Thesis: The Sentencing Council's aim to promote both individualised justice and consistency is problematic at least. People are not homogenous. Hence, judges will not unanimously agree on purposes of punishment, and the current choice seems to have been made on arbitrary grounds. The efforts to ensure consistency are inappropriate and not conducive to justice.

1. Introduction

Since the 1980s, developments in the English and Welsh criminal sentencing process has prompted heated debate. Those who generally favour consistency in outcome praise the trajectory for what has happened, and those who favour individualisation are generally disappointed. On the basis of this alone, the Sentencing Council has failed in its aim to promote both individualised justice and consistency. It is my suggestion that more should be of the latter opinion due to the numerous failings of the current system. One lens justifying this negative stance is how the reforms have not made the sentencing process more proportionate. Von Hirsch and Ashworth, explain this as 'the idea that the penal sanction should fairly reflect the degree of reprehensibleness (that is, harmfulness and culpability) of the actor's conduct'. [1] This comports with common-sense notions of justice, that how severely a person is punished should depend on the degree of blameworthiness of his conduct. The sentencing guidelines do not facilitate this, and are less likely to do so in future. Whilst there is an element of fluidity, mental health has greatly varying impacts on different people and this is not something that can be compartmentalised into a grid like the Minnesota system. The lack of societal homogeneity, the seemingly arbitrary justifications for the current system, judicial commentary, and how much experiences of mentally ill individuals exposes the flaws in the system all show that the efforts to ensure consistency is inappropriate and not conducive to justice.

2. Context

The aims for the Sentencing Council are confused as a result of needing to achieve mutually exclusive goals. The way these goals have been interpreted result in a system not fit for purpose. The council explicitly states that their objectives are to 'promote greater consistency in sentencing, whilst maintaining the independence of the judiciary'. Both are impossible, as maintaining independence permits judges to make decisions as they see fit, whereas promoting consistency would require judges to think unilaterally. Similarly, the Criminal Justice Act 2003 s142 (i) requires courts to consider the purposes of sentencing which, according to parliament, are (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). The lack of hierarchy as guidance, directly undermines potential for consistency in outcome. It is 'plain as a pikestaff that these purposes may conflict in application' (Ashworth, CJA 2003), creating numerous 'right' options, making consistency impossible without intervention from the Sentencing Council. Dhami noted the irony of the current situation, as the 'lack of specification limits the ability of guidelines to improve consistency and transparency in sentencing, and to reduce the potential for biased decisions'. [2] Thus, the approach taken to try to improve

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[1] Andrew Ashworth and Andrew Von Hirsch, *Proportionate Sentencing* (1st edition, OUP 2005)

[2] Mandeep Dhami, Prisoner Disenfranchisement (2013) 13(1) Analyses of Social Issues and Public Policy <https://doi.org/10.1111/asap.12007> accessed 16 May 2020

consistency, is an obstacle to that very goal from being achieved. Whilst one could perhaps defend this flawed decision by considering Roberts' description of sentencing as 'highly complex' and that the 'correct' sentence that could meet 'universal approval, may not exist'. [3] I do not feel that the difficulty of the task justifies the system in place. Whilst criticism is inevitable, the evolution of the English and Welsh criminal sentencing process as it is, or looks like it is going to be, remains problematic.

The current process seems to have a focus on reducing complexity and encouraging consistency. Instead, focus should be moved from the role of the courts to the impact of the sentence on the offenders. It seems arbitrary and unjust to encourage consistency in outcome at the potential risk of overly cruel punishments. This argument is essentially a debate between the rule of law (requiring consistency in order to demonstrate that all are equal before the law) and the human right to avoid excessive punishment. I find the latter to be a greater threat to society and should be avoided. As an alternative,I recommend that the Sentencing Council consider Ashworth's guidance in future reforms, as his recommendation is that the best approach would 'regard proportionality as the primary benchmark for guidelines and sentencing courts, and as setting limits to the pursuit of the conflicting purposes'. This would facilitate both of the Sentencing Council's goals as far as they can. Von Hirsch and Ashworth explain that 'properly understood' proportionate sentencing requires 'informed self-restraint' as it 'recognises the pain and deprivation that punishments… inevitably inflict on offenders'. This makes consistency more likely by indicating judges should favour purposes (a) and (c) of s142 Coroners and Justice Act 2009 (CJA), whilst permitting judges the freedom to express what that would look like in each case. Unfortunately, instead of using Ashworth's approach to achieve both of their goals, the history of the English and Welsh sentencing process reveals a vague preference for consistency at the cost of judicial independence. As a result, the Sentencing Council fails to meet either of their objectives and offenders risking gratuitous punishment.

2.1 Evolution of the criminal sentencing in England and Wales

An offender's journey from arrest to punishment is defined by legislation, sentencing guidelines, and common law. Through the increasing prominence of sentencing guidelines, the role of judges has transformed from taking holistic and personal approaches to being funnelled through an 8-9 step checklist.

Prior to the guidelines, there was already an element of consistency through statutes. Most offences had a maximum and minimum sentence, with a number of mitigating factors being regularly considered (if the offence was committed whilst on bail, if the offence was racially or religiously aggravated, if the offence was motivated by hostility to a victim based on sexual orientation/disability, whether the offence was planned). Ashworth noted that even at this relatively low level of restriction, the practical consequences of mandatory sentences as prescribed in law (such as life imprisonment for murder) are 'particularly severe' and 'capable of producing manifest injustices because of the very restricted discretion left to the courts'. This point reflects the ethos that there can be mitigating factors (mental health) that justify a

[3] Julian Roberts, 'Public Opinion Towards the Lay Magistracy and the Sentencing Council Guidelines' (2012) 52 British Journal of Criminology 7

sentence that does not adhere to the statutorily specified norm, irrespective of crime severity. Preventing judges from easily making this decision highlights how restricting judicial independence is much more than mere subversion of judicial authority.

