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# The Need for a Criminal Division of the High Court?

*David Ormerod*[*]

**Abstract** It seems to be assumed by some that 'crime is easy'. Not the commission of it, nor the securing of ill-gotten gains from it, but the study, practice, and judging of it. In this paper, I challenge what might be a significant consequence of such an assumption—the systemic impacts on the appointment and deployment of High Court judges and the structure of the High Court. I argue that criminal judging at both first instance and on appeal is distinctive and demands a cadre of expert judges. I explore two core criminal roles performed by High Court Judges—one as a first-instance trial judge trying the most serious offence of murder, and the other sitting in an appellate capacity reviewing applications for leave to appeal from the Crown Court. This leads me to conclude that the current system of recruitment to the King's Bench Division (KBD) of the High Court fails to guarantee that all KBD judges who sit in crime have the ideal level of expertise in criminal judging to equip them for that role. In turn, this prompts consideration of a range of solutions including, most radically, a proposal for the creation of a Criminal Division of the High Court, and the benefits that might offer.

**Key words:** criminal; courts; judiciary; expertise; judicial training; reform

## 1. *Introduction*

It seems to be assumed by some that 'crime is easy'. Not the commission of it, nor the securing of ill-gotten gains from it, but the study, practice[1]

[*] University College London Faculty of Laws, London, UK. E-mail: d.ormerod@ucl.ac.uk.
I am grateful for comments on early drafts from Karl Laird, David Perry KC, Dr Kate Grady; Professors James Chalmers, Cheryl Thomas KC and John Spencer CBE KC, Lord Justices Jeremy Stuart-Smith and Andrew Edis, McGowan and Chamberlain JJ, and the Registrar of Criminal Appeals, Alix Beldam KC. Thanks also to Allison Hochhalter for superb research assistance and Kian Leong Tan for meticulous proofreading. David Ormerod is a Deputy High Court Judge in the King's Bench Division. The views expressed are his personal views.

[1] See e.g., J. Andrews, suggesting that one of the reasons that criminal law failed properly to define 'wilfulness' was the 'relative sloppiness' in the 'construction and practice' of criminal law compared with the 'greater degree of intellectual discipline which is commonly observed by those who make and practice in … commercial, chancery and revenue law' in 'Wilfulness: A Lesson in Ambiguity' (1981) 1 LS 305. Similar comments were being made over 100 years before: see Parke B, Evidence to the *Royal Commission on Capital Punishment* (1866) Minutes of Evidence, 56 ('There are very seldom any questions of real doubt in administering the criminal law; all the questions of doubt are those connected with property and contracts'.).

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and judging of it. In this paper, I challenge what might be a significant consequence of such an assumption—the systemic impacts on the appointment and deployment of High Court judges (HCJs) and the structure of the High Court.

I argue that criminal judging at both first instance and on appeal is distinctive and demands a cadre of expert judges. I explore two core criminal roles performed by HCJs—one as a first-instance trial judge trying the most serious offence of murder, and the other sitting in an appellate capacity reviewing applications for leave to appeal from the Crown Court. This leads me to conclude that the current system of recruitment to the King's Bench Division (KBD) of the High Court fails to guarantee that all KBD judges who sit in crime have the ideal level of expertise in criminal judging to equip them for that role. In turn, this prompts consideration of a range of solutions including, most radically, a proposal for the creation of a Criminal Division of the High Court, and the benefits that might offer.

## 2. *What Is Distinctive About Criminal Judging?*

There is no obvious reason to assume that judging criminal cases is any easier than judging in any other branch of law. It requires the same skills of statutory interpretation; indeed, it is arguably more challenging in this respect given the volume and frequency of legislative amendment.[2] It demands agility in applying the sometimes radically and frequently changing core common law principles,[3] affecting the gravest offences of murder and manslaughter. Criminal trials also give rise to their share of

[2] A striking example of this is with criminal sentencing. Major changes to sentencing legislation occurred in 1991, 1993, 1997, 1998, 2000, 2002, 2003, 2005, 2007, 2008, 2009, 2012, 2014, 2015, 2018, 2020, 2021 and 2022: see the Criminal Justice Act 1991, Criminal Justice Act 1993, Crime (Sentences) Act 1997, Crime and Disorder Act 1998, Powers of Criminal Courts (Sentencing) Act 2000, Proceeds of Crime Act 2002, Criminal Justice Act 2003, Serious Organised Crime and Police Act 2005, Serious Crime Act 2007, Criminal Justice and Immigration Act 2008, Coroners and Justice Act 2009, Legal Aid, Sentencing and Punishment of Offenders Act 2012, Offender Rehabilitation Act 2014, Criminal Justice and Courts Act 2015, Assaults on Emergency Workers (Offences) Act 2018, Sentencing Code 2020, Counter-Terrorism and Sentencing Act 2021, Police Crime Sentencing and Courts Act 2022 and the Judicial Review and Courts Act 2022.

[3] For example, the change of law in relation to joint enterprise in *Jogee* [2016] UKSC 8, and the repeated redefining of core concepts such as intention in *Hyam* [1975] AC 55; *Moloney* [1985] AC 905; *Hancock and Shankland* [1986] AC 455; *Nedrick* [1986] 1 WLR 1025; *Woollin* [1998] 1 AC 82.

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constitutional issues and Human Rights Act challenges.[4] There may be nothing special in these respects, but there are, I suggest, other matters that do render 'criminal judgecraft' truly distinctive.

## A. *At First Instance*

At first instance, the distinctiveness of judgecraft in Crown Court trials[5] is illustrated by several features flowing from the nature of the legal dispute, the parties and the decision-making.

It is trite that criminal trials change lives. Even offences viewed objectively as 'low-level' with limited penalties have significant impacts on those involved whether as defendants, complainants or witnesses.[6] Clearly, litigation in civil courts impacts on lives too, but not with such routine intensity.[7] Lives are changed fundamentally whenever liberty is at stake. The stigma of a criminal conviction is unique. We should not ignore the fact that 82% of trials in the Crown Court result in conviction,[8] and for the 55% given custodial sentences, the average length of the term in 2022 was 33.8 months.[9]

Judges shoulder ever more onerous responsibility in case managing[10] these important trials, including handling numerous participants, with few professional witnesses and many who are vulnerable (including complainants and defendants).[11] The judge assumes increased responsibility for ensuring the effective participation of the defendant

[4] See e.g., *Ziegler v DPP* [2022] AC 408; *Horncastle* [2010] 2 AC 373.

[5] My focus is exclusively on the Crown Court, acknowledging that this represents a fraction of criminal cases.

[6] For recent powerful exposition of impacts on those acquitted see J. Peay and E. Player, '"Not a Stain on Your Character?": The Finality of Acquittals and the Search for Just Outcomes' [2021] Crim LR 921.

[7] Notable caveats exist, e.g., family law could legitimately claim this in 'non-money' cases.

[8] Crown Prosecution Service, 'CPS Data Summary Quarter 3 2021-2022' (21 April 2022) <https://www.cps.gov.uk/publication/cps-data-summary-quarter-3-2021-2022>.

[9] Ministry of Justice, 'Criminal Justice Statistics Quarterly: December 2022' (18 May 2023) <https://www.gov.uk/government/statistics/criminal-justice-system-statistics-quarterly-december-2022>.

[10] As transformed in the last 18 years by the Criminal Procedure Rules, on which see M. McConville and L. Marsh, 'Adversarialism Goes West: Case Management in Criminal Courts' [2015] E & P 172; cf. Lord Thomas, 'The Criminal Procedure Rules: 10 Years On' [2015] Crim LR 395. See also P. Darbyshire, 'Judicial Case Management in Ten Crown Courts' [2014] Crim LR 30.

[11] On defendants' perceptions of their trials generally, see J. Jacobson, G. Hunter and A. Kirby, *Inside Crown Court: Personal Experiences and Questions of Legitimacy* (Policy Press 2015).

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irrespective of the level of support from intermediaries and others.[12] The most distinctive feature of the process is, of course, that responsibility for the ultimate decision is shared with 12 random strangers, possessed of no legal training, conscripted for the task. The judge must secure each juror's collaboration,[13] foster their collegial team spirit, chaperone them through the evidence and deftly guide them to reach a fair and accurate verdict.

The presence of the jury has significant ramifications for the judge. The judge must possess exceptional foresight, having continually to anticipate how disputed evidence might (if admitted) impact on the jury's decision-making, and how directions will be required on the relevance and uses to which that evidence may legitimately be put.[14] Decision-making on mid-trial applications needs to be swift to avoid the proceedings becoming even less comprehensible and even more disjointed and inconvenient for jurors. Planning and timetabling the entire trial will be driven by a desire to accommodate the jury and their receipt of the evidence. The jury's presence also leaves less margin-for-error: slips may well lead to applications for jury discharge, as would any unguarded judicial comment or indeed any perceptible view on the evidence, performance of advocates, etc. Furthermore, the judge's communication throughout the trial must be so effective as to secure in everyone[15] confidence that the jury has followed the evidence, and that they have understood and can apply multiple, complex legal directions. Even with the routine reliance on jury direction manuals,[16] the Crown Court judge (CCJ) faces an onerous task in producing directions bespoke to the needs of each case.[17]

[12] On the significance of this see A. Owusu-Bempah, *Defendant Participation in the Criminal Process* (Routledge 2017).

[13] C. Thomas, 'Avoiding the Perfect Storm of Juror Contempt' [2013] Crim LR 483 found that many jurors are initially unwilling to serve yet ultimately reported positive experiences (see p. 500).

[14] See generally *The Crown Court Compendium* (2023). The author is one of the original authors of the Compendium and now an Editor.

[15] Not just the defendant, complainant and others, but also the wider public and the Court of Appeal.

[16] See D. Ormerod and H. Quirk, 'Systematising Jury Direction Manuals' (2023) *forthcoming*. See the CACD's endorsement in, *inter alia*, *AG* [2018] EWCA Crim 1393.

[17] See, e.g. on the need for written directions to enable juries to understand: *Atta-Dankwa* [2018] EWCA Crim 320; *N* [2019] EWCA Crim 2280; *BQC* [2021] EWCA Crim 1944.

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### B. *On Appeal*

Turning to the appellate judicial function, it can be argued that in the criminal jurisdiction the role is distinctive because it demands more by way of reconstruction of the trial process, and therefore relies more heavily than in civil cases on prior trial experience. The pace and unpredictability of the criminal trial, reliant as it is on so many lay witnesses recounting emotive events, makes it unrealistic to expect carefully crafted rulings on matters of law. Additionally, and crucially, there is *never* a reasoned judgment on the ultimate issue from the Crown Court[18]—as there will be in *every* civil appeal. In an effort to understand the reasoning underpinning the verdict, the appellate criminal judge must engage in reconstruction from the written directions, the indictment (as often repeatedly amended) and a host of other materials (jury questions, closing speeches, etc.). From those disparate sources, the judge must attempt to understand *how* and *why* the verdict was returned, recognising and comprehending the practical and tactical subtleties of the trial as it unfolded. The distinctiveness also derives from the nature of appellate review in criminal cases, which offers less scope for the appeal court itself to *remedy* defects in the trial process: the appellate court can quash the decision of the trial court but has only limited scope to 'fix' it.[19]

Those distinctive judicial skills at first instance and on appeal are, it can be argued, best exhibited by those who have acquired criminal trial (and ideally appellate) *experience.* For example, it seems obvious that *any* appeal judge's role is made easier by an ability, borne of experience, to understand the first-instance judge's decisions, directions and conduct. Such judges have subject matter and context-specific decision-making experience.

