other legislative provisions, this piece of legislation has been subject to plenty of academic criticism regarding the "*loose adherence*" paid to Sch.21 and the lack of discussion in the passage of the Bill.[742] Additionally, it has been the subject of much comment by the CACD; in *R. v Peters* the court observed:

> *"Broad guidance will produce sentencing consistency, but precisely because the circumstances of the offence and the offender vary, and may vary widely, an individual sentencing decision appropriate for the unique circumstances of each case is required."*[743]

Chapter 7 concluded that the structure provided by Sch.21 is insufficient and that it has been necessary for the CACD to provide additional guidance. If that is correct, and it is neither practicable nor pragmatic for parliament to provide the requisite guidance (either in the case of murder or for all aspects of sentencing), the irresistible conclusion appears to be that parliament cannot provide adequate structure on its own.

As was described in Chapter 7, sentencing practice evolves in an iterative fashion, principally through the continual development of sentencing jurisprudence by the decisions of the CACD. That chapter concluded that the CACD provided structure to the sentencing

742 See for example George Mawhinney, 'Sentencing murders done for gain: the Court of Appeal and schedule 21', (2015) 3 Sentencing News 8-11 and Barry Mitchell, 'Identifying and punishing the more serious murders' [2016] Crim LR 467.

743 [2005] EWCA Crim 605; [2005] 2 Cr.App.R. (S.) 101 at [3].

decision in numerous ways, including through the guideline judgment which it pioneered in the 1970s. The structure currently provided by the CACD – though positive in its effect upon the pursuit of consistency – is insufficient either in isolation or in conjunction with parliament. In particular, the analysis suggested that the guidance provided by the CACD as to the determination of sentence severity is too vague to achieve a high degree of consistency. Chapter 7 provided a comprehensive analysis of the many forms of guidance proffered by the CACD, concluding that the mainstay of the CACD's guidance – reviews of sentence – does not provide detailed, substantive guidance as to the application of the principle of proportionality. Accordingly, the other forms of guidance vary in the form, level of detail and degree of constraint provided.

This lack of detail is perhaps understandable. The primary function of an appeal against sentence is to determine the issue(s) presented by the case before the court; the provision of guidance for future cases is a latent aim only. Further still, the CACD is limited by the cases which come before it as to the guidance it can provide. Finally, Chapter 7 concluded that general guidance given by the CACD is prone to subjective (and therefore inaccurate and inconsistent) interpretation and application. This is particularly so in the case of guidance as to the application of the principle of proportionality (i.e. whether a sentence is too long or too short). The chapter concluded that the structure provided by parliament and the CACD was insufficient to effectively promote consistency.

With insufficient structure provided by parliament and the CACD, one must look to the SC. The SC has now assumed the role of the primary provider of guidance and structure of the decision to impose sentence. As Chapter 8 concluded, the SC's guidelines provide more detailed guidance than that which had previously been provided by the CACD and this

increased detail brings about a high degree of consistency, albeit there is more guidance that could be given. Chapter 8 established that the SC's guidelines do provide substantive guidance in a form which imposes an appropriate level of constraint upon sentencing courts. Elements of the guideline which risked (or encouraged) inconsistency were identified. These particularly included parts of the guideline which require the subjective interpretation of words and phrases in respect of which there is no further substantive guidance and which can impact in a significant way on the guideline categorisation and therefore the eventual sentence. Notwithstanding these deficiencies, Chapter 8 concluded that the guidelines do promote consistency in a meaningful way.

Chapters 6, 7 and 8 examined the way in which the sentencing scheme in England and Wales provides structure to the discretionary sentencing decision as a means of promoting consistency. It is clear that no one institution alone can provide the requisite degree of structure to effectively and efficiently promote greater consistency in sentencing. In concert, however, the conclusion of this latter part of the thesis is clear: the combined structure provided by the three institutions does promote consistency in an effective way and is likely to produce a high degree of consistency in practice.

The division of labour

Parliament, the CACD, and the SC all provide structure concerning the application of the principles underpinning the sentencing system. Parliament's role in this regard is principally to prescribe the core principles which underpin the scheme; it has (seemingly deliberately) not expanded upon them, instead explicitly recognising that the CACD and the

SC will amplify the principles and develop further guidance.[744] Parliament has offered some structure as to the application of the principle of proportionality, though this remains vague. For instance, the creation of limitations on a sentencing court's power by the imposition of maximum and minimum sentences provides a broad steer as to what parliament considers to be a proportionate sentence for a particular offence. As was noted in Chapter 6 however, given that the maximum sentences tend to be high, causing the sentencing ranges to be wide, the guidance provided is loose guidance at best.