Despite these disadvantages, since the late 20th century there has been increasing encroachments on judicial independent decision-making. A Sentencing Advisory Panel (2003) was created to draft deadlines and consult widely before determining the guideline format. Initially, the Court of Appeal was not bound to follow the Panel's advice but was only permitted to give guideline judgments after using Panel advice. In 2003 the Sentencing Guidelines Council could issue definitive guidelines determining how to sentence a crime. The CJA then created the Sentencing Council, which centralised the process of formulating, reviewing, and enforcing implementation of guidelines. S125 of this CJA 2009 changed proceedings from courts 'having regard' to saying they 'must… follow any sentencing guidelines… unless the court is satisfied that it would be contrary to the interests of justice to do so'. It was reported by the English Council that the 'departure' rate was only 5% across all sentences in 2014 (Roberts-Minnesota). That high threshold for defying sentencing guidelines underlines that many mitigating factors are now inadequate to reduce the sentence beyond the lower bound of the sentencing range.

2.1.1 Why do they specifically look as they do?

It cannot be suggested that the format of the guidelines is necessary to meet its goals. The guidelines since 2010 have reduced the process of sentencing to a 8-9 step process, all supposedly motivated by the need to both 'promote greater consistency' *and* 'maintain independence of the judiciary'. [4] Roberts challenged this by suggesting that the actual intentions of guidelines were to appease the public, after complaints regarding the size of the prison population (as well as sentencing disparities). Carter 2007 actually revealed that the prison population was the highest on record; he expressed a need for even further structure in the sentencing framework. Carter explains this further structure would 'better predict (and constrain) the prison population', although admitting that 'concern over disparity receded in prominence'. [5]Despite that being the intention, Roberts notes a lack of interest from the Sentencing Council or government to challenge prison rates, especially considering the consequence of guidelines has actually resulted in more and longer prison sentences. As a result, it is clear that there is academic commentary suggesting that the guidelines have decreased consistency (Dhami), undermined judicial independence to an unjust extent (Ashworth), and increased prisoned rates (Roberts). Therefore, the nature of the guidelines appear to be entirely unrelated to their goals. It should be considered how the guidelines may be improved if they took inspiration from other countries.

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[4] Julian Roberts, 'Evolution of Sentencing Guidelines in Minnesota and England and Wales' (2019) University of Chicago Press <10.1086/701797> accessed 16 May 2020

[5] Carter in ibid.

Dr. Brown did an extensive study on four models of judicial reasoning in sentencing, before concluding that justice is best achieved through wide but guided judicial discretion. [6] The first model he considers is 'instinctive synthesis' as used in Australia (R v Williscroft), where judges 'intuitively' find a 'punishment [that] seems appropriate'. [7] The capacity for inconsistent judgements is specifically recognised when the relevance of judges' 'personal experience' was noted without negative connotations. By avoiding a 'process involving the application of authoritative and ascertainable norms to a particular factual situation' (Bagaric and Edney), Australian judges have the capacity to consider anything that counsel present to be a convincing argument for increasing/decreasing the statement. [8] This is an advantage that should not be overlooked. The English case of R v L [2019] exposes how much the guidelines restrict judicial consideration to areas that are not included in the current 8-9 step programme. [9] The 15 year old applicant was sentenced to 14 years for admitting to murder post-conviction, and appealed on fresh evidence pertaining to his mental health. Whilst the Crown Court jury heard a psychiatric report explaining he had a 'severe unsocialised conduct disorder' (not an inherent medical condition) they did not hear any details of the applicant's troubled background (child had to be taken into care, own father deported for drug offences). On that basis they were left to decide the issue of manslaughter on the basis of lack of intent to kill. Following trial, a further report was written noting that his 'traumatic history, harsh parenting, PTSD… lack of trust in others… reliance on his father… provide a reasonable explanation as to L's denial of [the] stabbing' before the court being implored that 'individual differences need to be considered' (Professor Young in this case). In spite of all of these factors, the court refused to shorten the sentence. Many find it frustrating that (although psychiatrists explicitly acknowledged the child had symptoms of mental health issues) as the health issues were not to the degree required in sentence guidelines there was no possibility for a sentence reduction. Although it was suggested that this appeal may have been tactical ('Broadmoor' 2014), it should not require the financial and time cost of an appeal for an individual's traumatic history to be heard. [10] This method is a greater challenge to judges, with Corns 1990 noting that 'one of the most difficult and fundamental problems in sentencing is how the judge ought to approach the sentencing task in terms of a methodology or system of decision-making'. [11] Ashworth admonishes the 'instinctive synthesis' for permitting an 'inscrutable idea' that permits a 'free for all' approach without 'weight' to rule of law values. Australian Chief Justice Allsop challenged this criticism in his article on the rule of law where he underlines the importance of the 'resolution of legal rights… not by the exercise of discretion; equality before the law'. Hence, Ashworth's accusation

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[6] Graeme Brown, 'Four Models of Judicial Reasoning In Sentencing' (2019) 3 Irish Judicial Studies Journal <https://www.ijsj.ie/assets/uploads/documents/4.%20Graeme%20Brown.pdf> accessed 16 May 2020