## 3. *The HCJ's Role in Crime*

Having briefly outlined the distinctive nature of criminal judging, we return to the focus of this piece, i.e., the (in)adequacy of the existing High Court system in this regard. The HCJs under discussion are those in the KBD. As with all HCJs, they are appointed by the Judicial Appointment Commission. A small minority are selected from

[18] Note that the position is different with reviews of Magistrates' Court decisions in the High Court.

[19] I am grateful to James Chalmers for this point.

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the ranks of the criminal circuit bench,[20] together with a handful from criminal practice,[21] with the vast majority appointed directly from public law, civil and commercial practice.[22] It is worth noting that an HCJ's role involves a combination of both appellate and first-instance work, reflecting the hybrid nature of the High Court.

### A. *As a Trial Judge of Murder*

Murder trials are the principal criminal trial work of KDB judges.[23] Whatever their expertise as a lawyer or experience as a judge, a KBD judge will be expected to try a murder or possibly attempted murder as their first criminal trial in that role. That may surprise many people, not least murder suspects and bereaved relatives of victims. Some will have no experience of criminal courts in practice or as a judge.[24] More commonly, the HCJ will have sat part time as a Recorder in the Crown Court and so will have some criminal trial experience. But in that role, they will never have tried a murder (nor an attempted murder), and not all Recorders will have tried very serious crimes like sexual offences or have sat for more than a few months in total.[25] It is simply expected, not least because of their excellence as lawyers (something I am certainly not disputing), that all KBD judges will be able to deal with the most serious offence in the criminal calendar. In assessing that assumption, an exploration of the role of the murder judge is appropriate.

It is trite to note that in England and Wales, the crime of murder is unique in stigma and sentence.[26] For any judge other than an HCJ, the opportunity to try a murder arises only after (typically five) years of

[20] Judicial Appointments Commission statistics do not break down the proportion applying or appointed from civil and criminal judicial posts. An FOI for further breakdown was unsuccessful as the JAC did not hold information on how many HCJs had been appointed from the criminal circuit Bench.

[21] In response to an FOI, the JAC were not able to provide information on the proportion of applicants/appointees who listed crime as a principal practice area.

[22] The JAC do not hold such information, but of the biographies available from the Judicial Appointment Commission Website, of the last 13 appointed to the KBD, only two appointees list 'crime' as an area of practice.

[23] There is some limited other work on terrorism or serious/high-profile crime.

[24] Many HCJs are appointed from the ranks of the Deputy HCJs; until 2022, DHCJs did not try criminal cases.

[25] Per the Courts and Tribunals Judiciary, 'Recorders are expected to sit for 30 days a year', with appointments for a term of five years. (Courts and Tribunals Judiciary) <https://www.judiciary.uk/about-the-judiciary/who-are-the-judiciary/judges/recorder/>.

[26] Lords Hughes and Toulson in *Hughes* [2013] 1 WLR 2461 at [26]: 'To label a person a criminal killer of another is of the greatest gravity'.

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experience sitting as a full-time judge and having applied for and been explicitly authorised to sit on such cases after Judicial College training.[27]

As a matter of substantive law, murder is a challenging offence. It inevitably engages legally demanding concepts such as causation, where the criminal law struggles to maintain a consistent principled approach (as illustrated recently by the Court of Appeal's retreat in *Wallace,*[28] *Field*[29] and *Rebelo*[30] from the House of Lords' clear statement in *Kennedy (No 2)*[31]). The murder judge has to accept that '… it is not always safe to suppose that there is a settled or "stable" concept of causation which can be applied in every case'.[32] Many murder trials involve more than one defendant,[33] generating problems of complicity. Despite the landmark case of *Jogee*[34] exorcising the spectre of 'parasitic accessorial liability', there is no denying the complexities that remain (or have been generated).[35]

Murder trials, uniquely, give rise to the opportunity for partial defences reducing liability to manslaughter. The judge must contend with the complex and obscure drafting[36] of the loss of control defence and the (frequently appealed) judicial 'gatekeeping' role demanding 'rigorous evaluation'[37] of whether the defence may even be left to the jury.[38] Diminished responsibility pleas are ever more frequently contested[39] and generate distinct challenges. Predictable handling difficulties flow from a defendant with serious mental health issues, and the heavy reliance on expert evidence prompts the need for particular care in managing

[27] The JAC do not hold information on average years' service as a CCJ before being murder 'ticketed'.

[28] [2018] EWCA Crim 690.

[29] [2021] EWCA Crim 380.

[30] [2021] EWCA Crim 306.

[31] [2008] 1 AC 269.

[32] *Hughes* [2013] 1 WLR 2461, [20].

[33] In 2014, the Bureau of Investigative Journalism found that between 2005 and 2013, there were 1853 people prosecuted for homicide in a case involving four or more people, comprising 17.7% of all homicide trials (p. 7). (*Bureau of Investigative Journalism*, April 2014). <https://www.documentcloud.org/documents/1100186-joint-enterprise-investigation>.

[34] [2016] UKSC 8.

[35] See, *inter alia*, R. Buxton, '*Jogee*: Upheaval in Secondary Liability for Murder' [2016] Crim LR 324; B. Krebs (ed), *Accessorial Liability after Jogee* (Hart 2020).

[36] Lord Judge CJ in *Clinton* [2012] EWCA Crim 2 at [26] observed drily: 'We are required to make sense of this provision'.

[37] *Gurpinar* [2015] EWCA Crim 178, [14] per Thomas LCJ.

[38] See in particular *Clinton* [2012] EWCA Crim 2; *Gurpinar* [2015] EWCA Crim 178; *Dawes* [2013] EWCA Crim 322; and *Goodwin* [2018] EWCA Crim 2287.

[39] See R. Mackay and B. Mitchell, 'The New Diminished Responsibility Plea in Operation: Some Initial Findings' [2017] Crim LR 18.

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the roles of the expert and the jury.[40] The statutory drafting again leaves much to be desired,[41] and its application is complicated further by the rare imposition of a reverse burden of proof, necessitating caution with directions and routes to verdict. The inter-relationship with manslaughter also generates complexity. Murder trial judges frequently face the difficult question whether a jury should be left with an alternative count of manslaughter.[42] That decision links to the controversial question of whether a jury needs direction on unanimity as to the type of manslaughter verdict they might reach.[43]

Evidentially, murder generates numerous knotty issues that arise commonly, but not always predictably. Some of the most contentious applications of the Criminal Justice Act 2003 bad character regime arise in the uses of gang affiliation, as well as 'drill' and rap music as evidence[44] in murder trials, and this has generated controversy.[45] Such matters require sensitive handling to avoid risks of prejudice and allegations of cultural insensitivity. Numerous other evidential issues routinely arising in murder trials are far from straightforward, ranging from DNA to ballistics and forensic anthropology to name but a few.[46] The complexity of these and all evidential matters is compounded whenever there are multiple defendants, and (as often in murder) when they run 'cut-throat' defences—blaming each other.

Numerous trial management issues, although not exclusive to murder, create acute challenges. Witness safeguarding and handling may call for particular attention, with common concerns about witnesses refusing to

[40] See *Brennan* [2014] EWCA Crim 2387; *Golds* [2016] WLR 5231.

[41] See e.g., the measured criticisms of R. Fortson KC, 'The Modern Partial Defence of Diminished Responsibility' in A. Reed and M. Bohlander (eds), *Loss of Control and Diminished Responsibility: Domestic, Comparative and International Perspectives* (Routledge 2016).

[42] See the Criminal Justice Act 1967, s 6(2); *Coutts* [2006] 1 WLR 2154; and more recently *Rowe* [2022] EWCA Crim 27.

[43] See D. Ormerod and R. Taylor, 'Agreement and Disagreement in Murder and Manslaughter Verdicts' [2022] Crim LR 185.

[44] See, *inter alia*, *Saleem* [2007] EWCA Crim 1923; *O* [2010] EWCA Crim 2985; *Sode* [2017] EWCA Crim 705; *Simpson* [2019] EWCA Crim 1144; *Solomon* [2019] EWCA Crim 1356; *Stevens* [2020] EWCA Crim 280; *Rashid* [2019] EWCA Crim 2018; *Abdi* [2022] EWCA Crim 315; *Egan* [2022] EWCA Crim 392; *Heslop* [2022] EWCA Crim 897.

[45] A. Owusu-Bempah, 'The Irrelevance of Rap' [2022] Crim LR 130; T. Ward and S. Fouladvand, 'Bodies of Knowledge and Robes of Expertise' [2021] Crim LR 442.

[46] The Royal Society has published several 'primers for courts' detailing forensic analysis of these issues and more: see the 'Downloads' section at <https://royalsociety.org/about-us/programmes/science-and-law/>.

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testify through fear[47] or becoming hostile.[48] In cases of such high stakes, some of the most able advocates will appear and, quite professionally, rely on their years of experience and guile. There is a risk that the inexperienced KBD judge will fail to react to sharp (albeit ethical) conduct. There is also a need for expert management of the court room dealing with concerns as to security measures,[49] and juror safety. The deceased's and defendant's supporters will be in close proximity in the public gallery and need sensitive handling, particularly when emotive evidence is adduced and the verdict is delivered. The taking of verdicts generates its own difficulties, with a need to avoid conflict amongst supporters and those in the dock, especially where defendants blame each other.

Finally, as a matter of sentencing, murder is unique in carrying mandatory life imprisonment, but the sentence being fixed by law does not alleviate the difficulty of decision-making. Schedule 21 of the Sentencing Code 2020 stipulates different starting points for the tariff depending on the nature of the killing.[50] It should not be assumed that that exercise is straightforward;[51] a position perhaps made worse by the absence of a Sentencing Council guideline. The volume of appeals on sentences for murder highlights how contested and contestable these matters are.[52] Every decision will be subjected to scrutiny by the parties and the public with press interest often being intense (and sometimes global), not to mention the pressure involved in live broadcasting sentencing remarks. There is, in addition, the psychological pressure on those imposing such lengthy custodial sentences on offenders.[53]

Murder trials will make up the staple criminal trial diet for the HCJ, but they may also be listed to try grave offences renowned for their

[47] See the Criminal Justice Act 2003, s 116 and 'special measures' under Part II of the Youth Justice and Criminal Evidence Act 1999.

[48] See the Criminal Justice Act 2003, s 119.

[49] See Crim PD (2023) Ch 3, dealing with the deployment of firearms in court.

[50] See L. Harris and S. Walker, *Sentencing Principles, Procedure & Practice* (Sweet and Maxwell 2022), B2.

