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### Sentencing dangerous offenders: policy and practice in the Crown Court

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**\*Crim. L.R. 693 Summary:** *This article reports the results of an empirical investigation into the operation of certain disparate measures designed to deal with the sentencing of allegedly dangerous offenders.*<sup>1</sup>

#### Introduction

Protective sentences can be imposed under a number of provisions. These include:

(1) Section 80(2)(b) of the Powers of Criminal Courts (Sentencing) Act 2000 (formerly section 2(2)(b) of the Criminal Justice Act 1991)<sup>2</sup> by which courts may extend the “normal sentence”<sup>3</sup> that may be appropriate for a **\*Crim. L.R. 694** serious “violent”<sup>4</sup> or “sexual”<sup>5</sup> offence if of the opinion that only such a sentence would be adequate to protect the public from “serious harm”<sup>6</sup> from the offender.

(2) Section 109 of the Powers of Criminal Courts (Sentencing) Act 2000 (formerly section 2 of the Crime (Sentences) Act 1997)<sup>7</sup> which provides for automatic life sentences for offenders who commit a second “serious offence”.<sup>8</sup>

(3) The use of “extended sentences” under section 85 of the Powers of Criminal Courts (Sentencing) Act 2000 (formerly section 58 of the Crime and Disorder Act 1998).

(4) Discretionary life sentences.

In summary, the research set out to identify and examine in as much detail as possible cases dealt with under these provisions over a six month period in six Crown Court Centres in order to discover more about the nature of judicial reasoning, the extent of transparency in decision making, and whether there were any discernible relationships in their use.

#### Previous Research

The only relevant previous empirical research was that carried out by Flood-Page and Mackie which examined the operation of section 80(2)(b) as part of a larger study on Crown Court and Magistrates' Courts sentencing practices.<sup>9</sup> The study sampled 1,777 cases sentenced in 18 Crown Court centres between September 1995 and February 1996. The main aim of the report with regard to protective sentences was simply to discover how many there were. As may be seen from Table 1, three per cent of custodial sentences where the offender was convicted of a violent offence and six per cent of custodial sentences where the offender was convicted of **\*Crim. L.R. 695** sex offences (mainly indecent assault) were passed as section 80(2)(b) sentences. The average sentence length in section 80(2)(b) cases for violent offences was 7.2 years compared to 2.3 years for commensurate sentences, whilst for sexual offences the averages were 5.1 years and 3.0 years respectively.<sup>10</sup> The study also produced some basic information about the kinds of cases in which protective sentences were passed and, more particularly, tried to look at the type of information that judges used to assess the risk posed by the offender. However, despite the fact that the information was not detailed, the following findings are significant, if not particularly surprising.<sup>11</sup>

(i) All sexual offenders and the majority of violent offenders receiving longer than commensurate sentences under section 80(2)(b) had previous convictions which included convictions for similar offences.

(ii) The fact that the defendant was mentally ill was a factor in the decision to pass a section 80(2)(b) sentence in five of the 13 cases where a protective sentence was passed. In the one example

provided where the offender had pleaded guilty to a charge of attempted rape of a 78 year old woman, the judge was unable to make a hospital order since psychiatric reports suggested that the mental illness would not respond to treatment.<sup>12</sup> Similarly, three first offenders in the sample were also described as “mentally ill”.

From the limited information provided it is impossible to establish what proportion of those described as “mentally ill” in the sample could also be described as “dangerous severe personality disordered (DSPD) offenders” (assuming such a diagnosis is possible), but there are undoubtedly many violent and sexual offenders who suffer from various degrees of mental instability which may consist of an “untreatable” personality disorder and who are deemed to be dangerous.<sup>13</sup> Such offenders may in future be detained indefinitely if found to be suffering from a severe personality disorder which as a consequence renders them a serious risk to the public.<sup>14</sup>

**\*Crim. L.R. 696** It should also be pointed out that there are no research studies which examine the operation of section 109 of the Powers of Criminal Courts (Sentencing) Act 2000. The Government has suggested that the number of indeterminate life sentences is likely to rise following the implementation of section 109 and contribute to a reduction in the number of DSPD offenders free to commit serious violent and sexual crimes.<sup>15</sup> The fact remains, however, that section 109 has many serious deficiencies, particularly since several child-related offences such as indecent assault, indecency with a child and child abduction are excluded from the qualifying list of “serious offences”, and other important anomalies exist.<sup>16</sup> Similarly, no empirical research exists which evaluates the use of extended sentences under section 85 or discretionary life sentences.<sup>17</sup>

## Methodology

The research sample was drawn from cases listed for hearing at six First Tier Crown Court Centres selected from each of the six Circuits, *i.e.* Cardiff (Wales and Chester): Lewes (South Eastern): Nottingham (Midland and Oxford): Preston (Northern): Sheffield (North Eastern) and Winchester (Western). This number represented 6.7 per cent of the 90 Crown Court Centres (including Greater London Centres) and ensured adequate representation from each Circuit.<sup>18</sup>

More specifically, it was decided to concentrate on the following specific offence groups which fall within the ambit of section 80(2)(b):

Manslaughter, wounding or causing grievous bodily harm with intent, rape, attempted rape and indecent assault.

561 cases falling within these offence categories were identified from the weekly Running Lists supplied by each participating Crown Court Centre for the six month period--December 1998 to May 1999<sup>19</sup> (see Table 2). Although section 80(2)(b) is applicable in cases where the defendant is *convicted*<sup>20</sup> of an offence which falls within the specified sexual or violent offence categories,<sup>21</sup> it proved impractical to identify cases at the point of conviction. The offence categories were chosen on the basis that they included the most common and seriously perceived violent and sexual offences.

There is some overlap between those “violent” and “sexual” offences covered by section 80(2)(b) and “serious offences” relevant to section 109. For example, manslaughter, wounding or causing grievous bodily harm with intent, rape and attempted rape are “qualifying” offences under section 109, whilst indecent assault is not included. As part of the research it was, therefore, decided to identify cases where the offence “triggering” the automatic life sentence was either manslaughter, **\*Crim. L.R. 697** wounding or causing grievous bodily harm with intent, rape or attempted rape. Cases involving discretionary life sentences and extended sentences under section 85 were likewise identified from the trial record sheet (Form 5089).<sup>22</sup>

Additional information for all sample cases was obtained from the trial record sheet which was also used to identify relevant court reporting firms from which verbatim transcripts of relevant trial proceedings were obtained.<sup>23</sup> In longer than commensurate and automatic life sentence cases the transcripts analysed consisted of the judge's summing-up, defence counsel's mitigation on sentence and the judge's sentencing remarks, whereas only the latter were analysed in cases involving discretionary life sentences and extended sentences.