[7] R v Williscroft [1975] VR 292, 300 (Adam and Crockett JJ)

[8] Mirko Bagaric and Richard Edney, 'What's Instinct Got to Do with It? A Blueprint for a Coherent Approach to Punishing Criminals' (2003) 27 Criminal Law Journal

[9] R v L [2019] EWCA Crim 1326 [2019] 7 WLUK 367

[10] Olivia Lichtenstein, 'Inside Britain's Highest Security Psychiatric Hospital' (*ITV Studios Limited, 2014*) <https://www.youtube.com/watch?v=27ZovKsf9Mc&ab_channel=DocumentaryTV> accessed 16 May 2020

[11] Christopher Corns 'Destructuring Sentencing Decision-Making in Victoria' (1990) 23 Australian & New Zealand Journal of Criminology 145

that Australian judges are unfettered by Bingham's principles is clearly rebuked by Allsop's own admission of limited discretion. Even if Ashworth's critique was valid, the human rights' risk to offenders should outweigh the additional effort required from the judges. As a result, there is an obvious advantage of the Australian 'instinctive synthesis' system as it allows proper consideration of all factors during the sentencing process.

Contrastingly, one could investigate the advantages of the Minnesota grid system. Roberts asserts that 'the US guidelines emerged as a direct response to recognition that sentencing was unpredictable and inconsistent', and that goal has very clearly been achieved with the restrictive grids that 'generates high levels of judicial conformity and consistency'. Frase 1991 (Minnesota) underscores that the 'cost' of England/Wales being less 'prescriptive' is that English/Welsh individuals do not know their exact quantum of punishment, which could impinge on the certainty component of the rule of law. However, the very limited opportunity for judicial discretion in the Minnesota system highlights that if England/Wales were to strive for comparable levels of consistency, it would come at the sacrifice of the Sentencing Council goal for judicial independence. As a result, for England-Wales to be able to clearly fulfil one of its goals, it will have to sacrifice the other and become more like Minnesota or Australia. At this time, its attempts to do both are not viable (Barkow 2012- Minnesota). Beyond failing to reach the goals of the Sentencing Council, one must also be wary of recommending that England/Wales adopt more Minnesotan qualities as it could come to defy other important legal principles. The aforementioned lack of hierarchy in s142 CJA means that it is not known if courts are expected to aim to fulfil all subsections, or if there only has to be evidence of one. If it is the former, the Sentencing Council should be careful as 'criminal history enhancements in the Minnesota guidelines reflect retributive rather than preventative justifications' thus defying s142(b) CJA. Moreover, the Minnesotan commission interprets proportionality very differently to Hirsch and Ashworth, by saying "the goal of proportionality requires that sanction severity increase in direct proportion to increases in offense severity and criminal history" (Frase 1993). Consequently, adopting a system with such an ardent focus on criminal history without consideration to context may be either an asset or a detriment to the Sentencing Council on a theoretical level, depending on which academic is found to be more convincing. It should be noted that the response of the Sentencing Commission Working Group from 2008 evaluated the Minnesota grids before dismissing them for being too restrictive, and chose to create the Sentencing Council instead. Based on this, one could infer that even if recent developments have indicated that the Sentencing Council wishes for more consistency in punishment, this is not with the long-term aim to be like Minnesota.

In review, study of the other countries' guidelines exposes that the Sentencing Council guidelines are marred with confusion with respect to what they are trying to achieve and whether the guidelines are in accordance with the unranked criteria in s142 CJA. What is clear, is that pursuing both goals cancels the benefits of either, as evidenced by how inferior English/Welsh sentencing policy is in comparison to the case studies.

2.2 Purpose of sentencing

As the Sentencing Council's own goals are mutually exclusive, one can instead examine the guidelines' effectiveness with respect to how well they fulfil the academically-and-statutorily accepted purposes of sentencing. The concept has definitively evolved from the Benthamite utilitarian approach that relied on prevention and deterrence, to include rehabilitation, recidivism prevention, incapacitation (Roberts, 'Making Sense of Sentencing' and CJA s142). Brown regarded Galson's conclusion that these considerations cannot be merged nor morally ranked (Galston 1999, 880), and therefore each purpose has an 'equal claim on the sentencer's attention' (GDB, 119, Practical Wisdom). By not ranking purposes and leaving sentencers the freedom to choose, it is suggested that judges will have increased judicial discretion (and less consistency). This assumption was proven by McFatter's 1978 study, and Cole and Roberts used this to show that choosing a pre-eminent purpose for sentencing is necessary for consistency. One way to achieve this is to integrate something like s718 of the Canadian Criminal Code which underlines the importance of uniformity. However, considering the uncodified constitution and decentralised system of sentencing, it is unlikely that a decision of such a magnitude will be made without cause. Consequently, where one stands with respect to judicial discretion and consistency will dictate whether one supports the Sentencing Council's refusal to prioritise a purpose of punishment when using the guideline, but this debate is likely to remain theoretical due to the fundamental nature of UK law. As Roberts asked, 'The Sentencing Council is a very small cog in the criminal justice system: what is it realistic to expect it to achieve?'.