Having set down the broad limits of the scheme, generally speaking, parliament leaves the courts' discretion relatively untouched (merely providing for a maximum sentence and the general sentencing powers). On occasion, however, it has intervened where (it can be inferred) it considers that the courts are not imposing appropriate sentences. Examples include Sch.21 (discussed above), altering maximum sentences and creating minimum and mandatory sentences. Aside from these relatively rare legislative interventions, parliament's role is clearly one concerning the prescription of sentencing powers and overarching principles rather than detailed guidance as to the practice of sentencing.

It then falls to either the CACD or the SC (or a both) to provide such further guidance as is necessary to promote consistency[745]. It is evident that the SC has largely replaced the

[744] For instance, parliament placed (and later removed) a limitation on the CACD's ability to produce a guideline judgment, and expressly required the SC to produce a guideline on the principle of totality and the reduction in sentence for a guilty plea. See the Crime and Disorder Act 1998 ss.80-81 and the Coroners and Justice Act 2009 s.120(3).

[745] This view as to the division of labour broadly accords with the view expressed by Kenneth Culp Davis in his exposition of discretion in the context of US administrative law (see Kenneth Culp Davis, *Discretionary Justice: A Preliminary Inquiry* (University of Illinois Press, 1969); here, parliament constricts discretion, the SC (and to a lesser extent the CACD) structure it, and the CACD provides a check through appellate review.

CACD (which had previously replaced parliament) as the primary provider of guidance as to the principles to be applied by sentencing courts. This is evidenced not just by the SC's output, but also by the fact that where there is existing CACD guidance, the creation of an SC guideline on that topic supersedes that guidance.[746] The CACD has clearly recognised this transfer of responsibility and has altered its approach to providing structure to the sentencing decision. While it continues to consider appeals against sentence, such appeals now typically revolve around the application of the guidelines and appeals against sentence do not provide guidance in the way they used to. Formerly, practitioners would appear in the CACD and refer to multiple cases which (they would submit) demonstrated support for their contention that the sentence in question was too high, too low, or neither. These were not guideline cases but cases illustrative of the CACD's approach to the determination of sentence in previous, similar, cases. With the introduction of guidelines, this has changed and the court has commented that the citation of such cases "*is generally of no assistance*".[747]

As such, for offences where there is an SC guideline the CACD's role has morphed into providing guidance on the application of the guideline (interpreting terms and clarifying any misunderstandings that may have developed in practice). This represents a significant change in the practice of the CACD; it now acts in concert with the SC, supporting its work and amplifying the SC's guidance where necessary. Although guidelines are not to be interpreted as though they were a statute, the CACD has adopted a similar role to that which it takes with statutory provisions,[748] providing guidance as to their meaning and application. The

[746] For instance, see *R. v Webbe* [2001] EWCA Crim 1217; [2002] 1 Cr.App.R. (S.) 22 (handling stolen goods), *R. v Saw* [2009] EWCA Crim 1; [2009] 2 Cr.App.R. (S.) 54 (domestic burglary) and *Attorney General's Reference (R. v Kahar); R. v Ziamani* [2016] EWCA Crim 568; [2016] 2 Cr.App.R. (S.) 32 (terrorism).

[747] *R. v Thelwall* [2016] EWCA Crim 1755; [2017] Crim. L.R. 240 at [21].

[748] *R. v Robinson* [2015] EWCA Crim 1839; [2016] 1 Cr.App.R. (S.) 35.

CACD does continue to provide guidance separate from the SC, however. In cases where there is no SC guideline, the CACD has provided guidance regarding the approach to sentencing.[749]

In producing its guidelines, the SC relies heavily on the past decisions of the CACD. The default position for the SC is to replicate current practice,[750] with deviations – what might be described as 'policy change' – rare. The SC is concerned with the regularisation of practice and is not principally concerned with sentencing levels (in so far as they might be regarded as too high, too low, or just right). Instead, this remains the domain of the CACD who continue to hear appeals against sentence and adjudicate upon the application of the SC's guidelines. There is perhaps no better example of this than the SC's *Sexual Offences Definitive Guideline (2014)*. The levels contained in the guideline represented a marked increase on the levels contained within the earlier *Sexual Offences Definitive Guideline (2007)*, however this was not an example of the SC performing a 'policy' role in deciding to increase the levels as it considered them to be too low. Rather, the levels had been increased to reflect how current practice had evolved since the creation of the 2007 guideline. This was something explicitly stated by the SC at the time of the production of the 2014 guideline.[751] This creates a clear picture of harmony between the two institutions, each complimenting the other's work and marking a clear delineation between the CACD's 'policy' role and SC's pursuit of consistency.

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749 For example, in cases of arson see *R. v McKay* [2017] EWCA Crim 2299; [2018] 1 Cr.App.R. (S.) 36, in cases of handling stolen goods see *R. v Webbe* [2001] EWCA Crim 1217; [2002] 1 Cr.App.R. (S.) 22 (prior to the Theft guideline) and in cases of terrorism see *Attorney General's Reference (R. v Kahar); R. v Ziamani* [2016] EWCA Crim 568; [2016] 2 Cr.App.R. (S.) 32 (prior to the terrorism guideline).