Longer than commensurate and automatic life sentence cases were studied in detail using the case study method<sup>24</sup> in an effort to develop as full an understanding of each case as possible. This “holistic” focus was, therefore, refined in terms of specific research questions and the desire to develop propositions which were generalizable to other “similar” cases. A more limited application of

this research technique was possible for discretionary life sentence and “extended sentence” cases. The research was, therefore, concerned to examine the context of specific sentencing decisions in the trial process by describing and analysing the appropriation and assimilation of relevant information as an externally observable process, whilst also considering the extent to which trial participants might appear to share similar perceptions of relevant case material and legal rules.

## Results

### *Extended supervision*

Undoubtedly, the most significant findings relate to the use of extended supervision under section 85 and section 86.

As may be seen from Table 5, some form of extended supervision was imposed in 30 (5.4 per cent) of sample cases. It is important from the outset to point out that the expression “extended supervision” is used deliberately to encompass the use of either section 86 of the Powers of Criminal Courts (Sentencing) Act 2000 (formerly *\*Crim. L.R. 698* section 44 of the Criminal Justice Act 1991) or section 85.<sup>25</sup> The significance of this for the research is considerable since, in addition to extending supervision to sexual *and* violent offenders, section 85 only came into force on September 30, 1998 and applies only to offences committed after that date.

It is frequently overlooked in section 86 cases that section 86(1)(b) mandates the court to have regard to the matters referred to in section 32(6)(a) and (b) of the 1991 Act when ordering that section 86 should apply. The matters referred to in section 32 are: a) the need to protect the public from serious harm from offenders; and b) the desirability of preventing the commission by them of further offences and securing their rehabilitation. I would submit that in order to satisfy the section 86(1)(b) requirement the court must articulate its reasons as consistent with section 32(a) and (b) since there is otherwise no external recognition that this mandatory provision has been complied with. This occurred in only two of the 20 sample cases where section 86 applied. Furthermore, the effect of the licence arrangements imposed was not fully explained and the 1998 Practice Direction on custodial sentences inadequately complied with in six sample cases. More significant was the level of incomplete or inadequate explanation provided in the 10 section 85 cases. In seven cases there was no explanation of the rationale for applying section 85 and its effect was fully explained in only six cases. In two cases the issue was specifically left to defence counsel and in another the judge simply stated “I make a two year extended supervision order under section 58 of the Crime and Disorder Act. You may go down.” In addition to appearing contrary to the expressed intention of the 1998 Practice Direction on custodial sentences, these deficiencies are important since section 85 itself is quite explicit in its explanatory requirements. In particular, section 85(1)(b) refers to the fact that section 85 applies only where the offender would, apart from this section, be subject to licence requirements which in the court’s opinion would be inadequate “for the purpose of preventing the commission by him of further offences and securing his rehabilitation”. Clearly, there is an obligation for the sentencer to place reasons on the record. Such transparency is essential where the potential exists for an extremely lengthy period of incarceration.

Turning now more directly to the data in Table 5, the following remarks should be prefaced by the comment that the figures necessarily reflect the seriousness of cases present in the sample. Nevertheless, I would suggest that the data should be regarded as “representative” since the sample includes all relevant case categories *\*Crim. L.R. 699* listed for hearing during a randomly selected six month period in centres representing each of the six Crown Court circuits.

Subject to this proviso, the data are interesting in that they indicate that, in the offence categories examined, 30 (5.4 per cent) of cases were serious enough to warrant longer than normal supervision on licence. Even on these figures, the “extended sentence” appears to be a more attractive sentencing option than the longer than commensurate sentence under section 80(2)(b) (1.79 per cent compared with 0.9 per cent sample use). Winchester was the only Circuit Centre where section 85 was not applied in the sample cases.

In its recently issued Consultation Paper on the use of extended sentences the Sentencing Advisory Panel cites Home Office statistics which show 15 extended sentences were passed in 1999 and at least 50 in 2000, pointing out that the actual use of extended sentences was probably greater because the Crown Court computer system has not yet been adapted to recognise extended sentences separately.<sup>26</sup> The figures from this research tend to suggest that the Home Office figures

may be a significant underestimate. Given that the research data (10 extended sentences) related to a six month period (December 1998 to May 1999) shortly after extended sentences were introduced and covered only 6.7 per cent of Crown Court centres, a reasonable estimate based on these figures would suggest something in the region of 100 extended sentences being passed during 1999. It should also be borne in mind that the research information was obtained directly from trial record sheets and confirmed by analysis of the judge's sentencing comments in each case. It would seem, therefore, that the 30 per cent increase recorded by the Home Office for 2000 is just beginning to reflect reality; that extended sentences have been used extensively by the judiciary since their introduction in September 1998.

In one case only was a section 80(2)(b) sentence combined with an "extended sentence" under section 85. This case bears further analysis, particularly in the context of Thomas's suggestion<sup>27</sup> that such a combination may result in "a crushingly long period of custody which is totally out of proportion to the gravity of the offence and the risk presented by the offender." In the instant case the defendant (convicted of offences involving serious violence including section 18) received sentences totalling 79 months. On the basis that the offender would ordinarily have been automatically released at the two-thirds point of his sentence (52.6 months) and only remained on licence until the three-quarters point (59.3 months), an "extended sentence" of 36 months under section 58 was imposed by the judge on public protection grounds. In so doing the judge drew particular attention to the defendant's paranoid personality, his lack of remorse and his aggressively violent and uncontrollable temper. However, the psychiatrist's report specifically recommended anger management, assertiveness training and problem-solving skills training, all of which were currently available in prison, and further stated that there would be no advantage in extending the defendant's sentence in terms of risk management. Although the retributivist element in this sentence was justified on the basis that an "extended sentence" would not result in a sentence totally out of proportion with the gravity of the offence, the consequentialist (reductivist) risk element was not fully supported by the available evidence. In such circumstances it *\*Crim. L.R. 700* becomes difficult to support a potential increase in a custodial term of over one-third.