3. Disadvantages of the current system in contrast with individualised justice

The need for individualised justice is most obvious when examining the practical reality of the stringent guidelines being applied. Commentary from jurisdictions not using guidelines reveal consistent reference to the complex, deeply individual, nature of the sentencing process and how reliant on context it is. For example, the New Zealand case of Fisheries Inspector v Turner 1978 described the 'innumerable factors' that sentencing authorities need to take into account when 'determining the appropriate sentence'. Similarly, the traditional Irish approach was noted in People (DPP) v O'Brien where sentencing was deemed to 'never… [be] amenable to a rigid algorithmic or mathematical approach', and Dr. Brown specifically categorised his section on the English-Welsh approach as 'algorithmic'. A system that requires every offender's personal experience to be made to conform to a clumsy system seems inappropriate. This is further underlined when one considers each facet of the English 'algorithmic' approach from creation to application.

How guidelines first emerged is suspicious, and indicates that those who are most knowledgeable on sentencing (judges) had these unsavoury guidelines thrust upon them. This undermines the validity of the guidelines' effect. Ashworth and Roberts explained that 'some members of the judiciary fail to see merit in a scheme which creates presumptively binding sentence ranges'.This is echoed by Lord Woolf (2007), who recommended leniency in sentencing in order to achieve justice and serve public interest the best. Likewise, Canadian judge Justice Renee Pomerance asserts that some offenders 'on paper' deserve jail but 'in person' deserve another chance (for example, for changing something that previously led to

criminal activity) (GDB- p80). It is this human component to the English judicial system that needs to be preserved.

The sentencing process cannot be automated through a harsh, mathematical process. D'Amato 1977 noted a litany of reasons for why judges should not be replaced by computers, including referencing computer scientist Weizenbaum saying that as there are currently 'no ways of making computers wise, we ought not now to give computers tasks that demand wisdom'. He also said that for as long as computers are unable to empathise with humans there is risk for 'bizarre' results. For this reason it is important that judges express the element of humanity that separates them from computers. Although the guidelines do not go so far as to replace judges, the fact judges are statutorily required to use them is definitely a significant impingement on their faculties.

When questioning why judges accepted these guidelines to begin with, one can look to the 1978 report of the Advisory Council on the Penal System, where the council recommended amending the maximum penalties to be less harsh but judges refused. Roberts then asserts that 'the guidelines proved acceptable to the judiciary once it became clear that they would be devised by a primarily judicial body, which would be independent of government and the legislature, and would still permit courts a significant degree of discretion'. If that was the case for judges initially supporting guidelines, the institutional bodies preceding and including the Sentencing Council clearly exceeded their ambition and are no longer acting with judicial support. There are only 2 more judicial members than non-judicial members. The Sentencing Council was created by CJA 2009, its powers are derived from CJA 2003 s144, the government has the power to ask it to look at the impact of policy and legislation, and the 8-9 step programme is a significant encroachment into judicial discretion. As a result, Roberts' interpretation of the Sentencing Council's origins would indicate that the current sentencing landscape does not have judicial support. The fact judges supposedly wanted to protect judicial discretion (as individuals who do the most sentencing), compounded with the extensive academic commentary in support of judicial discretion. The current system is less than ideal.

A further problem with the sentencing system is that they are influenced by people who do not engage with sentencing as much as one would wish. Their good intentions have unfortunate consequences. The reforms made to the sentencing process were proposed by politicians John Straw and Lord Bach, two individuals with non-legal backgrounds. Practicing barrister O'Malley finds this explains why evolutionary direction of sentencing reforms (when looking at Scotland) as he found that 'in the comfort of the parliamentary chamber and emboldened by the high-minded rhetoric of their colleagues, legislators can easily reach the conclusion that everyone who commits a given offence should receive sure and severe punishment. Yet, even a modicum of exposure to day-to-day proceedings in the criminal courts would quickly displace this presumption'. Moreover, 75% of members of the Sentencing Council are non-judicial. Whilst the theoretical understanding offered by academic Dr. Parmar, and the alternative perspective offered by Chief Executive of Victim Support Diana Fawcett from her 7 years with Shelter are somewhat useful, they do not equate to a judge's understanding of sentencing as a process. Judges acknowledge their exclusive insight. Indeed, a Canadian Supreme Court Justice noted

that sentencing judges 'have served on the front lines of [the] criminal justice system', and Brown noted that this therefore means they have unique qualifications in terms of experience and the ability to assess parties' submissions. As a result, those most familiar with sentencing are silenced for those who may not have sat in a courtroom before.

Another facet to be considered, is that those who are making the sentence guidelines are not representative of all society. Less than 20% of Sentencing Council members are white, and yet much over 20% were Oxbridge educated. As a result, many demographics will be subject to the sentencing processes, and their potential influence is limited to the small pool who do public consultations. The experiences of those who may know or have disproportionately harsh experiences in the sentencing process are particularly important to be included, as they can provide the insight to ensure that the goal for consistency does not come at a cost of enabling discrimination through justice. Hood's 1992 study of 5 West Midlands Crown Courts revealed that black people were 5% more likely to receive a custodial sentence (considering all case characteristics), and Asian defendants were sentenced to 9 months longer than white defendants. Although this study is over two decades old, the sentiment is still present. This can be evidenced with the 2020 'Black Lives Matter' movement. The anger at the pervading presence of racism in the criminal justice system is especially vindicated in Dr. Koram's article naming Jimmy Mubenga, Rashan Charles as just two of the non-white individuals who were killed through acts of police brutality. Additionally, sentencing guidelines are not a political issue with electoral repercussions, the number of participants in public consultations is not easily found on their website. If one accepts the practical reality that guidelines are entrenched due to the lack of power to change the sentencing landscape then the best course of action is to ensure guidelines result in (von Hirsch) proportionate results. Due to the extent to which certain elements of one's demographic (class, race, mental and physical health) potentially impacts how one is sentenced, there should be a more diverse Sentencing Council in order to ensure all needs are accommodated for. Judge Frankel (1973) went so far as to suggest the commission should include 'present or former prisoners', and Frase 1993 noted that the English is apolitical. As a result, whilst remaining within the confines of reality (meaning a rapid change to instinctive synthesis is unlikely), the sentencing guidelines could be significantly improved with certain requirements for Sentencing Council members. It is arguably as a result of these uninformed influencers that so many judges are resistant to the current guideline system.