[51] See J. Roberts and J. Saunders, 'Sentencing for Murder: The Adverse and Unintended Effects of Schedule 21 to the Criminal Justice Act 2003' [2020] Crim LR 900; and B. Mitchell and J. Roberts, *Exploring the Mandatory Life Sentence for* Murder (Bloomsbury 2012).

[52] The annual number of applications for leave to appeal sentence where the main offence was murder between 2019 and 2022 numbered between 88 (2019); 62 (2020); 118 (2021); and 99 (2022).

[53] The wider significance of psychology for sentencing have long been recognised (e.g. C. Fitzmaurice and K. Pease, *The Psychology of Judicial Sentencing* (Manchester University Press 1988)), and more recently there has been increased recognition of the stresses particular to judges, as to which see, e.g. in the Australian context G. Mackenzie, *How Judges Sentence* (Federation Press 2005). I am grateful to the reviewer for this point.

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complexity: terrorism, gross negligence manslaughter and causing or allowing the death of a child or vulnerable person being good examples.[54]

It might be argued that many of these complexities are simply matters of interpretation, albeit ones requiring strong skills in law and communication which would be expected of any good judge. That may be true, but it is also true that there is currently explicit recognition by the judicial appointments system that for those other than KBD judges an *extensive level of criminal judicial experience* is required to try the most serious offence in the criminal calendar. We currently place the burden of trying such cases on only the most experienced circuit judges—typically those who have been *full time* criminal CCJs for at least 5 years—and yet we are willing to do so on *any* KBD judge whatever their background.

## B. *The HCJ's Role in Determining Leave to Appeal*

### (i) *Context*

In this section, I examine the role of the HCJ in just one, important, aspect of the appeal process: as the 'single judge' filtering leave to appeals.

At the outset, I note here that my challenge is not to the expertise or efficacy of the Court of Appeal (Criminal Division) as a full court as composed typically of three judges—a Lord or Lady Justice of Appeal, an HCJ and a further puisne judge or Circuit Judge.[55] In some sentencing appeals a two-court constitution suffices (usually a Lord or Lady Justice (LJ) and a HCJ).[56] In either situation, the combined criminal expertise of the Court should be substantial. All the LJs who sit in crime will have served for at least several years as a HCJ gaining criminal experience trying murders and other high-profile crime. They will also have sat as a 'winger' in the Court of Appeal (Criminal Division) (CACD) throughout their several years as a HCJ.[57] Similarly, every CCJ sitting in the CACD will also have extensive criminal experience, and will have been selected to sit in the CACD on the basis of their expertise and

[54] Contrary to s 5 of the Domestic Violence, Crime and Victims Act 2004. On the complexities of these, see D. Ormerod and K. Laird, *Smith, Hogan and Ormerod's Criminal Law* (16th edn, OUP 2021), Chs. 14 and 15.

[55] From a random sample of 100 cases from 2022, there were 46 cases where the constitution was LJ, HCJ, CCJ versus 54 where it was a LJ and two HCJs.

[56] In 2019, only 31 decisions were by two-judge courts.

[57] The average time spent as HCJ before elevation to LJ is almost 7 years, based on the published biographies of the LJs: see <https://www.judiciary.uk/about-the-judiciary/who-are-the-judiciary/senior-judiciary-list/lord-and-lady-justices-of-appeal/>.

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seniority.[58] My challenge is not to the expertise of the full CACD as an appellate tribunal sitting on criminal matters.[59] Nor is my focus on the role of the HCJ when sitting in the full Court of Appeal. In any constitution of the CACD, the HCJ is but one member of the panel hearing the appeal and participating in the delivery of a unanimous[60] reasoned judgment after oral argument.

Instead, the focus of my scrutiny is on the more specific role of the KBD judge as the sole decision-maker on whether to grant permission to appeal to the Court of Appeal. This is a vital and challenging role, and one which a judge with criminal trial and appellate experience might be expected to fulfil.

### (ii) *Section 31—permission to appeal*

Almost all of the public discussion of 'criminal appeals' (and that in the academic scholarship) is focussed on the work of the full CACD. Unsurprisingly, many lay people will wrongly assume that there is an automatic right to appeal from a conviction in the Crown Court. In practice, of the convictions and sentences in the Crown Court that are challenged, far more cases are finalised in the filtering process than by the full CACD on appeal. In 2019, for instance, 4,227 applications for permission to appeal against conviction or sentence were made; yet 2,200 never went beyond the HCJ at that stage.[61]

Section 31 of the Criminal Appeal Act 1968 regulates the process for leave to appeal from the Crown Court to the CACD. Prior to 1968, there had been an automatic right to appeal where the issue was on a pure point of law.[62]

[58] Appointment is by the Judicial Appointments Commission from the pool of Circuit Judges who respond to an expression of interest. Appointment is typically for a maximum of 6 years renewable. The JAC had no further data to share on the pool of applicants.

[59] For historical concerns about the adequate expertise of the LJs sitting in criminal appeals, see R. Pattenden, *English Criminal Appeals 1844-1994: Appeals against Conviction and Sentence in England and Wales* (Clarendon 1996), 50–54. See also the *Final Report of the Committee on Supreme Court Practice and Procedure* (Cmd 8878, 1953), para. 562.

[60] See R. Kelly, 'Criminalising Dissent' [2022] 138 LQR 432.

[61] Data supplied by HMCTS FOI reference 221223016.

[62] Leave, or a trial judge's certificate was required for questions of fact alone, or a question of mixed law and fact, 'or any other ground which appears to the court to be a sufficient ground of appeal…': Criminal Appeal Act 1907, s 3. See generally R. Pattenden (1996) (n 59) pp. 92–94. It was reviewed by the Donovan Committee (*Report of the Interdepartmental Committee on the Court of Criminal Appeal* (Cmnd 2755, 1965)), and again by the Runciman Commission (*Royal Commission on Criminal Justice* (Cm 2263, 1993), Ch. 10), but only to a limited extent by the Auld Report (*A Review of the Criminal Courts of England and Wales by The Right Honourable Lord Justice Auld* (2001)); on which, see K. Malleson and S. Roberts, 'Streamlining and Clarifying the Appellate Process' [2002] Crim LR 272.

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The current process under s 31 requires leave in all cases,[63] unless (exceptionally) the trial judge certifies that the conviction or sentence is fit for appeal,[64] or other unusual circumstances apply.[65] The application is considered by a single HCJ who has the power to grant the application in full or in part,[66] refuse it, or refer to the full CACD without granting leave. If leave to appeal is granted by the HCJ, the appellant has the appeal heard by the full CACD. If the HCJ refuses the application the applicant can, as an important safeguard, always renew the application before the full CACD.[67] That Court's decision on matters of leave to appeal is final.[68]

The significance of this 'filtering' system cannot be underestimated. Without it, the CACD would, it is assumed, collapse under the volume of work. In *Cox and Thomas*,[69] Lord Bingham CJ extolled the process as 'the lynchpin of our appellate system in the field of criminal justice' which 'enable[s] the court to concentrate its judicial resources on cases that have something in them'. Successive years' statistics seemingly bear out its significance.[70]

[63] Section 18 of the Criminal Appeal Act 1968 (hereafter 'CAA'). Such filtering processes are commonplace in common law jurisdictions, and the debate as to their merits is longstanding: H. L. Dalton, 'Taking the Right to Appeal (More or Less) Seriously' (1985) 95 Yale LJ 62; M. Arkin, 'Rethinking the Constitutional Right to a Criminal Appeal' (1992) 39 UCLA L Rev 503. In New Zealand, the introduction of the Bill of Rights led to the introduction of an automatic right to appeal, on which see P. D. Marshall, 'A Comparative Analysis of the Right to Appeal' (2011) 22 Duke J Comp & Int'l L 1.

[64] The trial judge should only grant a certificate in exceptional circumstances: *Atta-Dankwa* [2018] EWCA Crim 320; *Williams* (1991) 156 JP 325. See Crim PR 39.4.

[65] Where, e.g. the appeal has been referred by the Criminal Cases Review Commission (CCRC), or the appeal relates to contempt proceedings under s 13 of the Administration of Justice Act 1960. See further the *Court of Appeal Criminal Division—Guide to Commencing Proceedings* (2021) (hereafter 'Blue Guide'), A10–2. See also A. Beldam and S. Holdham, *Court of Appeal Criminal Division; A Practitioner's Guide* (2nd edn, Sweet & Maxwell 2018).

[66] See s 31(2)(a) CAA 1968 and also *Cox and Thomas* [1999] 2 Cr App R 6.

[67] Section 31(3) CAA 1968.

[68] *Davies* [2004] EWCA Crim 2521.

[69] [1999] 2 Cr App R 6, 9.

[70] I am grateful to Allison Hochhalter for compiling the table from FOIA responses.

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| **Appeals** | **2019** | | **2020** | | **2021** | | **2022** | |
|---|---|---|---|---|---|---|---|---|
| | # | % | # | % | # | % | # | % |
| Convicted in Crown Court After Trial | | | | | | | | |
| Application under s 31 | 4,227 | | 2,900 | | 3,311 | | 3,224 | |
| Application Refused (% of s 31 Applications) | 3,321 | 79% | 2,404 | 83% | 2,514 | 76% | 2,488 | 77% |
| Refusals where Loss of Time (% of Refused Applications) | 262 | 8% | 139 | 6% | 165 | 7% | 103 | 4% |
| Renewed application (% of Refused Applications) | 917 | 28% | 733 | 30% | 704 | 28% | 697 | 28% |
| Renewed application granted (% of Renewed Applications) | 94 | 10% | 58 | 8% | 70 | 10% | 48 | 7% |
| Appeal Allowed (% of Refused Applications) | 58 | 2% | 41 | 2% | 41 | 2% | 25 | 1% |

Given the volume of applications and the significance of the decision for the applicant, it might come as a surprise to hear that an HCJ, with perhaps limited experience of criminal judging, working alone and solely on the papers, traditionally outside normal court hours (in what Pattenden described as 'their spare time'[71]), is expected to determine applications which may arise from criminal trials involving offences and issues to which that judge has never been exposed.

The single judge also has the power to signal that the application is 'wholly without merit', triggering the potential for a loss of time order.[72] Although as a matter of statute, the HCJ can impose a loss of time order, in practice, there is no realistic possibility of an increase in penalty or loss of time *from the mere application* to the HCJ.[73] However, every s 31 application carries with it the potential for the HCJ to initial the 'loss of time' box on the form, indicating that if

[71] R. Pattenden (1996) (n 59), 97. The Auld Review (n 62) recommended that time should be made available during the working day for these: Ch. 12, para. 74.

[72] See the excellent analysis by S. Bergstrom, 'Advising on Loss of Time Orders in the Court of Appeal Criminal Division' [2022] 2 Arch Rev 4–7.

[73] In theory, that could be done by a HCJ even though counsel has advised that an application be made: *Howitt* (1975) 61 Cr App R 327.