### ***Protective sentences under section 80(2)(b)***

As is evident from Table 3, only five (0.9 per cent)--a surprisingly small number of sample cases--were passed as section 80(2)(b) sentences. The only comparable Home Office figures<sup>28</sup> are those drawn from Flood-Page and Mackie's study (discussed earlier) where, from a sample of 372 violent and sex offences, 3.5 per cent of offenders convicted received a section 80(2)(b) sentence (Table 1). The relative absence of section 80(2)(b) sentences in the sample was both unexpected and significant in that the sample itself represented a large percentage (82.5 per cent) of all selected violent and sexual offences listed for hearing during the six month data collection period.<sup>29</sup> Furthermore, the offence categories selected were (with the exception of manslaughter) likely to be well represented as listed cases across the six Circuits.<sup>30</sup>

The paucity of section 80(2)(b) cases may have been due to the fact that defendants' previous convictions included "serious offences" which triggered the imposition of an automatic life sentence under section 109. For example, if a person convicted of rape or some other serious sexual offence had a previous conviction under section 18 of the Offences against the Person Act 1861 for causing grievous bodily harm with intent, section 80(2)(b) would no longer apply and the offender would receive a life sentence under section 109, unless exceptional circumstances applied. However, section 80(2)(b) remains significant largely because the definitions of "violent" and "sexual" offence under section 80(2)(b) are not synonymous with that of a "serious offence" under section 109. Further, although section 109 only came into force on October 1, 1997 (as section 2 of the Crime (Sentences) Act 1997) and is, of course, mandatory, this would not have effected the throughput of potentially relevant cases since the first serious offence could have been committed before the section came into force.

The research also examined the extent of judicial compliance with the procedural requirements contained in section 79(4) of the Powers of Criminal Courts (Sentencing) Act 2000 (formerly section 2(3) of the Criminal Justice Act 1991). Section 79(4)(a) requires the sentencer to state in open court that he is of the opinion that section 80(2)(b) applies and give reasons which support that opinion, whilst section 79(4)(b) imposes an obligation on the sentencer to explain to the defendant in open court and in ordinary language why it is passing a custodial sentence on him. Significantly, the former section 2(3)(b) of the Criminal Justice Act 1991 stated that the court's duty was to "explain to the offender in open court and in ordinary language *why the sentence is for such a term*". This wording

was *\*Crim. L.R. 701* ambiguous in that it could have been construed as referring to the passing of an ordinary commensurate sentence, or, as imposing an additional requirement (in section 2(2)(b) of the 1991 Act cases) to explain further the court's reasons for imposing a longer than commensurate term on the defendant. The requirements of section 79(4)(a) were fully adhered to in all five sample section 80(2)(b) cases, although the explanatory requirements then imposed by section 2(3)(b) of the 1991 Act remained unfulfilled in the majority of cases where either no or an inadequate explanation was given to the defendant. Similarly, although discounts for guilty pleas<sup>31</sup> were given in three cases no explanation was forthcoming, nor was the extent of the discount made clear.<sup>32</sup> Furthermore, despite the significance attached to the distinction between the commensurate and protective elements in the section 80(2)(b) disposal drawn by the Court of Appeal and section 28 of the Crime (Sentences) Act 1997, in no sample case was this relationship identified and explained by the judge.

All five sample cases equated the determination of "dangerousness" with the defendant's inability to control his violent and/or sexual impulses. However, the relationship between aggravating and mitigating factors and the perceived need to protect the public from future serious harm is complex and fundamental to determining appropriate levels of risk and anticipated harm. The transcript analysis looked for evidence of the following potentially relevant personal circumstances: remorse, victim vulnerability, gaps in offending, lack of pattern, reduction in serious offences, successfully completed previous sentences, behaviour following charge, age, health, reparation and assistance to the police. Although age and assistance to the police were mentioned in two cases no other factors were evident except remorse and victim vulnerability. In the section 18 case it was the defendant's repeated failure to express any kind of remorse for his victims which was particularly significant. The psychiatric report suggested that the defendant's personality disorder allowed him to acknowledge his wrongdoing, the pleasure he derived from acts of violence and his need for treatment, whilst simultaneously being devoid of feelings of guilt, remorse or individual responsibility. In the two indecent assault cases remorse associated with a willingness to acknowledge a predisposition to future offending behaviour were regarded as significant determinants of risk management (rather than assessment) and as *post hoc* justifications for the decision to impose a longer than commensurate sentence. In such cases victim vulnerability<sup>33</sup> was the key determinant of predicted harm whilst unreformed paedophilic orientation coupled with several similar previous convictions were key determinants of risk, although the judicial language ranged from the defendant "remaining a threat to others" to posing "a very grave risk" or "a grave and escalating risk".

It is clear that the judicial decision on probability that there must be a "substantial risk" of further offending should be based on psychiatric opinion where the *\*Crim. L.R. 702* defendant has a mental or personality problem.<sup>34</sup> Although the present sample is small there is some indication that judges in any event draw the main inferences on risk from previous convictions and offence circumstances, and see this as the determinant factors to be extracted from any psychiatric report. Two cases involving paedophiles with abnormal personality traits provide an illustration. In the first, where no psychiatric report was obtained, the judge declared that the section 80(2)(b) sentence was passed on the basis that the defendant was an unreformed paedophile coupled with the large number of previous convictions. This clearly took precedence over the possibility suggested in the pre-sentence report that therapy and assistance during a normal commensurate sentence might help the defendant to overcome his predisposition. In the second case, which did involve a psychiatric report, an identical result was achieved since the judge concentrated on the defendant's past record and predisposition in assessing risk whilst ignoring the fact that the psychiatrist had specifically counselled against an extended sentence, arguing that community supervision following release from a normal commensurate term would be as effective in reducing the risk of re-offending. Such cases suggest that judicial interpretation of information concerning the sentencing process is contingent on attitudinal variables<sup>35</sup> that include (*inter alia*) penal philosophy. If these findings were to be replicated they might lead us to further question the wisdom of allowing the determination of "dangerousness" to remain a judicial decision.

With one exception judges, as required,<sup>36</sup> clearly alerted defence counsel to the possibility that a longer than commensurate sentence was contemplated. It is interesting to note that a major component in the construction of defence mitigation related to the treatment issue. In circumstances where expert opinion recommended treatment the likely unavailability of suitable treatment programmes, facilities and the predicted uncertainty of outcome enabled defence counsel to argue forcefully against the desirability of any extended period of custody under section 80(2)(b). However, where expert opinion suggested a good prognosis following a specialist treatment programme the mitigation was clearly divided between the need to address traditional commensurate concerns (such as credit for a guilty plea, age, good character, etc.) and the incongruity of an additional protective

term based on contingent future behaviour. At this point the mitigation generally advanced the defendant's willingness to undertake any available treatment. Hence, it appears that mitigating factors are predominantly examined in a way consistent with the proportionality rationale of just deserts and, therefore, relate specifically to harm and culpability of the conduct in terms of crime seriousness. In mitigation terms, it is arguable that defence counsel fail to draw out the distinction between the relevance of previous convictions to the assessment of desert and their major impact on risk prediction. This dichotomy also reflects the judicial tendency to focus on previous convictions and offence circumstances as risk determinants at the expense of wider social factors.