Judges' active criticisms and their efforts to circumnavigate sentencing guidelines reveal how the current system is not fit for purpose. Lord Justice Hughes clearly expresses his frustration in R v Healey [2012], wherein he noted the public debate surrounding drugs, the fact the system does not 'extend to deliberately disregarding the guidelines… because the judge happens to take a different view about where the general level ought to be', and that 'very few judges are fortunate enough to go through life without encountering rare occasions when they would prefer the law to be otherwise… it is the judge's duty nevertheless to apply it'. Providing some context to Hughes LJ's words, is Lord Reed's praise of the common law and its ability to permit judges to 'reflect the incessantly fluctuating requirements of society'. Reed's praise is in direct juxtaposition for the traits of the sentencing guidelines. Much of the academic commentary critiquing the overly 'unusually inflexible' (Dewey 1935) US constitution, especially when

considering that a guideline is a reflection of attitudes at publication and judges must continue to respect them until there is a new guideline or statute. Hence, guidelines could risk judges being locked in time.

It should be noted that Hughes' LJ decision was dictated by the guidelines, not him being able to use the guidelines to shape his own opinion. This nuance is what distinguishes the English-Welsh system from the instinctive synthesis as used in Australia. In Hili v The Queen (n23) where the majority said that consistency is achieved through applying relevant legal principles ('statute, legal principle and community values all confine the scope'), not mindlessly following steps. Dr. Brown underlined the point that 'the sentence must have regard… [to] WHY it was done' (emphasis from original). Making this comparison emphasises how ineffective the English/Welsh system is at meeting its goal of consistency, as the Australian system encourages consistency without the cost of judicial independence. Moreover, the contrasting approaches from different English-Welsh judges exposes how unfit for the purpose of promoting consistency the sentencing guidelines are with respect to personal mitigation consideration. The individualised justice within the guidelines distinguishes the Sentencing Council's approach from that like Minnesota by giving room for judges to consider other factors. However, not all judges take the opportunity to hear reasons why an offender's sentence should be changed that are not on the prescribed sentence guideline. Consequently, only some offenders will have the opportunity for their sentence to be changed. As a result, the opportunity left in the guidelines to promote individualised justice is often neglected by judges and actually reduces consistency in sentencing.

Roberts critiques guidelines for 'inhibiting individualisation by undermining consideration of aggravating and mitigating factors', as the reduced opportunity input has meant judges are exclusively looking for whether the guideline factors are present. Cooper (2013) agrees that 'the council interprets personal mitigation very narrowly' as shown in R v Mohammed Bedin Joinal [2020] wherein the judge used the guideline principle that the more serious the offence, the less weight that should be attributed to good character (Step 2 for Sentencing Council Rape Guideline) to not give any weight to the offender's background. The offender's counsel argued that 'the appellant's age and his lack of maturity were not reflected in the sentencing remarks', and instead of further discussion the court merely stated that the age (30 years old) meant they were 'unable to understand what mitigation is to be found… nor [were they] aware of any evidence of a particular lack of maturity on his part'. Whilst I recognise the severity of the crime and the horrific impact it potentially had on the victim, von Hirsch principles of proportionality require recognition of the impact of punishment on the offender. Hence, the lack of closer investigation on points of judicial confusion meant that judges used the guideline structure to disregard a factor that could have reduced the individual's sentence, meaning that the offender was subject to an unjustly long sentence.Conversely, the judge in R v Rattu (Ajay) [2020] reduced a co-defendant's sentence due to 'difficulties in his personal life', the impact of imprisonment on his young family, and because the first judge supposedly was 'manifestly excessive' by applying the guidelines 'in an over-rigid fashion'. Showing the discrepancy between the first and second judge's decision highlights how much consideration of personal

mitigation can change the length of one's sentence, 'if one takes one's eyes out of the pictorial boxes and troubles to read the whole of [the guidelines]' (Healey).

The court changing the sentence based on consideration to pressing family need was found by researchers to be a particularly popular factor in personal mitigation (Jacobson and Hough- in Cooper 2013) and yet is not included in the guidelines. This shows that there is clear precedent for family need reducing a sentence, and yet this cannot be consistently relied on as only proactive judges exceed guidelines. As a result, the current sentencing guidelines are manifestly unfit to support either of the Sentencing Council aspirations, and judges use this to make decisions in their own fashion. Unfortunately, the deviations between judicial approaches to offenders' personal circumstances impacting sentencing is something Cooper (2013) recognises to cause 'society as a whole [to] suffer'. Beyond the considerations presented, Cooper also notes that by reducing the influence of personal mitigation so that it 'hardly gets a reference in… the guidelines', the courts miss the opportunity to establish the most effective form of rehabilitation (which could be in wider societal interests). Brow,n in his extensive survey of Scottish Sheriffs, underlined the risks of custodial sentences by describing it as a 'university of crime'. Hence, the number of reasons for being more tentative and encouraging a system of penal minimalism should not be underestimated.