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the applicant renews the application to the full CACD, that Court should consider making a loss of time order. In 2019, of the 3,321 refusals by the HCJ just 262 had the s 29 box ticked. When that happens and the applicant renews the full CACD will always consider[74] loss of time. Indeed, the full Court may go further and make such an order even where the legal representative has supported a renewed application, believing there to be valid grounds of appeal[75] and where the HCJ did *not* initial the box. Other than to echo the powerful calls for reform voiced over the last half century, no more need be said about s 29.[76]

This practical operation of the s 31 scheme may seem odd even to those familiar with the idiosyncrasies of English criminal procedure. It may then also come as a surprise that the s 31 scheme has been held to be compatible[77] with the package of fair trial rights guaranteed by Article 6 of the European Convention on Human Rights (ECHR)—even though the decision is made without a public, oral hearing and is conducted in the absence of the defendant.[78] The European Court of Human Rights (ECtHR) has consistently held that the art. 6 guarantees apply to appeals,[79] but readily accepted that the process may be more limited than at trial, provided

> any restrictions contained in domestic legislation on the right to a review … must … pursue a legitimate aim and not infringe the very essence of that right.[80]

[74] *Gray* [2014] EWCA Crim 2372, per Hallett VPCACD.

[75] *Hart* [2006] EWCA Crim 3239; *K* [2005] EWCA Crim 955; *Gray* [2014] EWCA Crim 237; *James* [2018] EWCA Crim 285. The practice was described by M. Zander, 'Legal Advice and Criminal Appeals: A Survey of Prisoners, Prisons and Lawyers' [1972] Crim LR 132 as 'indefensible' (p. 167).

[76] See *inter alia* K. Malleson, 'Miscarriages of Justice and the Accessibility of the Court of Appeal' [1991] Crim LR 323. See also Malleson's important review for the RCCJ, Research Study No 17 *A Review of the Appeal Process* (HMSO 1993), and K. Telhat, *CCRC Intern Project 2020/21 – Loss of Time Orders Research Report* <https://s3-eu-west-2.amazonaws.com/jotwpublic-prod-storage-1cxo1dnrmkg14/uploads/sites/5/2022/01/Loss-of-Time-CCRC-Intern-Project-2020-Final-Report.pdf≥.

[77] Subject to safeguards; as to which, see: *Kucera v Austria* App no 40072/98 (ECtHR, 3 October 2002), para. 25; *Kremzow v Austria* (1993), Series A no. 268-B, p. 45 § 68.

[78] *Monnell and Morris v UK* (1987) 10 EHRR 205. Cf. *Ekbatani v Sweden* (1991) EHRR 504 for a broader interpretation of what might be expected under art 6. The CACD remains resolute: *Oates* [2002] EWCA Crim 1071. For criticism of *Monell* see A. Ashworth, B. Emmerson and A. MacDonald, *Criminal Justice and Human Rights* (3rd edn, Sweet and Maxwell 2013), para. 21.27 et seq.

[79] *Delcourt v Belgium* (1979–80) 1 EHRR 355.

[80] *Shvydka v Ukraine* App no 17888/12 (ECtHR, 30 October 2014), para. 49.

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As Mole and Harby explain, 'there is no right under Article 6 to any particular kind of appeal or manner of dealing with appeals'.[81] Such limited case law[82] as there is seems also to confirm that, in principle, leave stages to filter appeals are also compatible with the more specific guarantees in Article 2 of Protocol 7 of the ECHR.[83] The same is true of the similar guarantee under Article 14(5) of the International Covenant on Civil and Political Rights (ICCPR).[84]

### (iii) *The demanding nature of the s 31 decision*

Section 31 is heavily amended and currently runs to over 600 words. At its core, the question for the HCJ is whether it is arguable that the conviction is unsafe and/or the sentence is wrong in principle or manifestly excessive. Despite the degree of detail in the statute, the precise test is less straightforward to apply than might be expected. First, there is not complete unanimity on what the test entails. Most references are to whether one or more grounds of appeal 'is arguable', but some are to a more refined, objectivised test: whether it is 'properly' or 'reasonably' arguable[85] that the ground of appeal might lead the Court of Appeal to find the conviction unsafe or sentence manifestly excessive. Yet others refer to whether the application 'has some merit'.[86] In the ECtHR, the

[81] N. Mole and C. Harby, *A Guide to the Implementation of Article 6 of the European Convention on Human Rights* (2nd edn, Council of Europe 2006), 9. On these human rights issues more generally, see S. Trechsel, *Human Rights in Criminal Proceedings* (OUP 2005), 362.

[82] *Shvydka v Ukraine* App no 17888/12 (ECtHR, 30 October 2014), para. 49: '[I]t is considered acceptable that, in certain countries, a defendant wishing to appeal may sometimes be required to seek permission to do so'.

[83] At the time of writing, Protocol 7 to the ECHR has not yet been ratified by the UK. Art. 2 provides: 'Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law. … 2 This right may be subject to exceptions in regard to offences of a minor character, as prescribed by law, or in cases in which the person concerned was tried in the first instance by the highest tribunal or was convicted following an appeal against acquittal'. See B. Rainey, P. McCormick and C. Ovey, *Jacobs White and Ovey: The European Convention on Human Rights* (3rd edn, OUP 2021), 343; Ashworth et al (n 78), Ch. 21.

[84] Which guarantees a right of appeal: 'Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law'.

[85] *Fortean* [2009] EWCA Crim 437, [10].

[86] See R. Pattenden, *Judicial Discretion and Criminal Litigation* (2nd edn, OUP 1990), 343.

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test was described as being whether the grounds are 'substantial and arguable'.[87]

Secondly, the CACD has provided little additional guidance on this issue. Court of Appeal judgments dealing with the interpretation and application of s 31 are scarce,[88] with only occasional passing references in the course of commenting on the merits of an appeal.

Thirdly, there is the parasitic nature of the decision to consider. In a conviction application, the HCJ's s 31 decision involves a prediction as to how the Court of Appeal might apply its primary test of whether the conviction is 'unsafe'. Disappointingly, the precise meaning of the primary test of 'safety' remains obscure and controversial,[89] so much so that it is a focus of the Law Commission's current review of criminal appeals.[90] Despite the thousands of reported decisions of the CACD applying the safety test, predicting whether a conviction will be found unsafe is never easy. Similarly, with sentence appeals, there is no scientific precision in predicting whether the CACD will conclude that a sentence is 'manifestly excessive' or 'wrong in principle'. The CACD's primary test as set out in s 11[91] is in reality no test at all; it is the description of a power, and assessing the likelihood that a ground of appeal 'might' succeed is a difficult one.

The HCJ thus faces an unenviable task: avoiding overburdening the full Court whilst simultaneously striving to identify arguable potential points of appeal. The degree of difficulty can perhaps be illustrated by the fact that there is a clear proportion of 'false negatives': cases in which the HCJ concludes that the appeal is not even arguable, but then on a

[87] *Monnell and Morris v UK* (1987) 10 EHRR 205, 212.

[88] Pattenden (n 86) categorises the s 31 decision as a 'discretion': see p. 332.

[89] See A. Clarke, 'Safety or Supervision? The unified ground of appeal and its consequences in the law of abuse of process and exclusion of evidence' [1999] Crim LR 108; also J.C. Smith, 'The Criminal Appeal Act 1995--Appeals against Conviction' [1995] Crim LR 920. The test was criticised in the Auld Review (n 23) Ch. 12, para. 10.

[90] See the Law Commission's Criminal Appeals: Issues Paper (2023), 52 <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2023/07/Appeals-Issues-Paper-combined-doc.pdf>, and the discussion in D. Ormerod and H. Quirk, 'Reforming Criminal Appeals' [2022] Crim LR 791.

[91] 'On an appeal against sentence the Court of Appeal, if they consider that the appellant should be sentenced differently for an offence for which he was dealt with by the court below may—(i) quash any sentence or order which is the subject of the appeal; and (ii) in place of it pass such sentence or make such order as they think appropriate for the case and as the court below had power to pass or make when dealing with him for the offence; but the Court shall so exercise their powers under this subsection that, taking the case as a whole, the appellant is not more severely dealt with on appeal than he was dealt with by the court below'.

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renewal the CACD, applying the same test, grants leave.[92] Returning to our example above of 2019, the HCJs refused to leave in 3,321 cases. Of those, just 28% (917 cases) renewed; the CACD granted leave in 94 cases. This equates to around a 10% rate of disagreement on the cases that were subjected to review.[93] Even looking at the bigger picture, of all cases refused by the HCJs, 3% were later considered arguable by the full CACD on a renewal—nearly 100 cases. Moreover, in 2% of cases refused by the HCJs, the full CACD went on to quash the conviction or allowed the appeal against sentence: nearly 60 cases. Of course, no statistics reveal the proportion of the cases (2,200 in 2019) where an HCJ's erroneous refusal of leave remains undetected because no renewal application is made.[94]

Aside from the core s 31 and s 29 decisions, the raft of other decisions the HCJ is called upon to make in these paper applications include rarefied aspects of criminal law, sentencing, evidence and procedure. Some decisions involve highly technical aspects of criminal procedure including, e.g., applications for leave to launch an interlocutory appeal under s 9 CJA 1987[95] or s 35 CPIA 1996;[96] prosecution appeals against confiscation orders (or a refusal to make one other than on reconsideration of benefit);[97] and prosecution or third party appeals against a determination under s 10A of the Proceeds of Crime Act 2002.[98] Some decisions also require considerable sensitivity in dealing with vulnerable defendants (leave to appeal against a verdict of not guilty by reason of insanity;[99] against disposal orders made consequent on such a verdict,[100] as well as by appointed trial advocates against a finding that

[92] Where the HCJ concluded that the appeal was arguable, it would be erroneous to say that a subsequent dismissal of the appeal meant that the HCJ was 'wrong'. The HCJ was asking 'is it *arguably* unsafe'; the CACD is asking whether 'it *is* unsafe'.

[93] These may of course be the decisions most vulnerable to being corrected. There is also the influence of having oral argument in the CACD, which probably skews the outcomes.

[94] Although it would, theoretically, be possible for the judiciary to work this out, e.g. by reviewing a sample of decisions from every judge—just as HMCPSI does for CPS decision-making. See generally: <https://www.justiceinspectorates.gov.uk/hmcpsi/about-our-inspections/our-inspection-programme/>.

[95] Section 31(2D) CAA.

[96] Section 31(2E) CAA. See, e.g. recently *R (City of York Council) v AUH (SoS for BEIS intervening)* [2022] EWCA Crim 1113.

[97] Section 31(1) and (2) Proceeds of Crime Act 2002 (POCA). See further the procedure in Crim PR 42.

[98] See ss 31(4) and (5) POCA 2002 and Crim PR 42.

[99] Section 12 CAA and Crim PR 39.

[100] Section 16A CAA and Crim PR 39.

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the defendant was unfit to plead and that the defendant did the act or made the omission charged[101]). Other matters on which the HCJ may be required to rule include a diverse range of matters of criminal process, such as whether to grant vary or revoke bail pending an appeal;[102] and whether to grant leave against orders: for trial by jury of sample counts;[103] for juryless trials because of a danger of jury tampering;[104] to continue a trial without a jury following jury tampering;[105] restricting or preventing reports;[106] and for Serious Crime Prevention.[107] Indeed, some of these issues arise so very rarely in practice that without extensive experience, they are prone to catch out the unwary, or induce a simple referral of the entire application to the CACD (see below), which defeats the purpose of the s 31 filter.