**\*Crim. L.R. 703** The "loosening" of the relationship between commensurability and public protection in *Chapman*<sup>37</sup> may well accentuate the consequences flowing from the incompatible rationales implicit in section 80(2)(b). If, as Thomas suggests,<sup>38</sup> the protective element in the sentence expands to compensate for discounts in the proportionate term following a guilty plea, defence counsel's attention will inevitably need to focus on strategies to attack section 80(2)(b)'s social defence rationale. Hence, the commensurate concerns of traditional mitigation will be replaced by a need to address more directly the risk and harm prediction issue. Correspondingly, the narrow judicial approach to the assessment of "dangerousness", whilst perhaps understandable, will be further exposed as inadequate.<sup>39</sup>

### ***Automatic life sentences under section 109***

Although there is no statutory requirement for sentencers to provide an explanation of their reasons for the imposition of an automatic life sentence to the defendant under section 109 (since it is mandatory), such an explanation would, nevertheless, be compatible with the expressed wishes of the Court of Appeal regarding transparency contained in the 1998 Practice Direction on Custodial Sentences<sup>40</sup> which applies (*inter alia*) to discretionary life sentences. In none of the four section 109 cases examined in the research was any such explanation forthcoming, there being instead a simple statement that each was a case where an automatic life sentence applied. This is in marked contrast to the obligation imposed by section 109(3), which applies where the court does *not* impose a life sentence under section 109, requiring it to state in open court that it is of the opinion that there are "exceptional circumstances relating to either of the offences or to the offender"<sup>41</sup> which justify it in not imposing a life sentence under section 109 and what the "exceptional circumstances" are. Again, there is no statutory obligation under section 109(2) for sentencers to state in open court that there are *no* "exceptional circumstances" applicable, but this seems the logical corollary of section 109(3) and is what occurred in the four sample cases. Hence, typically the sentencer stated that the only course open was the imposition of an automatic life sentence and that there were no "exceptional circumstances" applicable without further elaboration. There was no explanation of how and what factors might amount to "exceptional circumstances" and the rationale for their non-applicability in the instant case.

Notwithstanding, of much greater significance was the apparent injustice in sample cases produced by the mandatory nature of section 109 and forthrightly **\*Crim. L.R. 704** expressed by one particular judge. In addition to the technical anomalies produced by section 109,<sup>42</sup> the opinions expressed by this judge were no doubt symptomatic of a much wider disenchantment<sup>43</sup> with section 109 and remain a cause of serious concern given the Government's acceptance of the strategic significance of section 109 in dealing with "dangerous" offenders (see *post*). Whilst the need for strained interpretation of the "exceptional circumstances" exception was firmly dispelled by Lord Woolf C.J. in the important case of *Offen*,<sup>44</sup> it is worth noting the extent of judicial opprobrium expressed in *Turner*<sup>45</sup> where Rougier J. delivered the Court of Appeal's judgment in connection with the fourth sample case which was heard by Swanson H.H.J. at Sheffield Crown Court in September 1999. At first instance the judge dealt at length with the implications of section 109 and the nature of the "exceptional circumstances" exception. The facts of the case were straightforward insofar as the defendant was found guilty of one count of wounding with intent to cause grievous bodily harm which "triggered" the automatic life sentence provision in section 109. However, the previous "serious offence" was a conviction for manslaughter committed in 1967 when the appellant was 22 and for which he was sentenced to three years imprisonment. In mitigation it was suggested that there were facts relating to both offences which were probably "exceptional" by themselves, although not likely to be accepted as such following *Kelly*.<sup>46</sup> For example, the three year sentence for manslaughter was a "very modest sentence" which the judge agreed reflected that the victim's death had been largely a matter of luck resulting from an assault. Similarly, the second offence resulted from a verbal argument, and the material point appears to have been the use of excessive force by the defendant. In addition, it was accepted that the defendant was not "dangerous" and there was no evidence that he was likely to

re-offend; that he was “effectively of good character”, a “popular” and “decent” man and that the victim in the case had previously and far more recently been convicted of a serious offence.

Nevertheless, Swanson H.H.J. recognised that (following *Kelly*) the length of time between offences could not be exceptional any more than the fact that the defendant was not a danger to the public. The learned judge expressed his frustration thus:

“I have struggled, but can in conscience and in my attempt to interpret the law, see no way that I can find that there are in the circumstances of this case, or in your circumstances, exceptional circumstances to justify me not imposing a life sentence. You are a popular man. That may give cause to the public, certainly where you live, to wonder if this kind of statute is the kind of statute that they really want in a civilised society ...”.

**\*Crim. L.R. 705** It is somewhat ironic that the pre-sentence report had been unequivocal in suggesting that a form of community sentence was an eminently suitable disposal for the offender. In expressing the Court of Appeal's opinion Rougier J. indicated that in passing section 2 of the Crime (Sentences) Act 1997 Parliament must have realised that a judge's sense of justice might be offended and noted (significantly) that there had been no submissions on matters of human rights law. The application had to be refused “even where to the distaste of the court, the result exemplified the type of injustice which the 1997 Act could bring about”.

It is perhaps instructive to compare these observations with those of Rose L.J. in *Stephens*.<sup>47</sup> It is submitted that the Court of Appeal reached an absurd result in deciding that where defence counsel failed to inform the defendant as to the likelihood of his receiving a mandatory life sentence if he were to be convicted of causing grievous bodily harm with intent (having previously been convicted of a “qualifying offence”) this was capable of amounting to an “exceptional circumstance” within section 109(3). In this case the court found that, if the defendant had been made aware of the fact he might have decided to plead guilty to the alternative charge of inflicting grievous bodily harm, a plea acceptable to the Crown, and would thereby have avoided the mandatory provisions of section 109. Although this was not a circumstance “regularly, routinely or normally encountered” (as *Kelly* suggested), or one suggesting that the offender did not constitute a significant risk to the public (as *Offen* now suggests) this case seems to place a further premium on plea as a bureaucratic expedient which equates with justice only in the sense of the defendant having been deprived of an opportunity to manipulate the system to his own advantage without referring to the merits of the case.