Beyond failing in its goal for consistency, the various forms of judicial rebellion against guidelines has meant that some judges are performing acts of penal excess. Hayes suggested that it would be for the public good if the sentencing bodies committed to penal minimalism, as the potential risk of vigilante justice is tempered by everyone's total freedom being more secure. This echoes the von Hirsch and Roberts ethos of self-restraint in punishment. Furthermore, Hayes underlines the true painful scope of criminal punishment, presenting it as more than just the mere deprivation of liberty for breaking the law by alluding to 'physical pain, psychological suffering, and/or emotional trauma'. Having some people be subject to this for longer than others due to a lacklustre consideration of mitigating factors underlines that the implications of the sentencing system failing to meet its goals goes beyond merely being unfit for purpose. The solution becomes obvious when one considers all of the above cumulatively. Indeed, Schneider underlined the value of individualised justice over guidelines due to the capacity for the 'variety of sentencing options, alternatives, objectives, and principles [which] allows a court flexibility in sentencing an individual accused to ensure that the sentence is the best possible 'fit' not only for the offence but for the accused'. As a result, the method in which the guidelines tried to achieve both goals has resulted in individuals being disadvantaged (they risk being arbitrarily subject to more punishment than their counterparts), which then threatens our wider society.

4. How mentally ill offenders who murder highlight all problems previously discussed

Mental health as a concept is unfortunately stigmatised and characterised by misinformation. As recently as 1997, the improvement of care for people with severe mental illness was derived from a preoccupation with 'dangerous' people, and funding was negligible in comparison to what was given for physical health. In reality, an individual with mental health issues should generally be offered support and treatment. The Sentencing Council makes a minimal effort towards

encouraging this approach, as the guideline (published 22 July 2020) by including a list of vague recommendations ('care should be taken to avoid making assumptions', 'offender may be unaware or unwilling to accept they have an impairment… may fear stigmatisation if they disclose it') but does not go so far as to ensure that mentally ill offenders have their personal circumstances considered during the sentencing process. The guidelines' attempt at encouraging consistency and judicial discretion whilst ensuring just sentences for those with complex mental health issues has been shown to fail on all counts in recent case law.

The disappointing performance of judges and their utilisation of the previous iteration of the sentencing guideline for mental health is extremely problematic. Although the stigma for mental health encourages people to hide their disorder, meaning many view it as something that affects relatively fewer people, a 2007 study revealed that 25% of people will experience some form of mental health issue each year in England (McManus, Meltzer, 2009). It is particularly important for the sentencing process to consider the needs of the mentally ill as the Prison Reform Trust revealed that there is a large cross-section in the venn diagram of people with mental health issues and people who are in prison (particularly in comparison with demographics). The Office of National Statistics found 90% of prisoners suffer from at least one mental health issue. This clearly shows that the sentencing process is required to process a large number of mentally ill persons, and if this paper proves that they are not catered for then it would be undeniable that the current sentencing approach is not fit for purpose.

Statutes require certain elements of mental illness to be demonstrated in exchange for sentence reduction. It would make sense if guidelines intended to support and explain judges in the process of sentencing offenders with mental health issues would show how such arbitrary obstacles to sentence reductions could be avoided. Instead, the guidelines fail to encourage judges to look beyond the procedural requirements, despite it being obvious that mental health issues should be considered as a mitigating factor even when not in the format statutes require for formal reductions. As a result, the Sentencing Council guidelines' impact on judicial discretion and subsequent prevention in judges taking a holistic approach to sentencing mean that offenders with mental health issues can be subject to disproportionate sentencing. This underlines that guidelines encroachment on judicial discretion means there is greater risk for mentally ill offenders to be subject to disproportionate sentences for arbitrary reasons.

5.1 R v Rejmanski (Bartosz)

The applicant was tipsy, had a disagreement where the victim made derogatory comments regarding soldiers in the Afghanistan war, before kicking the victim until he died from head injuries. Two psychiatrists and psychologists agreed that he was suffering from PTSD, but the sentencing guidelines do not prevent judges from reducing the sentence for that reason alone. It must be shown whether the symptoms of PTSD affected his capacity for self-control and tolerance. Despite fulfilling the statutory requirements s54(1)(c) of CJA 2009, and meeting subsequent the case law test to show the taunting caused the PTSD flare up (Camplin 1978, Holley 2005), the appeal was dismissed and the applicant was unable to use PTSD as a partial defence. Counsel suggested that PTSD was an admissible mitigating factor as it would not be unreasonable for someone with a mental health issue to respond as Rejmanski did.

Unfortunately, this logical point was disregarded as Lord Justice Hallett found that PTSD could only qualify as a 'relevant circumstance' for jury consideration if there was evidence asserting that Rejmanski was suffering from a flashback at the time of attacking the deceased. Between the fool's errand that is proving one's mental health for a court room, and having to prove the relevance of a mental health issue to a crime when medical professionals have recognised the issue and its propensity to make one commit a crime in the given circumstances, the statute requirements for sentence reduction seem unreasonable. Dickson and Stuart-Cole criticised this judicial decision as it meant the individual was 'effectively deprived' of a defence. It would seem that the most recent publication encouraging judicial support should address this deficit of justice, and instead the guidelines re-emphasise minimal judicial discretion (so not meeting the requirements mean there is no available mitigation in that respect) and subject the offender to a longer sentence seemingly arbitrarily.