The HCJ also plays a key role case managing for the Court of Appeal those applications meriting further scrutiny. Chief amongst these are cases in which the HCJ decides not to refuse the application but to 'refer' to the full Court; typically, where it involves fresh evidence,[108] fresh representation[109] or a 'change of law'.[110] In such cases, a simple referral avoids the HCJ making decisions that might fetter the CACD in any way in its determination of these more difficult appeals.[111] Furthermore, in any case referred or where leave is granted, the HCJ has additional decisions to make which impact significantly on the process for the appeal: e.g., making a witness order (e.g. in fresh evidence cases) or an order for production of a document or exhibit;[112] and granting leave for the appellant to attend the full hearing where leave is

[101] *Roberts* [2019] EWCA Crim 1270.
[102] Crim PR 39.8.
[103] Section 18 Domestic Violence, Crime and Victims Act 2004 and Crim PR 37.
[104] Section 45(5) and (9) Criminal Justice Act 2003 (CJA) and Crim PR 37.
[105] Section 47 CJA 2003 and Crim PR 37.
[106] Section 159 Criminal Justice Act 1988 and Crim PR 40. Such applications may be heard in private: Crim PR 36.6(1).
[107] Section 24 Serious Crime Act 2007 and art. 9 of the Serious Crime Act 2007 (Appeals under section 24) Order 2008, SI 2008/1863); Crim PR 39.
[108] The Blue Guide, (n 65) para. A 12-1. P. Taylor (ed) *Criminal Appeals* (3rd edn, OUP 2022), para. 6.157. See generally S. Roberts, 'Fresh Evidence and Factual Innocence in the Criminal Division of the Court of Appeal' (2017) 81(4) J Crim Law 303.
[109] See *France* (2016) (11 May 2016); *Duncalf* [2021] EWCA Crim 504.
[110] Particularly since *Jogee* [2016] UKSC 8; *Johnson* [2016] EWCA Crim 1613. See on the impact for s 31 *Garwood* [2017] EWCA Crim 59.
[111] As, e.g. if the HCJ granted leave on the substantive issue, but the CACD had to make a decision on the adequacy of the explanation for the delay: *Gabbana* [2020] EWCA Crim 1473.
[112] Crim PR 39.7, ss 31 and 31A.

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granted.[113] Sentencing applications bring their own range of decisions on important powers to order reports (from prison, probation, mental health, etc.) when granting leave if these will assist the full Court.

This extensive catalogue of decisions range across the entire criminal process. They involve decisions of great portent for the defendant and often require scrutiny of the minutiae of sometimes obscure aspects of the criminal trial. To assist them, newly appointed HCJs are provided with guidance and support from an experienced Court of Appeal Office lawyer in understanding the process, but the lawyer plays no part in the decision-making.

### (iv) *Reasoned decision-making*

The HCJ must provide reasons for their s 31 decision sufficient to demonstrate that the points raised have been engaged with, that the application has had a fair review,[114] and to inform legal representatives who need to decide whether to renew. Beyond that, it is unclear (certainly from the law in the books) what is expected of the HCJ. Academics who conducted empirical work on s 31 were critical of the succinctness of the reasons.[115]

The pressures in this regard on the HCJ extend beyond the obvious. Without adequate reasons, there is a risk that actual or perceived superficiality in the s 31 process will lead to it failing in its primary purpose. Defendants and legal representatives will be less likely to be accepting of the process[116] and thereby more willing to renew applications, adding to the burden of the full CACD.

### (v) *Summary*

Section 31 decisions are important, multifaceted, usually final and can involve any aspect of criminal law, evidence, procedure and

[113] Section 31(2)(c).

[114] *Garcia v Spain* (1999) 31 EHRR 589, para. 26.

[115] J. Plotnikoff and R. Woolfson's study was critical of the concise nature of reasons: *Research Study No 18, Information and Advice for Prisoners About Grounds For Appeal and the Appeals Process* (HMSO 1993), 35. Malleson (n 76) was also critical of reasons in non-counsel applications in particular (see p. 37). See also Pattenden (n 59) (1996), 99.

[116] See, e.g. Tom Tyler's compelling scholarship on the importance of the perception of due process in securing public acceptance of the validity of decision-making: T. Tyler, 'What Is Procedural Justice?: Criteria Used by Citizens to Assess the Fairness of Legal Procedures' (1988) 22(1) *L & Soc Rev* 103; and *Why People Obey the Law: Procedural Justice, Legitimacy, and Compliance* (Princeton 2006). See also K. Burke and S. Leben, 'Procedural Fairness: A Key Ingredient in Public Satisfaction' (2007) 44 Ct Rev 4.

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sentencing. They are required to be made alone and without the assistance of oral advocacy (even though in other contexts oral hearings have been demonstrated to lead to higher success rates than paper applications[117]). Yet these decisions are ones on which a person's long-term liberty will turn. Although there is the possibility of a renewal to the full court, as experience and empirical work over decades have revealed, the renewal system is an imperfect safeguard, not least because of the 'loss of time' regime. For the last 50 years, scholars[118] have recognised how that scheme unfairly impedes access to the CACD,[119] has been[120] and remains[121] frequently misunderstood by practitioners and defendants, and disproportionately impacts those serving short sentences,[122]including most notably women.[123] To sum up, then, the s 31 filtering step is so important in the overall scheme of the appellate system that it seems appropriate to deploy judges with criminal trial and appellate expertise.

## 4. *The Adequacy of the Present System*

Having established the distinctiveness of criminal judging and the roles expected of the HCJ, this section considers whether the current regime of appointment and training of KBD judges guarantees that the decision-makers are well equipped to perform these demanding roles.

### A. *Criminal Trials*

As noted, the criminal trial diet of the KBD judge will be murder, manslaughter and terrorism, alongside other occasional serious

[117] Research by Cheryl Thomas and Hazel Genn demonstrated in the tribunal context that where the information in written submission was identical, claimants were two and half (2.5) times more likely to have their appeal allowed with an oral hearing (60%) compared with a paper case (24%): *Understanding Tribunal Decision-making: A Foundational Empirical Study* (Nuffield Foundation 2013), 8.

[118] M. Zander, 'Legal Advice and Criminal Appeals: A Survey of Prisoners, Prisons and Lawyers' [1972] Crim LR 132.

[119] K. Malleson, (n 76).

[120] Plotnikoff and Woolfson (n 115).

[121] See K. Telhat, *CCRC Intern Project 2020/21 – Loss of time Orders Research Report,* <https://s3-eu-west-2.amazonaws.com/jotwpublic-prod-storage-1cxo1dnrmkg14/uploads/sites/5/2022/01/Loss-of-Time-CCRC-Intern-Project-2020-Final-Report.pdf>.

[122] See Malleson (n 76), 328.

[123] See Telhat (n 121), 8–10.

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complex crime. In short: cases that are the highest profile and most demanding.

It seems reasonable to expect that judges should be tasked with these trials only when possessed of adequate expertise, although I do not deny that judges will continue to acquire that once in post. As explored later, the expertise required may well be best borne of experience. My argument may thus appear paradoxical: if judges can only deal with murders when they have experience of dealing with murderers, then how would a judge ever start to acquire any? The answer to that, I suggest, has to be seen in the context of the ticketing system for criminal judges and the appointment regime. The ticketing system allows for judges throughout their career to incrementally develop experience of progressively more demanding trials—beginning with securing a ticket to try serious sex cases, then a ticket to try attempted murder and finally a ticket to try murder. Yet with KBD judges there is no expectation of that experience being, or having been, acquired.

Similarly, given the range, complexity and diversity of the powers in s 31, one might expect that considerable experience of criminal trial process would be a prerequisite to fulfil the 'filtering' role. To articulate that aspiration is not simply to fulfil some academic desire for a 'pure' system: there is a real risk that the inexperienced HCJ will miss technical points of law and practice, and that risk may be exacerbated by the absence of any oral argument or judicial collaboration. Inexperience also increases the prospect that the decision will be abdicated by an HCJ too readily referring difficult cases to the CACD, thus undermining the purpose of the s 31 system in the first place.

### B. *Appellate Criminal Experience*

As noted, the filtering process necessarily involves decisions that are parasitic on the primary tests of the CACD. It seems odd to expect a judge who may well have little or no experience of sitting in the CACD to 'shadow' its function in this way. Even if, on appointment, the HCJ has some practical experience of criminal trials, they will (initially) lack experience of appellate criminal processes: recorders do not gain such experience, nor do Deputy HCJs.

Again, there is an apparent contradiction. If prior CACD experience is required and yet before appointment to the KBD most judges are unable to acquire that experience how will experience ever be gained sufficient to be appointed? This is not, I suggest, fatal to the argument. One

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response is that there are judges who have the sought-after experience as CCJs ticketed to sit in the CACD.[124] Secondly, the experience required can be safely acquired once in post, with a newly appointed judge sitting in the CACD as part of a panel alongside experienced criminal judges. In advancing this suggestion, however, I do not propose to consider the secondary question of how many months sitting full-time in the CACD would expose the new judge to an 'adequate' number of appeals.[125]

### C. *And yet the System 'Works'…*

Challenges to the present regime may be countered by arguments that (i) the system demonstrably works and indeed (ii) has produced some exceptional criminal expertise from the KBD judges from other practice backgrounds. It is submitted that neither argument is, on close examination, compelling.

#### (i) *Made to work*

Those within the system are well aware that it is *made to work* by the diligence of several key players behind the scenes—the President of the King's Bench Division (PKBD) and Registrar in particular—as well as by the determination of the KBD judges.

Despite the size of the Division and the range of experience King's Bench judges bring with them, successive Presidents have skilfully matched each judge's experience to the particular murder to try. The difficulty with that, however, is that it is not a wholly transparent process, although that is typical of many allocation decisions overseen by senior judges.[126]

In relation to the appellate role, it is the Registrar who ensures the smooth running of the s 31 process even with judges possessed of limited criminal expertise. She clearly succeeds to the extent that s 31 avoids the CACD drowning in appeals.[127] The Registrar acts as the 'gatekeeper'

[124] See discussion in Section 6.

[125] Efforts are made to allow new KBD judges to sit in the CACD soon after appointment.

[126] See in a different context C. Hanretty, *A Court of Specialists: Judicial Behavior on the UK Supreme Court* (OUP 2020) 268. Note also Brian Opeskin, 'The Relentless Rise of Judicial Specialisation and its Implications for Judicial Systems' (2022) 75(1) CLP 137 <https://academic.oup.com/clp/article/75/1/137/6767848> referring to the *de facto* specialisation of judges that results (p. 162).

[127] There is a separate question about whether it is necessary given the decline in numbers of appeals in recent years.

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of the process,[128] managing each of the thousands of applications annually.[129] In practical terms, she seeks to ensure equivalence in volume allocation between the judges, whilst having regard to complexity, the extent of the bundle of papers involved and the existence of linked applications and sentence applications. Non-criminal judges are given a lighter load with a greater preponderance of the (impliedly easier) sentencing applications.