750 See for example, Sentencing Council of England and Wales, *Theft Offences Guideline Assessment*, (Sentencing Council of England and Wales 2019), 1, <https://www.sentencingcouncil.org.uk/wp-content/uploads/Theft-report-FINAL-web.pdf> Last accessed 13 May 2019 and Julian V. Roberts and Andrew Ashworth, (2016) 'Evolution of Sentencing Policy in England and Wales 2003-2015', 45(1) Crime and Justice, 307-358, 339.

751 Sentencing Council of England and Wales, *Sexual Offences Response to Consultation* (Sentencing Council of England and Wales 2014), 19-20.

The system clearly relies upon each institution to perform a distinct role. Parliament provides the foundations for the scheme, prescribing the general principles and imposing some limitations on the powers of the sentencing courts. Thereafter, the SC provides substantive guidance predominantly in relation to the application of the principle of retributive proportionality in order to assist courts in determining the appropriate length of sentence. The CACD provides any additional guidance as is necessary to assist in the use of the SC's guidelines and additionally, further guidance in relation to topics not the subject of SC guidelines. While the picture is one of a functioning system providing structure to effectively promote consistency in sentencing, could more be achieved?

The elephant in the room

There is a conspicuous absence from the preceding three chapters: race and gender. Chapter 3 considered the empirical literature regarding these non-legal factors and demonstrated – at the very least – a cause for concern. The guidance offered by parliament, the CACD and the SC is drafted in gender neutral language and there is no suggestion that the application of the principles underpinning sentencing in England and Wales ought to be affected by race or gender. Yet, in the face of the empirical evidence, one wonders whether positive action ought to be being taken.

What measures of structuring discretion designed to avoid inconsistency which is attributable to the race and/or gender of the defendant could be adopted? It is beyond the scope of this thesis to explore in any detail such measures, particularly in light of the gender and race neutral language adopted by the measures currently in place. What is needed, however, is an

exploration of the way in which the current guidance allows for these (and other) illegitimate considerations to be incorporated in the sentencing process. Returning to the definition in Chapter 2, in multiple offender scenarios, the consideration of inconsistency of outcome at the final step of the process provides one method of redress. But it is right to note that in single offender cases, there is no such redress. While it will help ensure sentences are imposed in accordance with sentencing principles, it cannot identify where a sentence has been increased by reference to an illegitimate factor providing the resultant sentence is in the permissible range.[752] Further empirical work is needed to identify elements of the process which permit such illegitimate practices.

Could the current regime be improved upon?

Insufficient flexibility

Although the risk of inconsistency stems predominantly from insufficient structure and too much judicial discretion and flexibility, there is one area in which the pursuit of consistency requires *greater* flexibility. It will be recalled that in Chapter 6, there was criticism of the use of minimum and mandatory sentences which limit the exercise of judicial discretion as a means of imposing a proportionate sentence. Chapter 6 described these devices as ‘blunt’ tools which, because of their highly prescriptive nature, cannot achieve the form of consistency advocated for in this thesis. This is because minimum and mandatory sentences place an inappropriate emphasis on consistency of outcome as opposed to the finely balanced determination of a proportionate sentence achieved through a consistent approach and application of sentencing principles which requires individualisation. Such provisions treat cases which are not alike as if they were, resulting in disproportionate sentences. The complete reliance upon the CACD

[752] Unless of course the factor is explicitly referenced.

and the SC to provide this type of structure would produce greater consistency in sentencing and in a more principled manner. Chapter 6 was clear in its conclusion: minimum and mandatory sentences are antithetical to consistency as defined in this thesis.

Although Chapter 6 was clear that the structure provided by parliament alone is insufficient as a means of achieving an account of consistency focussed upon the proper application of sentencing principles, the combination of the CACD and the SC obviate the need for parliament to take any major remedial action. While there could be improvements made on a theoretical level to the sentencing system in England and Wales, it appears that the scheme is clear enough as to the principle on which it is founded. Within the regime, therefore, (with the exception of mandatory and minimum sentences as discussed above) improvements to better promote consistency are to be made elsewhere.

More substantive guidance

As identified in Chapter 8, the SC could provide more detailed guidance on specific terms used in their offence-specific guidelines, and more illustrative examples could be used in the overarching guidelines when describing principles and their proper application. Currently, the former is partially fulfilled by the CACD where it may make a broad statement about the meaning of the term in the guideline or simply determine the issue but confine its comments to the case before it. Accordingly, this guidance produced by the CACD is of varying assistance and arises only when the CACD is presented with a suitable case raising an issue, where the CACD is minded to provide guidance and is in fact able to do so.[753] Additionally,

[753] It may be that the issue raised is one which requires further research and is not suited to guidance delivered through a judgment.

on a practical level, further detail contained within guidelines is more likely to be brought to the attention of the sentencing judge than if reference has to be made to an SC guideline and CACD authorities.