5.2 R v Gassman (Charice)

The victim and her daughter entered a shop, the victim headbutted G, G chased the victim threatening to kill her. G stabbed the victim once in the chest, who died soon afterwards. G claimed to have limited memory of what happened, was known to mental health services (she suffered from auditory hallucinations and disassociation) and had previous convictions for violence. A close family member had died the day before the attack. Psychiatric expert witnesses found she did not suffer from a major mental illness, but expressed a form of personality disorder and was in an abnormal mental state at time of killing. The doctor found G was liable to 'outbursts of anger or violence with an inability to control the resulting behavioural explosion'. G was found guilty of murder after the jury was told to consider all circumstances, but not the personality disorder as it meant she was less able to exercise tolerance and restraint. This request in of itself is nonsensical as one's mental health is fundamental to shaping one's world view, and extracting that factor from jury evaluation means that whatever conclusion they reached should not be relevant when judging the offender. The sentence was appealed on these grounds, but was dismissed. Hallett reduced the relevance of her personality disorder to be a matter that affected her general capacity for tolerance, so was already considered in s54(1)(a)-(c) CJA. I do not believe this is giving accurate evaluation to the scale and impact of a personality disorder. This conclusion is understandable as it was reached by a non-medical professional, and therefore this case highlights how decisions made by uninformed individuals can result in offenders receiving a disproportionate sentence. What is particularly frustrating about this case is that Hallett LJ specifically acknowledged that if the condition was as serious as suggested by defence counsel, the 'correct route' would have been to claim partial defence through diminished responsibility. However, that option is not available after appeal, showing that Hallett LJ recognised himself that the statute and subsequent failure of guidelines to allow judges to redress problems, mean that individuals can serve excessive sentences. If G was having this identical trial in Australia, there is greater likelihood of her circumstances appropriately understood as a result of instinctive synthesis. Both G and Dowds 2012 underline that the recognition of a medical condition is necessary, but not always sufficient to raise the issue of diminished responsibility. The threshold for that defence is particularly high (following CJA 2009), requiring a causal link between the defendant's impairment to exercise self-control and killing. Exacerbating matters, Martin (EWCA Crim 1359) finds that it is rare for the jury to

decide on loss of control, reinforcing a restrictive interpretation of the law, meaning it is particularly unlikely for sufferers of a personality disorder (an illness in of itself is less well-known) to be appropriately catered for in this defence. Consequently, sufferers like G would have significant mental dysfunction that is specifically known to increase propensity for disregarding the law, and have no legal recognition of difficulties. By guidelines normalising the 'numerical' guidelines and mindless step following, certain mitigating factors are not being considered and sentences are not proportional to the offender's actions.

5.3 R v Key (Robert), R v Joyce (Trevor)
K, a diagnosed paranoid schizophrenic was a habitual long-term drug user. On one occasion he consumed heroin, amphetamine, and alcohol before stabbing his victim in 35 places. Doctors found that he was dependent on amphetamines, which (combined with the schizophrenia) impaired his responsibility for his actions. An alternative doctor suggested that the psychotic state was as a result of his medical condition and thus the intoxication was involuntary. The psychosis was caused by the voluntarily induced intoxication. Instead of considering all contributing factors, the judge asked the jury to choose whether the psychotic episode was caused by the voluntary consumption of drugs, or the schizophrenia (exacerbated by intoxication, against a background of a dependency syndrome). He was found guilty of murder. The sentencing process is clearly flawed when a decision that is clearly one with great consequences (particularly considering the minimum sentence for murder compared to manslaughter), and requires medical knowledge, is being put to the jury. Consequently, this case highlights that the current sentencing process shackles judges from being able to consider all factors before making a balanced decision, and it does not seem just for certain possibilities to have to be discounted when sentencing.

5.4 Lord Falconer v Her Majesty's Advocate and R v Peter William Coonan
Both of these cases demonstrate that how the seriousness of the offence can obscure judges' abilities to appropriately consider how mental health caused the offence to take place, increasing the likelihood of disproportionately long sentences.

In Lord Falconer v Her Majesty's Advocate, the appellant assaulted and raped two individuals on three occasions. He was initially given an 11 year sentence. The social worker noted the appellant was a service veteran with PTSD who struggled to interact with others, understand emotions and psychological experiences. After the appellant left the army his PTSD was not treated, and the social work report found there was a high risk of further sexual reoffending and medium risk of violent recidivism. The judge gave an extended sentence on account of the risk the appellant could pose after prison. It was repeatedly suggested that insufficient account had been taken of a particular traumatic experience from when the appellant was in Afghanistan. Context presented to the judge was that he had a clean track record until he went to Afghanistan, and both drugs and counselling were prescribed to help him treat it. It was for those reasons the offender argued the sentence was excessive. The judge noted that a sentence for 8 years imprisonment with 3 year extension was a standard sentence for sexual offending, and 'apart from the fact of PTSD, we cannot fault that sentence'. That assertion clearly shows the minimal regard the lower judge had for mental health issues and the reduced

culpability the offender has as a result of this illness. It is due to the sentencing guidelines failing to provide more detailed and careful explanation of mental health disorders that such uninformed judgments can take place.