More challenging still is the Registrar's role in the decision about which HCJ receives which applications. There is no published guidance on this, but we can assume it involves assessment of their suitability to hear the application given their previous trial and appellate and s 31 experience. Similarly, it would seem obvious to consider the type of case,[130] the seniority of the trial judge and the gravity of the sentence. Notably, this exercise appears quite unlike the listing of trials in the Crown Court, where it is at least transparent which judges are 'ticketed' to hear which class of offence.[131]

### (ii) *Optimal or 'working'?*

More fundamentally, the claim that the system 'works', is short-sighted and ignores the goal of an *optimal* rather than a *working* system. Indeed, the claim that the system is 'working' is itself a doubtful one since that cannot be measured in any meaningful manner. It can be demonstrated not to be 'failing' since the level of miscarriages of justice remains low, but that is a different question. Moreover, the acceptance of a 'working' system also ignores the well-being and satisfaction of the HCJs. To articulate something rarely if ever spoken, dealing with criminal cases without expertise may well mean that the KBD judge is less confident than they deserve to be in the senior position they occupy.

This argument for the status quo also ignores the discontent (equally rarely if ever publicly expressed) of practitioners and CCJs alike. Advocates appearing in murder trials with inexperienced KBD judges shoulder an educative burden in chaperoning the judge through the case on top of the pressures of dealing with a client facing the most serious charge. Similarly, it is not unexpected or unreasonable to assume that a

[128] *Lambert* [1977] Crim LR 736.

[129] I am deeply grateful to the Registrar, Master Alix Beldam KC (Hon) for her patience and unique insights drawing on her encyclopaedic knowledge of the system.

[130] Some applications may be better dealt with by those from commercial backgrounds, e.g. some aspects of confiscation.

[131] Allocation categories for trials are provided for in the Crim PD 2023.

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circuit judge of many years standing might feel aggrieved at having an inexperienced non-criminal HCJ adversely review their decision in the s 31 process.

### (iii) *It has produced exceptional criminal judges*

I turn to address the second argument, chiefly that the existing system has produced some exceptional criminal judges. I endorse the celebration of the many HCJs from non-criminal backgrounds who have excelled, and many who have gone on to excel in the Court of Appeal and beyond. I caution, however, that this is certainly not true of all who have come through that system. Moreover, I suggest that this claim wrongly attributes causation: in other words, the current system does not maximise the likelihood of producing exceptional criminal judges, and some of those who become such do so *in spite of* the present system, not because of it. Furthermore, it might be argued that the roles involved (and the consequences at stake) are simply too important to be used as a potential training ground for future judicial leaders.

## 5. *Options for Reform*

Having identified the present system's failings in guaranteeing all KBD judges have sufficient expertise in crime, I turn now to examine various options for reform of the system. Before doing so it is worth exploring, briefly, the meaning of 'expertise' in criminal law in this context.

### A. *Expertise and Experience*

The problems with the current regime examined above are underpinned by a concern that many KBD judges lack distinctive judicial skills at first instance and on appeal. These are, it can be argued, best exhibited by those who have acquired criminal trial (and ideally appellate) *experience*.

Unsurprisingly, there is a rich psychological literature on what it takes to acquire expertise and when someone can be classified as an expert.[132] Those questions are context-specific[133] and particularly difficult to

[132] See *inter alia*, J. K. Phillips, G. Klein and W. R. Sieck, 'Expertise in Judgment and Decision Making: A Case for Training Intuitive Decision Skills' in D. J. Koehler and N. Harvey (eds), *Blackwell Handbook of Judgment and Decision Making* (Wiley 2007), Ch. 15.

[133] See G. Edmond (ed) *Expertise in Regulation and Law* (Ashgate 2004), Ch. 1.

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answer in the judicial context.[134] At the outset, it is clear that knowledge and experience are both necessary but neither is sufficient to render someone an expert. Put differently, it is not just what a person *knows* but what they can *do* that demonstrates whether they are an expert.[135] In relation to the particular tasks of decision-making, researchers have reported that the skills exhibited by expert decision-makers centre on their ability to identify problems based on *experience*.[136] The acquisition of the enhanced levels of skill leads to 'consistent, accurate, complete, efficient' decision-making and 'increased self reliance'.[137] Consequently, 'experts in particular fields will see analogies that others do not and will see structural and relational similarities (and differences) when others see only surface similarities and differences'.[138]

Disappointingly, there is no consensus on whether expertise (whatever that means) produces 'better' quality decision-making. There is little empirical evidence to support that in a legal or judicial context, but it appears to be accepted that expert decision-makers do go about their task in a qualitatively different manner from novices.[139] 'Expert decision makers take more features of a situation into account, and represent that information to themselves in a different way, than novices do'.[140]

[134] For an excellent account of the difficulties underpinning assumptions of judicial specialisation and expertise see C. M. Oldfather, 'Judging, Expertise, and the Rule of Law' (2012) 89 Wash Univ L Rev 847 <http://ssrn.com/abstract=1799568>.

[135] Phillips et al, (n 132), 300.

[136] Phillips et al, (n 132), 303. See also 305: '[S]killed decision makers make sense of the situation at hand by recognising it as one of the prototypical situations *they have experienced* and stored in their long-term memory' (*emphasis added*). The psychological research labels this 'Recognition Primed Decision Making'. See G. Klein, 'Recognition–primed Decisions' in W. B. Rouse (ed), *Advances in Man-machines Systems Research* (JAI Press 1989), 47–92.

[137] Phillips et al, (n 132), 300 citing R. Glaser, 'Changing the Agency of Learning: Acquiring Expert Performance' in K. A. Ericsson (ed), *The Road to Excellence: The Acquisition of Expert Performance in the Arts and Sciences, Sports, and Games* (Erlbaum 1996).

[138] F. Schauer and B. Spellman, 'Analogy, Expertise, and Experience' (2017) 84 Univ Chi L Rev 249, 261; see also p. 265 of that volume.

[139] Oldfather (n 145), 883, referring to J. F. Yates and M. D. Tschirhart, 'Decision-making Expertise' in K. Anders Ericsson et al. (eds), *The Cambridge Handbook of Expertise And Expert Performance* (CUP 2006) 421. See also p. 426: '[S]ubject matter experts often exhibit much worse judgment accuracy than most people expect'.

[140] Oldfather (n 134), 888 citing J. F. Yates, *Judgment And Decision Making* (Prentice-Hall 1990), 372, 383.

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It also seems to be accepted that training can, beyond simply imparting knowledge, enhance and develop skills. Although sophisticated models of scenario-based simulated practice and feedback[141] have been developed to assist decision-makers develop their skills, there remains a need for acquisition of a level of skill based on hands-on experience.

It is important to reiterate here that it would be nonsense to argue that *all* HCJs are lacking in expertise and experience in criminal law. There will always be those with experience garnered in post and those appointed with strong criminal judicial backgrounds. The contention then is that the two criminal roles performed in the KBD (which involve sitting without the support of other judges) are best performed by those with criminal judicial experience. Unless that can be guaranteed, there are risks that the inexperienced judge will: be more likely to make errors;[142] be less likely to maintain consistency;[143] be less efficient in their conduct of the trial; need more assistance from the (more junior) judges at the court centre at which they are sitting; require more assistance from the Court of Appeal Office on s 31 applications; present challenges for the Registrar in selecting s 31 cases appropriate to their limited experience; and present more challenges for listing officers and the Presiding Judge for the Circuit in allocating cases they might confidently be permitted to try at first instance.

The creation of a new Division of the High Court (CDHC) could meet these concerns, but would be a radical step that I consider further in the next section. In the remainder of this section, I consider two lesser alternatives, both of which arguably merit some discussion.

## B. *More Training*

A predictable response to current failings might be to call for further training of newly appointed non-criminal King's Bench (KB) judges. That would be highly desirable in any event, but there are several arguments to suggest it is not a panacea.

[141] Phillips et al (n 132), 306. See further R. M. Pliske, M. J. McCloskey and G. Klein 'Decision Skills Training: Facilitating Learning from Experience' in E. Salas, G. A. Klein (eds), *Linking Expertise and Naturalistic Decision Making* (Psychology Press 2001), 40–41 describing techniques for training that are designed to facilitate the development of decision-makers' 'experience base'.

[142] It is impossible to demonstrate relative error rates since only HCJs deal with s 31 applications.

[143] On the benefits of consistency from experienced judges see Opeskin (n 126), 172; and F. Schauer and B. Spellman, 'Analogy, Expertise, and Experience' (2017) 84 Univ Chi L Rev 249, 264–5.

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Although theoretically possible, in practice it seems unlikely. Currently, KB judge training is minimal (around 2 days per annum). In a chronically underfunded criminal justice system, it seems fanciful to expect training provision on the scale that may be required. More importantly, while acquisition of *knowledge* of the law in the classroom might be straightforward for such excellent legal minds, the same cannot be true of acquiring criminal judgecraft *skills*.[144]

What exposure of the current systemic problems *does* provide is an opportunity for greater creativity in integrating judicial appointment processes and training. Could appointments be contingent on training, including acquisition of experience? Could more bespoke training packages be devised to meet the diverse needs of appointees? Could specific training and monitoring on s 31 applications be provided by more experienced criminal KBD judges? Certainly, such changes would have cost implications and may be unattractive to some applicants. Would judges appointed to the KBD be willing to spend months in the Crown Court dealing with less serious cases learning their criminal judgecraft? Would they be willing to have their s 31 applications checked by their peers? This should prompt much wider questions beyond the scope of this paper about whether Judicial College training is sufficiently geared to helping judges, not only to thrive in their present post but to progress in their career.

### C. *A Criminal Subdivision of the KBD*

A further less radical alternative to a new Division would be to create a specialist court *within* the KBD which could remedy the problems identified. The KBD already recognises specialist subdivisions for Admiralty, Commercial, Technology and Construction, etc., but bizarrely, not for criminal. Each newly appointed HCJ has the opportunity to indicate in which specialist courts they wish to sit, with the PKBD authorising judges subject to appropriate training. Judges usually hold multiple tickets.

Creating a specialist criminal subdivision could ensure that only those with sufficient expertise were authorised to try murders and deal with s 31 applications. It could be coupled with a more formal and transparent regime of allocation, matched with enhanced training obligations for any KBD judge seeking to sit in criminal cases. Such a specialist court

[144] The importance of such skills is explicit in the *Judicial College Strategy*, <Judicial College Strategy 2021-2025 (judiciary.uk)>.

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*within* the KBD would bring many of the advantages of a new Division, and would certainly be more likely achieved,[145] although there would be opposition from those concerned about (over)specialisation.

This model would seem to offer (almost) all the benefits of a new Division with far less controversy. That claim can best be considered as the case for a new Criminal Division is explored in full—the issue to which I now turn.

## 6. *Do We Need a Criminal Division of the High Court?*

This section considers what a new Criminal Division (CDHC) might offer, and whether its merits outweigh those of the less radical reform options (in particular, the creation of a criminal subdivision). It is worth noting that the question posed from the outset was whether a new Division is 'needed'. Although not without ambiguity, there is without doubt a high threshold to be met before such change should be introduced.