### ***Discretionary life sentences***

It should be noted that there has been persistent legislative failure to consider the relationship between the determinate protective sentence under section 80(2)(b) and the indeterminate sentence of life imprisonment. Where a discretionary life sentence for a “violent” or “sexual” offence is contemplated on public protection grounds the criteria in section 80(2)(b) must be complied with: (section 80(4), formerly section 2(4) Criminal Justice Act 1991). In such a case, as confirmed in *Chapman*<sup>48</sup> the gravity of the offence must be such as to merit a very long sentence, and the public protection condition must be satisfied by evidence that the offender is likely to remain a serious danger to the public for an indeterminate period. Furthermore, the fact remains that, according to the second criterion in *Hodgson*, life imprisonment is only appropriate for offenders whose mental condition renders them dangerous to the public but does not amount to a “psychopathic disorder” (“treatable” under the Mental Health Act 1983) when a hospital order with restriction may apply. However, a discretionary life sentence imposed for the purposes of retribution or deterrence rather than public protection need not comply with section 80(2)(b); *Baker*.<sup>49</sup>

The four discretionary life cases were initially examined against the criteria for the imposition of such sentences set out in *Hodgson*.<sup>50</sup> Three of the cases involved serious and persistent indecent assault, rape and indecency offences (two within a **\*Crim. L.R. 706** family context) whilst the fourth involved murder,<sup>51</sup> attempted murder, robbery and section 18 offences. In terms of the *Hodgson* criteria, all four cases justified life sentences on the basis of offence gravity; three on the basis that the defendant was likely to remain a serious danger to the public for an indefinite period and one (the murder case) where the defendant was suffering from a mental incapacity falling short of a treatable psychopathic disorder within the terms of the Mental Health Act 1983. On the question of whether it is possible to differentiate discretionary life and section 80(2)(b) cases, the judge in the one sample case involving a regressive paedophile deliberated between these two sentencing options and took significant account of the public's “right to demand that the court did everything in its power to ensure that the defendant would never again be free to present such a risk to young children”.

Although clearly justified on the basis of the *Hodgson* criteria in the instant case, public perception is likely to assume an increased significance in judicial decisionmaking to the extent that the emphasis in the *Hodgson* criteria on seriousness is diminished in favour of risk and harm assessment.<sup>52</sup> In such circumstances public perceptions of dangerousness and victim vulnerability may (together with previous convictions) assume disproportionate significance in judicial assessments of risk and anticipated future harm at the expense of psychiatric and medical report recommendations. As Thomas suggests, the balance may be maintained by ensuring that the cut-off period specified under section 28 of the Crime (Sentences) Act 1997 does not fall below a certain figure designed to support the seriousness of the offence criteria in *Hodgson*.<sup>53</sup> However, even within these constraints the indirect influence of perceived public opinion, together with increased significance accorded to victim impact statements, may be significant in judicial determinations on the degree of dangerousness, thus upsetting the fine balance between seriousness and dangerousness sought in *Chapman*. In circumstances where offence seriousness is insufficient to satisfy the *Hodgson* criteria a longer than commensurate term under section 80(2)(b) is more consistent with logic and principle. This is clearly an area requiring some guidance from the Court of Appeal (Criminal Division). As regards the operation of section 28 itself, it is disturbing that only one judge complied fully with the obligation to state and explain the significance of the "specified period", thereby also complying with the 1998 Practice Direction on custodial sentencing. Of the remainder, one judge was reminded of its existence by counsel and no mention or indirect reference to its provisions made in the other two sample cases.

**\*Crim. L.R. 707** It is also interesting that the proportion of discretionary life sentences remained small (0.7 per cent), although not surprising given the continued existence of the restrictive *Hodgson* criteria.<sup>54</sup> Nevertheless, the apparent willingness of the judiciary to embrace the concept of the recently introduced "extended sentence"<sup>55</sup> as a separate protective measure is particularly significant and receives further comment later. This point is reinforced by the data in Table 4 which indicate the distribution of offences receiving some form of protective sentence in the sample. From this it is evident that 80 per cent of the "extended sentences" were passed for cases of indecent assault, although it must be remembered that approximately twice as many offenders are sentenced annually in the Crown Court for indecent assault than for rape in the Crown Court.<sup>56</sup> More significant, however, is the apparent preference in the sample for "extended sentences" in relevant sex offence cases rather than for offenders sentenced for assault with intent to cause grievous bodily harm.<sup>57</sup>

### Conclusions and implications

The most significant findings of this research undoubtedly relate to the apparent judicial preference for using the new form of extended sentence provided by section 85. I would suggest that there appear to be several inter-related aspects to this development:

(1) As the results confirm, there is paucity in the application of section 80(2)(b). Despite attempts to reconcile the reductivist credentials of section 80(2)(b) as an exception to the just deserts rationale for sentencing explicit in the 1991 Act,<sup>58</sup> its judicial neglect is due in no uncertain measure to judicial unease with the considerable burden of having to decide essentially non-legal issues relating to predicted risk and harm with such profound consequences for the deprivation of individual liberty. In addition, numerous difficulties continue to hinder the successful operation of section 80(2)(b), namely; the ongoing uncertainty as to what is (or is not) a "sexual" or "violent" offence as defined; the balance to be maintained between risk and harm in the assessment of dangerousness and its relationship to commensurability; the human rights implications of the **\*Crim. L.R. 708** release provisions applicable to section 80(2)(b); the appropriate relationship between the commensurate and the protective elements of the sentence; and the appropriateness and consequences of a guilty plea discount. These issues together with uncertainty as to choice between respective prospective measures are likely to militate against the combination of a longer than commensurate sentence with an extended supervision period under section 85.

(2) More probable, as this research tends to support, is an increased use of section 85 in combination with a commensurate sentence under section 80(2)(a). For example, its use in serious indecent assault cases<sup>59</sup> coupled with proposed changes in offence definitions and penalties<sup>60</sup> must surely provide a considerably more effective penal response than currently exists.

(3) This research reflects continued judicial uncertainty as to the appropriate choice between the protective measures currently available. This has been exacerbated by the retention of automatic life sentences under section 109, which continue to attract judicial opprobrium and general condemnation from commentators, yet appear certain to remain central to the Government's essentially "bifurcatory"

penal policy. As confirmed by the recent Home Affairs Select Committee Report,<sup>61</sup> the general expansion of this measure for DSPD offenders is viewed with equanimity and tacit approval. As Thomas suggests<sup>62</sup> there remains (following *Offen*) a need for later decisions to clarify exactly what amounts to a significant risk to the public--by no means a straight-forward task--and, in any event, the numerous fundamental objections to such forms of collective incapacitation remain.<sup>63</sup> The continued existence of such legislative provisions also exacerbates the palpable tension between Government penal policy and the higher judiciary's perceived need to defend judicial independence in sentencing matters which has persisted since the Criminal Justice Act 1991. Notwithstanding, arguments to encourage the judicial use of discretionary life sentences<sup>64</sup> ignore the fundamental need for further Court of Appeal guidance on the appropriate relationship and choice between the various sentencing alternatives. If section 80(2)(b) were to be abolished and section 109 remain, what would be the basis for the indeterminate detention of a non-DPSD offender, since section 109 relies on *\*Crim. L.R. 709* on repeat offending and section 85 merely relies on extended supervision?<sup>65</sup> If indeterminate detention is given to all dangerous offenders (subject to review) and made the only available sentence, what will happen to the *Hodgson* criteria? Non-repeat offenders with "personality disorders" falling short of DSPD which are currently prima facie section 80(2)(b) cases would undoubtedly benefit from independent assessment<sup>66</sup> and the appropriate use of extended supervision available under section 85.