The CJA specifies that when choosing the most appropropriate minimum term for murder, the judge can consider medical evidence of mental disorder if the jury rejects evidence suggesting this issue is present. This fact underlines how much expert evidence is disregarded in favour of jurist opinion. In Coonan, the applicant was convicted of 20 counts of attempted murder and murder, but was making a case for diminished responsibility due to suffering from paranoid schizophrenia. He felt there was a divine voice instructing him to eradicate prostitutes. The jury and judge needs to be convinced of symptoms in order for Schedule 22 of CJA to be met. The arguments critiquing non-sentencing members of the Sentencing Council can be largely applied to giving responsibility to the jury. The offender's reputation and nature of the crime is likely to alienate the jury. Prior to trial, Coonan was dubbed the 'Yorkshire Ripper' and Laura MAdhloom suggested that as a result 'his actions would be on trial and not the person'. Vasiljevic and Viki examined the dehumanising effects of the sentencing process, including how victim impact statements are given with the central purpose being to underline the impact of the crime on the victim and family, and 'highlight to jurors that the defendant is subhuman and therefore not worthy of compassion' which leads jury-eligible respondents to make more punitive judgments (Myers, 2004). As Boreham J stated that the 'offences were so heinous and the perpetrator so dangerous that life should mean life' underlines excessive focus on s142(a) CJA, instead of regard being given equally to all purposes of punishment. Consequently, in particularly serious cases it is easy for the relevance of the offender's mental health to be reduced to an afterthought, and this problem is something guidelines clearly should instruct judges to override. Instead, Boreham J in Coonan chose to disregard the fact Dr. Murray (clinical director of Broadmoor Hospital) and his many associates agreed that 'the offences had arisen directly as a consequence of mental disorder'.

This case also highlights that sentencing guidelines enforce consistent outcomes to a potentially detrimental extent. Mitting J's decision was constrained by schedule 22 and schedule 21 of the 2003 Act, which provides the framework for determining the minimum term for an offence. When the seriousness of the offence fulfils the 'exceptionally high' category and the offender is at least 21 years of age when committing the act, the only available sentence outcome is a whole life order. As Mr. Peter Coonan fulfils these traits, and the judge was not convinced by the psychologists and psychiatrists, that was his sentence. This gives rise to an argument for a sentencing process that permits judges more discretion, so that the judge could maybe recognise the validity of the arguments with some slight difference in sentence. Overall this case shows that reforms to the criminal sentencing system have given rise to the potential for disproportionate sentences through giving too much power to people who are not informed.

Schneider noted that 'the assumptions we make and take for granted when dealing with the general population cannot be automatically made for the mentally disordered accused. It is critical that counsel take the time to know the peculiarities of their clients and the options that the law allows for in dealing with them'. It is this exact reason why the concept of requiring

judges to compartmentalise people into the different categories stipulated in the guidelines has been ineffective. Despite the attempt of the most recent guideline publication (with Annex A including a very short explanation of what various illnesses are) seems to miss the pivotal point that mental health issues impact all individuals differently. Therefore, the structure of guidelines and the various thresholds (determined by non-medical professionals) for offering mental health treatment is inappropriate. The cases above demonstrate that the guidelines create the opportunity for people to be denied reduced sentences on account of arbitrary requirements, thus showing complete ignorance to von Hirsch ideals of proportionate sentencing.

5. Conclusion

The many dimensions through which the Sentencing Council has failed and therefore created a sentencing process wherein mentally ill offenders (among others) are at excessive risk of disproportionate punishment underline the importance of reform.

It first failed in respect to creating realistic goals. The mutually exclusive nature of judicial discretion and consistency does not mean that England enjoys the advantages of both. Instead, the system is confused and achieves neither goal. The process of making judges statutorily bound to follow the guidelines had the direct impact of losing their judicial input, which has meant offenders in the case studies did not have their mental health issues appropriately respected and consequently they were subject to punishment that did not reflect their culpability due to their mental health issue. It also had the indirect impact of frustrating judges, This indicates a flaw in the system considering judges are the most familiar with sentencing, and so for them to be subject to unsavoury guidelines indicates that guidelines are not an asset to the sentencing system. More importantly, judicial frustration at guidelines has been shown to actually be a cause for inconsistency in sentencing, as they have used their judicial discretion in order to either vent their frustrations or flout instructions.

Upon study of the inhuman, mathematical system used in Minnesota, in comparison to the holistic approach facilitated by the instinctive synthesis model, it is clear that the latter is more suited to creating a sentencing system that would have greater regard to the extent to which mental health affects offenders. Whilst some may fear that this would be the death knell to consistency, the current operation of the system in Australia demonstrates that both are possible.

Overall, the needs of the mentally ill are not appropriately considered in the English-Welsh sentencing system, and the guidelines urgently need to be intensely reworked in order to ensure offenders are not subject to disproportionate punishment.

Provisional Bibliography (contact for full bibliography and further commentary)

Ashworth A., Hirsch A., *Proportionate Sentencing* (1st edition, OUP 2005)
Bagaric M., and Edney R., ‘What’s Instinct Got to Do with It? A Blueprint for a Coherent Approach to Punishing Criminals’ (2003) 27 Criminal Law Journal

Corns C., ‘Destructuring Sentencing Decision-Making in Victoria’ (1990) 23 Australian & New Zealand Journal of Criminology 145
Dhami M., Prisoner Disenfranchisement (2013) 13(1) Analyses of Social Issues and Public Policy <https://doi.org/10.1111/asap.12007> accessed 16 May 2020
Lichtenstein O., ‘Inside Britain’s Highest Security Psychiatric Hospital’ (ITV Studios Limited, 2014) <https://www.youtube.com/watch?v=27ZovKsf9Mc&ab_channel=DocumentaryTV> accessed 16 May 2020
Roberts J., ‘Public Opinion Towards the Lay Magistracy and the Sentencing Council Guidelines’ (2012) 52 British Journal of Criminology 7

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R v L [2019] EWCA Crim 1326 [2019] 7 WLUK 367