An assessment of the need for a new Division is necessarily speculative and far from straightforward. Since an underlying theme of the reforms (whether as to a subdivision or a new Division) is to move towards yet more specialisation, there is value in drawing upon the wealth of scholarship on that topic.[146] Although revealing no consensus on the desirability or success of specialisation in courts generally, the literature reveals a multiplicity of relevant factors. These will not be determinative of, nor even provide an agreed framework by which to assess the merits of criminal specialisation in the High Court. Nevertheless, an awareness of these issues enriches the current debate as the possible costs and benefits of a Division (or subdivision) are examined.[147]

Specialisation of courts, it has been argued,[148] generally promotes: better processes of adjudication;[149] increased accuracy of

[145] In terms of the level of specialisation, there are many benefits of such multi-ticketing. See S. Legomsky, *Specialized Justice Courts, Administrative Tribunals and a Cross-National Theory of Specialisation* (Clarendon 1990), 40.

[146] Leading works include S. Legomsky (n 145); L. Baum, *Specializing the Courts* (University of Chicago Press 2011) (see in particular the Appendix, 25–27 for the literature). More recent and sophisticated accounts that merit close attention are those by Brian Opeskin (n 126) and Chad Oldfather (n 134).

[147] Oldfather (n 134), 851.

[148] For close analysis of the validity of these claims see Oldfather (n 134), 867, recognising that '[p]redicting the relative impacts of specialisation versus generalism … is necessarily a speculative and contingent matter'.

[149] Oldfather (n 134), 856.

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outcomes;[150] better quality judgments; greater consistency[151] and efficiency;[152] and, more authoritative statements of law.[153] It is, however, also recognised to carry risks of, *inter alia*: narrowminded 'isolation and insularity' of specialist judges;[154] over-confidence;[155] 'clannishness'[156] working with the specialist bar; judges succumbing to 'faddishness';[157] an overambition to 'strive for brilliance';[158] proneness to jargonism;[159] judicial case-hardened attitudes;[160] stagnation of the law for want of cross-fertilisation;[161] and confusion over whether the dispute lies within the 'boundary' of the specialism.[162]

This cataloguing of pros and cons can be enhanced by a more sophisticated analysis identifying the types of specialisation and, in this case in particular, the nature of subject matter (criminal), and the 'functional specialisation' (the distinctive judgecraft identified above).[163] In addition,[164] Opeskin has rightly emphasised the need to consider the different modes by which specialisation can occur,[165] and the potential *impacts* of such specialisation on core values within the justice system including cost-effectiveness, just outcomes, impartiality, public trust in the administration of justice, access to justice and procedural fairness.

At first blush, decisions made by the KB judges in trying murders and on s 31 applications bear many of the characteristics which scholars have suggested merit specialisation. The decisions can involve technical

[150] But see Oldfather (n 134) casting doubt on the assumption that specialisation promotes expertise and in turn rectitude of decision-making.

[151] Oldfather (n 134), 856; and see J. McIntyre, *The Judicial Function: Fundamental Principles of Contemporary Judging* (Springer 2019) Ch. 7.3 for a theoretical discussion on the consistency and analogy reasoning in judicial decision-making.

[152] Legomsky (n 145) 17; Baum, (n 146), 98–105; Oldfather (n 134), 894.

[153] Oldfather (n 134), 855.

[154] Legomsky (n 145), 26; Oldfather (n 134), 848.

[155] Legomksy (n 145), 11; Oldfather (n 134), 848; cf. Baum (n 146), Ch. 4.

[156] Legomsky (n 145) 28; Oldfather (n 134), 866.

[157] Oldfather (n 134), 877.

[158] Oldfather (n 134), 876.

[159] Oldfather (n 134), 876.

[160] Oldfather (n 134), 860.

[161] Legomsky (n 145), 15; and see (n 222).

[162] Oldfather (n 134), 863.

[163] See Opeskin (n 126), Part II identifying these and others.

[164] The excellent review by B. Opeskin (n 126) which includes the interrogation of the 'nature, extent, and limits of judicial specialisation to ensure that it fortifies, rather than weakens, the core values underpinning the judicial system' (p. 143) repays close reading.

[165] Based on structures, personnel, administrative arrangements.

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complexity[166] and yet be highly discretionary;[167] and the decision-making is cohesive around criminal law, which is interconnected.[168] Much of the decision-making is at first instance, and that on appeal does not involve a review of a fully reasoned trial decision.[169] Moreover, the decision-making is frequently repetitive in type and has to be consistent,[170] with judges required to identify closely the similarities and dissimilarities. Despite that, there is a general caution against overspecialisation. The Consultative Council of European Judges, e.g., proposes that there should be a presumption in favour of generalised courts: 'Specialist judges and courts should only be introduced when necessary because of the complexity or specificity of the law or facts and thus for the proper administration of justice'.[171] It is also worth noting that the call for a CDHC involves a rejection of the general orthodoxy, which is to recognise greater specialisation at first instance but generalism on appeal. That challenge to the orthodoxy follows from the diverse roles performed by the KB judge, who must sit both at first instance and on appeal in crime.[172]

## A. *Some Potential Benefits of a New Division*

### (i) *Expert criminal judges*

A new Division would be constituted solely by expert criminal judges. For the reasons articulated further below that expertise should offer substantive and procedural benefits, but before exploring those it is important to acknowledge *who* those judges might be.

The principal candidates for appointment would be full-time criminal circuit judges. Those with murder tickets and already authorised to sit in the wings of the CACD would be the strongest applicants. The appointment scheme ought also to accommodate those with experience of crime as Recorders or from extensive criminal practice who would be eligible to apply (subject to judicial training and an extended period

[166] Legomsky (n 145), 25.
[167] Legomnsky (n 145), 22.
[168] Legomsky (n 145), 27.
[169] Legomsky (n 145), 15.
[170] Legomsky (n 145), 11. See also Opeskin, (n 126), 172.
[171] Consultative Council of European Judges, Opinion No. 15 on the Specialisation of Judges (Adopted at the 13th plenary meeting of the CCJE) (Paris, 5–6 November 2012) 4, 11 < https://rm.coe.int/09000016807477d9>. See also Opeskin (n 126), 139.
[172] But see the discussion by Opeskin (n 126), 153 et seq, recognising the 'common wisdom' of specialisation at trial and generalisation on appeal (p. 184).

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sitting in the Crown Court and the Court of Appeal). Similarly, serious consideration would need to be given on how 'generalist' KBD judges who wished to sit in crime could be 'dual-ticketed' so that they had that opportunity, alongside the other varied work of the KBD, to sit in the CDHC (again, subject to them acquiring sufficient expertise and experience of criminal trial and appellate work). They could then divide their time between the general KBD and the CDHC appropriately.[173]

There is also the question of whether generalist KBD judges would continue to be eligible to sit in the CACD. Subject to sufficient numbers appointed to the CDHC and KBD judges choosing to be dual ticketed, there should be no reason for them to do so. That could have implications for the range of expertise a particular KBD judge has to offer when it comes to applying for promotion to the Court of Appeal, but it bears mention that that is no different from the current situation where not all applicants to the Court of Appeal will have been ticketed to sit in all the specialist courts, or even in crime.

The precise details for appointment to the CDHC would ultimately need to be developed by experts from the relevant division of the Ministry of Justice, Judicial Office and the Judicial Appointments Commission. Similarly, the size of the Division would depend on the demand for criminal work (murder trials, s 31, etc.).

### (ii) *The quality of decision-making*

With every judge in the CDHC possessed of expertise and experience in criminal cases there should, logically, be reduced likelihood of errors at trial, thereby reducing the likelihood of appeals. A judge experienced in criminal trial and appellate work should also bring greater prospects of accurate decision-making in the s 31 process, but this claim is difficult to substantiate and is doubted by some eminent academics.[174] Even if enhanced accuracy does not follow, it has been argued that there will be enhanced quality of decision-making with specialisation.[175] That would follow not only at first instance but in the quality of the CACD

[173] See on the merits of multi-ticketed judges see Legomsky (n 145), 37.

[174] Oldfather (n 134), 17, quoting J. Frank Yates and Michael D. Tschirhart, 'Decision-Making Expertise', in K. Anders Ericsson et al. (eds), *The Cambridge Handbook of Expertise and Expert Performance* (CUP 2006), 421, 432: 'And the most consistent expertise conclusion has been this: Subject matter experts often exhibit much worse judgment accuracy than most people expect'.

[175] Baum (n 146); cf. Oldfather (n 134) who is critical of assumptions it produces better decision-making (at pp. 886–890) but accepts that experts go about their tasks in a manner that is qualitatively different from novices (p. 883).

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decision-making: any experienced criminal HCJ sitting as a 'winger' in the CACD would be in a position to contribute more to the decision-making of that court, and would alleviate the burden on the LJ presiding (who may themselves have limited personal criminal experience). Consequently in both instances, there would be enhanced procedural justice.

### (ii) *Finality*

Given that one of the primary objectives of an effective appellate system is to promote finality, having expert criminal judges as decision-makers should also further promote this important aim. Appeals play a role not only in securing justice in the individual case, but in promoting public confidence in the system. Where the appellate system is flawed to the extent that it fails to secure public confidence, that can have wider repercussions for criminal justice.[176] As Schiff and Nobles observe, 'the issue of finality is bound up with the ability of the legal system to lend its authority to the routine practices that constitute criminal justice'.[177] The point to be emphasised again is that creating a CDHC demonstrates a systemic recognition of the need to treat criminal cases seriously.

### (iii) *Efficiency gains*

There would be efficiency gains[178] in criminal trials and in allocation with the PKBD, with listing officers in Crown Courts and Presiders of Circuits no longer obliged to match anticipated murder trial complexity to the relative experience of the judge. Wider benefits could flow from the greater flexibility in the deployment of the most senior criminal judges, particularly as Crown Courts currently struggle to get through over 60,000 cases in the 'backlog'.[179] Similarly, s 31 decision-making should be more efficient in the hands of experienced criminal judges, with the Criminal Appeal Office (CAO) and Registrar able to allocate

[176] See A. Zuckerman, 'Miscarriage of Justice and Judicial Responsibility' [1991] Crim LR 492.

[177] For sophisticated analysis of what finality might mean in this context see D. Schiff and R. Nobles, *Understanding Miscarriages of Justice: Law, the Media and the Inevitability of a Crisis* (OUP 2000), 9; see also K. Malleson, 'Appeals against Conviction and the Principle of Finality' (1994) Brit J Law & Soc 151.

[178] The claim of efficiency gains in specialised courts is less controversial: see Legomsky (n 145), 17; Oldfather, (n 134), 894; Opeskin (n 126), 169–170.

[179] See D. Ormerod, 'Tackling the Backlog' [2022] Crim LR 1.

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applications more freely and with less preparation. Benefits in the Court of Appeal should also follow as that court can approach with greater confidence the decisions made on s 31 applications.