(4) The research highlighted numerous examples of judicial failure fully to explain sentencing decisions consistently with principles of openness and transparency exemplified by the 1998 Practice Direction on Custodial Sentences.<sup>67</sup> This is surely a matter of some concern, particularly in the context of Article 6 of the European Convention on Human Rights with its emphasis on public scrutiny of the trial process in contested cases.

In summary, the research findings indicate that, so long as discretionary decisions on dangerousness remain within the judiciary they are likely to focus disproportionately on legal factors (such as previous convictions and offence seriousness) in making their judgments on risk and harm assessment. I would submit that judicial reticence to use existing alternatives (such as section 80(2)(b) and discretionary life sentences) stems from this long-standing fundamental flaw in dangerousness provisions which require judges to weigh (often) complex medical evidence regarding predicted behaviour with conventional legal factors relating to aggravation and mitigation. This is exacerbated by a lack of Court of Appeal guidance, and manifests itself in a judicial failure to fully articulate the reasons underlying the sentencing choices made. It is, therefore, not altogether surprising that the judiciary may have indicated a preference for the concept of extended supervision where dangerousness is predicted, since section 85 (in particular) makes a clear conceptual distinction between fixing the custodial term and the extension period during which the offender will be subject to licence and the rationale for each.

Further, the decision to add an extension period in section 85 is specifically tied to whether the court considers the normal licence period applicable to the custodial term as adequate to achieve the objectives stated in section 85(1)(b), namely, the prevention of crime and rehabilitation of the offender. In 1985 Nigel Walker<sup>68</sup> commented on the apparent reluctance by judges to use the form of extended sentence originally introduced under the Criminal Justice Act 1967, suggesting that part of the reason was due to the fact that judges generally were not in favour of determinate sentences which exceeded what the offence itself seemed to merit. Although the rationales and forms of contemporary protective sentence are manifestly different, I would suggest that vestiges of what Walker calls "a retributive limitation" continue to govern the judicial approach to sentencing dangerous offenders. The future attractiveness of section 85 may, therefore, lie in the separate bases for the decisions relating to dangerousness and commensurability, despite the fact that the overall problem of proportionality between offence gravity and *\*Crim. L.R. 710* sentence remains.<sup>69</sup> The judicial reliance on legal factors in predictive decision-making revealed in this research suggests that the distinction between commensurability and prevention drawn by section 85 may be desirable. Nevertheless, the discretionary decision on predicted dangerousness remains a judicial one. I would suggest that, given the weak moral (and practical) justifications for these decisions, they should no longer remain a solely judicial responsibility.

**Table 1: Violent and Sex Offenders by type of custodial sentence<sup>1</sup> (Home Office 1998)**

	No. sentenced	No. receiving custodial sentence	No. receiving protective sentence

		n	(%)	n	(%)
Violent offences	292	171	(59)	82	(3)
Sex offences	80	69	(86)	53	(6)
Total	372	240	(65)	13	(3.5)4
Notes:					

**Table 2: Composition of research population by Crown Court Centre**

Centre	Missing Cases <sup>1</sup>	Non-protective sentences	Protective sentences	Sample population	Target population	Sample as percentage of target population
Cardiff	2	160	10	170	172	98.8
Lewes	2	33	5	38	40	96.0
Nottingham	3	116	7	123	126	97.6
Preston	14	93	10	103	117	88.0
Sheffield	62	72	2	74	136	54.4
Winchester	35	44	9	53	88	60.2
Total	118	518	43	561	679	82.5
Note:						

**Table 3: Protective Sentences by Crown Court Centre**

Centre	S.80(2)(b)	S.109	Life	S.85/S.86	Total
Cardiff	1		1	8	10
Lewes	1	1	1	2	5
Nottingham			2	5	7
Preston	1	1		8	10
Sheffield		1		1	2
Winchester	2	1		6	9
Total	5	4	4	30	43

Offence1	S.80(2)(b)	S.109	Life	S.852	Total
Manslaughter			7		7
S.18	1	2		1	4
Rape	1	2	3		6
Attempted			1	1	2
rape					
Indecent	3			8	11
assault					
Total	5	4	11	10	30
Notes:					

	S.86		S.85		Total	
	n	(%)	n	(%)	n	(%)
Cardiff	6	(3.5)	2	(1.2)	8	(4.7)
Lewes			2	(5.3)	2	(5.3)
Nottingham	3	(2.4)	2	(1.6)	5	(4.1)
Preston	5	(4.9)	3	(2.9)	8	(7.8)
Sheffield			1	(1.4)	1	(1.4)
Winchester	6	(11.3)			6	(11.3)
Note:	Percentages are calculated on the basis of the total of sample cases for each Centre, i.e. Cardiff (170), Lewes (38), Nottingham (123) Preston					

(103),  
Sheffield  
(74),  
Winchester  
(53).

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1. In this study the expression "protective sentence" is used generically for convenience to reflect disposals which may claim some reductivist impact on the future criminality of "dangerous" offenders. Note that Mental Health Act disposals were excluded from the analysis.
  2. The justificatory section is section 79(2)(b) (formerly section 1(2)(b) of the 1991 Act) which provides a second criterion for the imposition of a custodial sentence where the offence is a violent or sexual offence and that only a custodial sentence would be adequate to protect the public from serious harm from the offender. Section 80(2)(b) deals with fixing sentence length and provides that where the offence is a violent or sexual offence the custodial sentence shall be for such longer term (not exceeding the statutory maximum) "as in the opinion of the court is necessary to protect the public from serious harm from the offender".
  3. In this context "normal" refers to a commensurate sentence passed in accordance with the just deserts rationale embodied in section 79(2)(a) (formerly section 1(2)(a) of the 1991 Act) and operationalised through the application of section 80(2)(a).
  4. Section 161(3) defines a violent offence as an offence which leads or is intended or likely to lead to a person's death or to physical injury to a person and includes an offence which is required to be charged as arson (whether or not it would otherwise fall within this definition).
  5. Section 161(2) lists a number of offence creating sections to provide the definition of "sexual offence". These include rape, incest, sexual intercourse with under age females and indecent assault. For further discussion see M. Wasik and R. Taylor, *Blackstone's Guide to the Criminal Justice and Public Order Act 1994* (London: Blackstone Press, 1995) 24.
  6. Section 161(4) states that any reference to protecting the public from serious harm is to be construed as a reference to protecting members of the public from death or serious personal injury, whether physical or psychological, which would be occasioned by future violent or sexual offences committed by the offender.
  7. Section 109 requires the court to impose an automatic life sentence on any offender over 18 who is convicted of a "serious offence" committed after the commencement of the Act, if he has been convicted of another "serious offence" before committing the later serious offence, unless the court is of the opinion that there are exceptional circumstances relating to either of the offences or to the offender which justify its not doing so.
  8. Section 109(5) includes the following within the definition of a "serious offence", *i.e.* an attempt, conspiracy or incitement to murder, soliciting murder, manslaughter, wounding or causing grievous bodily harm with intent, rape or attempted rape, intercourse with a girl under 13, various firearms offences and robbery involving possession of a firearm or imitation firearm.
  9. C. Flood-Page and A. Mackie, *Sentencing Practice: an examination of decisions in magistrates' courts and the Crown Court in the mid-1990s*. Home Office Research Study No. 180 (London: HMSO, 1998).
  10. *ibid.*, 92.
  11. *ibid.*, 93.
  12. A discretionary life sentence was imposed instead on public protection grounds. It must be assumed that Flood-Page and Mackie use the expression "mental illness" in a generic sense, since "treatability" is not a condition precedent to the making of a hospital order in the case of "mental illness" under the Mental Health Act (1983).