It seems proper that greater substantive guidance is given by the SC; not only is the SC the body specifically given responsibility for promoting consistency in sentencing, but who else is better placed to define a term used in an SC guideline? The question as to which terms require expansion is trickier. A starting point may be to take the terms which the CACD has interpreted – on the basis that it has considered that greater guidance is necessary. Thereafter, the SC may have to be more proactive and attempt to identify those terms which may be more commonly applied (or misapplied) or predict which terms require greater detail.

Moreover, while the factors listed at Step 1 of the offence-specific guidelines are weighted (in the sense they are placed into categories), the factors at Step 2 are not. As argued in Chapter 8, this creates a real risk of inconsistency and undermines the guidance provided by Step 1. Accordingly, I conclude that real consideration ought to be given to the provision of further guidance as to the application of the factors listed at Step 2 of the offence-specific guidelines. Whether an approach which seeks to weight these factors proves to be too prescriptive, or whether an approach which seeks to guide the approach to the (case-by-case) weighting of these factors proves to be insufficiently detailed remains to be seen. Certainly, there are challenges to such an endeavour.

I have concluded that there is a sufficient degree of constraint and substantive guidance provided for by the current guideline regime, in conjunction with the CACD's decisions. That was the clear conclusion of Chapter 8 and is supported by empirical research. Chapter 8 did,

however, conclude that further guidance would likely produce a higher degree of consistency. I have identified in Chapter 8 elements of the offence-specific guidelines and the overarching guidelines which could benefit from more detailed guidance and greater structure and suggest that it is likely that a further positive effect on consistency would be seen as a result.

Would this further structure limit flexibility? As concluded in Chapter 8, there is an appropriate degree of constraint imposed by the SC's guidelines regime. While the duty to "*follow*" appears highly prescriptive and limiting, it has sufficient flexibility built in to it (particularly at Step 2) to allow a sentencer to impose the sentence he or she considers proportionate. It is my conclusion that the guideline regime assists the sentencer by encouraging them to consider the appropriate sentence in a structured way, rendering a proportionate sentence more likely.

What role for the CACD?

With the SC the predominant provider of guidance, what role is left for the CACD? It is readily apparent that the expertise and skill within the CACD ought to continue to be put to good use through the provision of substantive guidance on an *ad hoc* basis. I conclude that, as the SC is better equipped to provide substantive guidance, this should be restricted to instances of interpreting guidelines or providing guidance in areas in which the SC has yet not produced substantive guidance. In due course, the SC can consider the CACD's decisions and determine whether to produce guidance of its own. If it does, that guidance can replace the guidance provided by the CACD, in the same manner as described above.

Additionally, there is clearly a continuing role for the CACD in the form of appellate review as to the application of the guidelines. By hearing appeals against sentence and providing a 'steer' as to whether the application was correct or incorrect, the CACD has a direct impact upon the application of the principle of proportionality in so far as the level of sentences is concerned. This respects what has become the loose delineation of responsibility, between the provision of substantive structure by the SC to produce consistency and the supervision of the levels of sentences by the CACD. Finally, this process is cyclical, as when the SC comes to review and revise the guidelines, the practice of the CACD will be taken into account as the SC's approach is to replicate current practice rather than to adopt a policy-making role as regards sentencing levels. The CACD therefore retains a central (albeit less visible) role.

I conclude that the CACD ought to continue to provide guidance in areas where the SC has not and that the symbiotic relationship between the SC and CACD should continue. One would expect, however, that over time as the SC moves towards completing its programme of work, the role of the CACD will involve providing fewer traditional guideline judgments and involve a greater amount of guidance which is complementary to existing SC guidelines.

Final remarks

Without guidelines the court strive to impose sentences which reflect the concepts of harm and culpability. Yet there is much room for interpretation. Different judges may ascribe very different 'weights' to factors relevant to the determination of harm and culpability. For example, one sentencer may view planning and premeditation as secondary factors while another may regard them as a primary reflection of enhanced culpability. This difference of opinion is solved by a guideline which assigns this factor to a specific step (Step One) in the

methodology. Placement at Step One ensures this factor directs guideline category placement; all courts must follow this direction (unless it is contrary to the interests of justice).

This is but a single factor. The guidelines provide direction for most common sentencing factors and this constitutes an important step towards promoting a more consistent and principled approach to sentencing. And, as has been argued, an inevitable consequence of this guidance on the approach to sentencing is likely to lead to greater consistency of outcome. This needs to be the subject of empirical verification, however.

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