13. A typical example was *Creasey* (1994) 15 Cr.App.R.(S) 671; [1994] Crim.L.R. 308, where the defendant was described as having an untreatable paedophillic orientation and an inability to accept responsibility for his own behaviour.
14. White Paper, *Reforming the Mental Health Act*, Cm 5016, Part II, 2000. See further, Home Office/Department of Health, *Managing Dangerous People with Severe Personality Disorder: Proposals for Policy Development*, July 1999. House of Commons, Select Committee on Home Affairs First Report, *Managing Dangerous People with Severe Personality Disorder*, 7th March 2000; House of Commons, Select Committee on Health Fourth Report, *Provision of NHS Mental Health Services*, 13th July 2000. Detailed discussion of these proposals is beyond the scope of this article although their implications are addressed in terms of the research results. For a useful overview of the main issues see "Mental Health and the Criminal Justice System" (1999) 37 *Criminal Justice Matters* (whole issue). Note also that the Halliday Review proposes a new type of sentence for non-DSPD violent and sexual offenders who present a risk of serious harm to the public; Home Office, *Making Punishments Work*. Report of a Review of the Sentencing Framework for England and Wales (July, 2001) Ch. 4.
15. See Home Office/Department of Health *ibid.*, Part One, para. 17 and the discussion in Home Affairs Committee Report, *ibid.*, para. 24.
16. For background, see R. Henham, "Making Sense of the Crime (Sentences) Act 1997" (1998) 61 MLR 223.
17. For policy analysis, see Lord Windlesham, *Responses to Crime*, Vol. III (Oxford: Oxford University Press, 1996) Chap. 9.
18. Source: Hazell's Guide (Henley-on-Thames: R. Hazell & Co., 1995).
19. It should be noted that all cases listed during this period were included.
20. Section 79(1).
21. See n.4 and 5 above.
22. This form provides the following information in respect of each person appearing for trial: name and date of birth, date of committal and from which magistrates' court, whether committed on bail or in custody, whether legally aided, the name of the judge at trial and sentence, names of counsel and solicitors, date of the trial and the result, whether further remanded for reports, date of sentence and penalty imposed, court reporters present at each appearance.
23. The interrogation of trial transcripts as a methodology for deconstructing aspects of the trial was achieved using a template of variables relevant to the issues to be investigated. It was felt that the status of such transcripts as official accounts of the trial process was almost equivalent to official law reports. Observation and verbatim recording of proceedings were rejected as methodologies on resource and practical grounds.
24. See further R. K. Yin, *Case Study Research: Design and Methods* (Newbury, Ca.: Sage, 1984); C. C. Ragin and H. S. Becker, (eds) *What is a Case? Exploring the Foundations of Social Inquiry* (New York: Cambridge University Press, 1992); R. E. Stake "Case Studies" in N. K. Denzin and Y. S. Lincoln, (eds) *Handbook of Qualitative Research* (Thousand Oaks, Ca.: Sage, 1994) 236-247.
25. Section 86 allows a court when sentencing for a sexual offence to order that the offender's licence will remain in force until the end of the whole term rather than terminating at the three-quarter point of the sentence. However, section 85 extends to offenders convicted of sexual and violent offences (as defined by section 161). The court shall not pass an extended sentence the custodial term of which is less than four years where the offence is a violent offence (section 85(3)) and the extension period shall not exceed five years in the case of a violent offence, and 10 years in the case of a sexual offence; section 85(4). In neither case may the extended sentence exceed the maximum sentence for the offence committed: section 85(5). For further analysis see R. Leng, R. Taylor and M. Wasik, *Blackstone's Guide to the Crime and Disorder Act 1998* (London: Blackstone Press, 1998) 123-125; D. Thomas "Dangerous Offenders" (1999) 3 *Sentencing News* 7, 9-10 and commentary on *Gould and Thornton* [2000] Crim.L.R. 313. Grounds for imposing extended sentences were recently considered in *Barros* [2000] Crim.L.R. 601 where it was held that it was not necessary for the expected future offences to involve serious harm to the public, or even for them to be violent or sexual offences. For further discussion of the scope of section 85 see *Ajaib* [2000] Crim.L.R. 770.
26. The Sentencing Advisory Panel, *The Use of Extended Sentences: Consultation Paper*, <http://www.sentencing-advisory-panel.gov.uk/exsent.htm>, 5th June 2001, para. 18, p.7.
27. D. Thomas "Dangerous Offenders" (1999) 3 *Sentencing News* 7, 10.
28. If allowances are made for guilty pleas to lesser offences, judge ordered/directed acquittals and jury acquittals, the research data show that 2.7 per cent of convicted offenders received a section 80(2)(b) sentence.
29. See Table 2. Notwithstanding, the relative seriousness of offences present in any sample produced by sampling any population of offences cannot be guaranteed.
30. The following proportions of relevant indictable offences were tried/sentenced at the Crown Court in 1997 (figures for those sentenced in

brackets); Manslaughter 1.2% (1.5%), Wounding or other act endangering life (which includes section 18) 12.6% (10.7%), Rape 5.5% (3.8%), (attempted rape not shown), Indecent Assault 13.4% (12.8%); *Criminal Statistics, England and Wales Supplementary Tables Vol. 2* (London: HMSO 1998) Table S2.1(A).

31. Note, although initial uncertainty was expressed as to whether guilty plea discounts were applicable in section 80(2)(b) cases (D. Thomas "Viewpoint" (1994) 2 *Sentencing News* 12) it was held in *Bowler* (1994) 15 Cr.App.R.(S) 78, that the mitigating effect of factors such as a guilty plea should be reduced when a protective sentence under section 80(2)(b) is contemplated.
32. See further R. Henham "Bargain Justice or Justice Denied?: Sentence Discounts and the Criminal Process" (1999) 62 M.L.R. 515, 525.
33. Both cases involved repeated assaults on young boys.
34. *Fawcett*, (1995) 16 Cr.App.R.(S) 55; *Thomas* (1995) 16 Cr.App.R.(S) 616.
35. See J. Hogarth *Sentencing as a Human Process* (Toronto: University of Toronto Press, 1971); N.F. Lemon "Training, personality and attitude as determinants of magistrates' sentencing" (1974) 14 *B. J. Crim.* 34.
36. See *O'Brien* (1995) 16 Cr.App.R.(S) 556. In the exceptional case the judge's indication came towards the end of the mitigation speech, by defence counsel who was consequently unable to respond effectively.
37. [2000] 1 Cr.App.R.(S) 377. [1999] Crim.L.R. 852 (affirmed in *Parsons* [1999] Crim.L.R. 919). In *Chapman* the Court of Appeal adopted a different approach from *Mansell* (1994) 15 Cr.App.R.(S) 771 and *Crow and Pennington* (1994) 16 Cr.App.R.(S) 409 in suggesting that there was no necessary ratio between the commensurate and public protection elements of a sentence passed under section 80(2)(b). The *Chapman* approach was recently followed in *Wilson* [2000] Crim.L.R. 503 whilst *de Silva* [2000] Crim.L.R. 502 appears to herald a return to *Mansell* and *Crow and Pennington*. As Thomas points out (*ibid.*, 504), clarification by the Court of Appeal of this area of sentencing law is necessary.
38. Commentary on *Chapman*, *ibid.*, 854.
39. A shift from the legal formalist model of decision-making towards a communitarian model will be required.
40. Practice Direction: Custodial Sentences, 22 January 1998. See D. Thomas "Honesty in Sentencing" (1998) 1 *Sentencing News* 12.
41. These words appear in section 109(2).
42. See for example, Attorney-General's Reference No. 71 of 1998 (*Anderson*) [1999] Crim.L.R. 587, CA; *Buckland* [2000] 1 All E.R. 907; *Offen* [2001] 2 All E.R. 154.
43. See comments by Thomas at [1999] Crim.L.R. 242; [2000] Crim.L.R. 309. For similar reaction to mandatory minima in the U.S., see generally R. Henham "Anglo-American Approaches to Cumulative Sentencing and the Implications for UK Sentencing Policy" (1997) 36 *Howard Journal* 261.
44. n.42 above.
45. *The Times*, April 4, 2000, [2000] Crim.L.R. 492.
46. (1999) 2 Cr.App.R.(S) 176; [1999] Crim.L.R. 240. In this case Lord Bingham CJ stated that "exceptional" was not a term of art but referred to circumstances not regularly, or routinely or normally encountered (although not necessarily unique, or unprecedented or very rare).
47. *The Times*, March 29, 2000. See commentary by D. Thomas at [2000] Crim.L.R. 403.
48. n.37 above.
49. [2000] Crim.L.R. 700.
50. (1967) 52 Cr.App.R. 113.
51. A plea of guilty to manslaughter by reason of diminished responsibility was accepted in connection with this count. The seven cases where manslaughter was the principal offence charged were excluded from the analysis.

- [52.](#) See comments by Lord Bingham C.J. in *Chapman*, n.37 above, where the Court of Appeal emphasised the significance of the relationship between offence gravity, the likelihood of further offending and the gravity of any future offending behaviour. Whilst re-affirming the need for gravity in the original offence, the court indicated that the likelihood and potential gravity for future offending behaviour might impact on the emphasis accorded to the gravity of the original offence.
- [53.](#) n.27 above, section 28 of the Crime (Sentences) Act 1997 requires the court to specify the period based on the gravity of the offences which must elapse before the offender may be considered for early release. For comment, see M. Wasik, *Emmins on Sentencing* (London: Blackstone Press, 1998) 155.
- [54.](#) (1967) 52 Cr.App.R. 113. The criteria stipulate that a life sentence may only be imposed: (i) "where the offence or offences are in themselves grave enough to require a very long sentence", and (ii) "where it appears from the nature of the offences or from the defendant's history that he is a person of unstable character likely to commit such offences in future", and (iii) "where if such offences are committed the consequences to others may be specially injurious as in the case of sexual offences or crimes of violence".
- [55.](#) Ten (1.8 per cent) were passed.
- [56.](#) However, approximately 83.0% of rape cases receive custodial sentences compared to 65.0% for indecent assault; *Criminal Statistics*, n.26 above, Table S2.4.
- [57.](#) However, a caveat must be entered that the proportions of relevant violent as opposed to sexual offences in the sample could not be controlled and it may be that a sufficient proportion of relevant section 18 cases did not present themselves during the six month period. Alternatively, it is arguable that the sample should be regarded as reasonably balanced in respect of the distribution of offences since it was drawn from the entire throughput of relevant offence categories over six months in representative Centres for each of the six Crown Court Circuits.
- [58.](#) A. von Hirsch and A. Ashworth "Protective Sentencing Under Section 2(2)(b): The Criteria for Dangerousness" [1996] Crim.L.R. 175, 177.
- [59.](#) Eight of the 10 section 58 disposals in the research were for serious indecent assault cases.
- [60.](#) See Home Office, *Setting the Boundaries: Reforming the Law on Sex Offences*. July 2000.
- [61.](#) n.14 above, para. 24. This view was not shared by the Select Committee on Health, n.14 above, para. 165.
- [62.](#) [2001] Crim.L.R. 67. Thomas also points out that, following *Offen*, defendants may appeal against their sentences on the ground that the original interpretation of the law in *Kelly* was incorrect, or where they have appealed unsuccessfully against their sentences on the ground that the circumstances were exceptional in the sense adopted by *Kelly*, they need to apply to the Criminal Cases Review Commission and request a reference to the Court of Appeal.
- [63.](#) See T. Mathiesen *Prison on Trial* (London: Sage, 1990) Ch 4.
- [64.](#) See Home Office/Department of Health, n.14 above, para. 14; Home Affairs Select Committee Report, n.14 above, para. 24.
- [65.](#) Further, amongst other anomalies, cases of indecent assault are not caught by section 109.
- [66.](#) Section Home Office/Department of Health, n.14 above, paras 36-42, Annex C; Home Affairs Select Committee Report, n.14 above, paras 26-33.
- [67.](#) n.40 above.
- [68.](#) N. Walker *Sentencing Theory Law and Practice* (London: Butterworths, 1st ed., 1985) 357.
- [69.](#) This may have contributed towards the apparent lack of enthusiasm for the option of combining longer than commensurate sentences with section 85 extension periods revealed in the research.