### (iv) *Transparency*

Aside from these practical gains, in principled terms, a CDHC would avoid the current 'behind the scenes' allocation process by the Registrar having to match cases to suitable experience on unknown criteria.[180]

### (v) *Confidence*

There should be a greater confidence in the quality (and possibly accuracy) of decision-making from every perspective. The HCJs themselves will be more justifiably confident in the performance of these demanding roles with the high profile they occupy, as will the CAO and the CACD. Furthermore, flowing from the expertise and greater confidence should be greater prospects of high-quality criminal jurisprudence developing more rapidly and robustly.[181]

There should also be an enhanced perception of the fairness of process from legal representatives making the s 31 applications (there may also be fewer speculative applications currently lodged in the hope of passing an inexperienced HCJ). Logically, there should also be fewer renewals as defence representatives are more likely to accept the judgment of an expert criminal judge. That in turn has positive implications for access to justice if applicants are better placed to make decisions on renewal. The defendant/applicant also stands to gain confidence in the process knowing their judge is an experienced criminal judge. Notably, it is well established from wider empirical research that due process and the confidence of the decision-maker impacts on the confidence of the litigant.[182]

Finally, a point that is not often discussed, the CCJ whose decision is under scrutiny will have reason to be more confident in the process and thereby more accepting of any s 31 outcomes.

[180] There may be similar informal procedures for allocation in the High Court and CACD in areas other than crime which serve to make the system work better in practice.

[181] See Baum (n 146), 34 et seq on the impacts of specialisation on development of legal policy.

[182] T. Tyler (n 116).

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(vi) *Redistribution of 'appellate' criminal work*

Thinking more creatively, beyond any gains from the enhancement of existing practices, establishing a CDHC could offer opportunities for reallocation of the criminal-related work conducted by the Administrative Court. That court currently deals with challenges to convictions from the magistrates' court by way of case stated and judicial review.[183] There are also those judicial reviews relating to search warrants and other crime-related matters. In total, there were 170 'criminal' judicial reviews in 2019.[184] Accepting that these cases sometimes require public law expertise, there is nonetheless an opportunity to improve the efficiency (and possibly accuracy) of decision-making if the court comprises at least one criminally experienced judge.[185] On a yet more radical approach, there could be the opportunity for the Administrative Court to deal with criminal matters when constituted by two HCJs from the CDHC (or CDHC and KBD where the subject matter requires it) without needing a LJ to preside.

The creation of CDHC also offers the opportunity to remedy a related problem, frequently and powerfully voiced by James Richardson, then Editor of *Archbold*. Richardson condemned as 'unlawful' the practice of 'listing criminal cases in the High Court before a single judge'.[186] In short, his concern was that it is possible for a criminal cause or matter to be (potentially conclusively)[187] determined by a single HCJ, including one with no criminal expertise. Richardson observed that it is inappropriate in this context for a single judge to be able to preclude consideration of the relevant issues by the full CACD given the critical importance of

[183] The system has long been in need of an overhaul—see Law Commission, *High Court Jurisdiction in Criminal Cases* (Law Com No. 324, 2010).

[184] These 170 cases arose from a total of 3,400 judicial review applications in 2019: Ministry of Justice, 'Civil Justice Statistics Quarterly, England and Wales, October to December 2019 (provisional)' (5 March 2020) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/870184/civil-justice-statistics-quarterly-Oct-Dec.pdf>, 11.

[185] Even if the HCJ appointed from a criminal background will not have sat in the magistrates' court, they may have conducted appeals from the magistrates under s 108 Magistrates' Courts Act 1980.

[186] See, e.g. *R (DPP) v Lancaster Magistrates' Court* (2010) 174 JP 320, QBD (Foskett J) and commentary at (2010) Crim LW 26/2.

[187] If the HCJ refused leave to apply for judicial review and certified as totally without merit, under CPR 23.12 that renders the process final in a criminal cause or matter: CPR 54.12(7) excludes the right of the applicant to make a request for the decision to be reconsidered at a hearing. Section 18(1)(a) Senior Courts Act 1981 excludes an appeal to the Court of Appeal in a criminal cause or matter. See *R (Imbeah) v Willesden Magistrates' Court* [2016] EWHC 1760 (Admin), with commentary in (2016) Crim LW 33/1.

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matters related to an individual's liberty. Having a Criminal Division of the High Court with expert experienced judges could alleviate some of these concerns.

The guarantee of judicial criminal expertise could also allow for further creative reform of how the criminal appellate courts are constituted and how the flow of work through the appeals system could be improved. Over 20 years ago, Sir Robin Auld suggested a distinction between 'straightforward cases' being heard by two-judge courts while cases of general public importance secured the attention of a full three-judge court.[188] Such radical schemes might be more palatable where any two-judge court is constituted by two CDHC judges both necessarily possessed of criminal expertise.

Under the current system, sentencing appeals can be heard by two-judge courts. That perhaps reflects the narrower range of matters to be challenged and the much more directed guidance now available from the Sentencing Council, Sentencing Code and Crim PR. The creation of a CDHC might thus prompt more widespread use of two-judge appeals on sentencing. Even more radically, could a single Criminal Division HCJ deal with a full sentencing appeal where the matter was 'straightforward', with complex cases being sent directly to the full CACD (whether by the trial judge granting a certificate for appeal on novel or complex points or the HCJ/CAO referring the case to the full Court)? All of these initiatives would free up the CACD to hear more conviction appeals, and might also bring benefits in the reallocation of non-criminal work to the 'general' KBD judges.

### (vii) *Symbolism*

Creation of a CDHC should help debunk the myth that 'crime is easy'. For anyone in doubt about that, recollect the many times the Court of Appeal has demonstrated its own shortcomings on criminal matters: the multiple attempts to interpret the definition of hearsay under the Criminal Justice Act 2003 being an obvious one.[189]

### (viii) *A career path for criminal judges*

It might legitimately be argued that almost all, if not all, of the benefits examined could be secured with the creation of a new subdivision of the

[188] Auld Report (n 62), Ch. 12, para. 90.
[189] Until Hughes LJ rectified matters in *Twist* [2011] EWCA Crim 1143.

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KBD. The core values of promoting justice, finality and efficiency could certainly all be achieved as could some of the more creative reconfigurations of the High Court criminal work. However, the CDHC alone would offer the clearest career path for the most talented criminal circuit judges. Those judges form a ready pool of candidates with the precise qualification, expertise and experience: the very best of the cohort of CCJs who have been authorised to sit as wingers in the CACD.

This is not to suggest that all such CCJs should be converted automatically to HCJs; nor to suggest that only those criminal judges would be eligible to apply. However, judges in this pool are, from anecdotal evidence at least,[190] often deterred from even applying to the KBD. They express concern that they lack the expertise and experience to deal with the range of non-criminal matters that a KBD would be called to adjudicate upon. Several have also described to me how their applications were rejected for want of experience beyond crime, and their perception that some senior judges may regard non-criminal work as 'too intellectually demanding' for the criminal circuit judge.

The available talent in that pool of judges is, it is contended, under utilised and that problem will intensify as CCJs are appointed relatively young in career terms[191] and yet able to serve longer (until 75). One consequence is that there is a cohort of expert criminal judges who will, after a decade or so in post, face 15 or more years in the same role with no realistic prospect of promotion. Little wonder, then, that the Judicial Attitudes Survey published in 2022 reveals dismayingly poor morale amongst circuit judges: 40% reported they were not satisfied or that job satisfaction could be better;[192] 53% were not satisfied with, or thought that career progression opportunities could be better;[193] and 41% would

[190] Judicial Appointment Commission statistics for 2019 (last available in full for HCJ) reveal that 23 salaried judges (including crime, civil and family) applied for the HCJ competition, with 9 being shortlisted and 2 recommended for appointment; as against 14 barristers applying, of whom 7 were shortlisted and 5 recommended for appointment. Put differently, that represents a 2/23 versus 5/14 appointment ratio. The statistics can be found at <https://judicialappointments.gov.uk/statistics-about-judicial-appointments/>.

[191] Eleven percent of Circuit Judges are under 50 and over half are under 60: Ministry of Justice, *Diversity of the Judiciary: Legal Professions, New Appointments and Current Post-holders – 2023 Statistics* (14 July 2023) <https://www.gov.uk/government/statistics/diversity-of-the-judiciary-2023-statistics/diversity-of-the-judiciary-legal-professions-new-appointments-and-current-post-holders-2023-statistics>, Fig. 42.

[192] C. Thomas, Judicial Attitudes Survey (UCL Judicial Institute 2021) <https://www.judiciary.uk/wp-content/uploads/2022/07/JAS-2020-EW-UK-TRIBS-8-Feb-2021-complete.pdf>, Fig. 6.11. The 2022 Judicial Attitude Survey did not break down different judicial posts in this level of detail.

[193] 2021 Judicial Attitudes Survey (n 192), Fig. 6.18.

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consider leaving the judiciary early over the next 5 years if that were a viable option.[194] In contrast, HCJs were much less likely than circuit judges to report that they would leave the judiciary within the next 5 years (28% vs 41%).[195]

Expanding the pool of candidates likely to apply to the High Court[196] by the creation of a CDHC may have (albeit statistically marginal)[197] positive consequences for enhanced diversity of the High Court. These interrelated benefits of career pathways and enhanced diversity could have further impacts as some CDHC judges rise through to the CACD and from there to the Supreme Court, where the need for criminal expertise and diversity is acute.[198] I accept, however, that the matter is one constantly under scrutiny and merits separate consideration as it has broader impacts and carries risks.[199] If the appointment process focuses too greatly on prior judicial skill, that might exclude applicants from the legal professions seeking direct appointment to the High Court. This in turn might impact on a range of diversity issues.[200]

## B. *Arguments against a New Division*

Having canvassed the arguments in favour of the CDHC, I turn to consider the opposing side. Even if there is acceptance that the current system warrants reform and that lesser alternatives are found wanting,

[194] 2021 Judicial Attitudes Survey (n 192), Fig. 5.17.

[195] ibid.

[196] See also R. Hunter, 'Problems of Scale' in G. Gee and E. Rackley (eds), *Debating Judicial Appointment in an Age of Diversity* (Routledge 2018), 250–251 on the need to diversify the HCJ pool.

[197] See Ministry of Justice, *Diversity of the Judiciary: LegalProfessions, New Appointments and Current Post-holders – 2022 Statistics* (13 July 2023) <https://www.gov.uk/government/statistics/diversity-of-the-judiciary-2022-statistics/diversity-of-the-judiciary-legal-professions-new-appointments-and-current-post-holders-2022-statistics>, Fig. 21. 6% of all HCJs (6) are ethnic minority as are 6% of CCJS (39). The position is not much different for women—28% women in HCJ and 32% in CC: Fig. 28. Further comparisons of CCJ and HCJ office holders on age, sex, ethnicity, professional background, etc., can be found in the 2023 statistics (n 197).

[198] On the importance of judicial diversity see, *inter alia,* JUSTICE, 'Increasing Judicial Diversity: A Report by JUSTICE' (JUSTICE 2017); and E. Rackley, *Women, Judging and the Judiciary From Difference to Diversity* (Routledge 2013). See generally the 2022 Diversity of the judiciary statistics (n 197), Table 2.5, and the 2023 Diversity of the judiciary statistics (n 197), Fig. 33.

[199] There is an argument for promoting career paths for judges from the lowest tiers.

[200] On the benefits of varied career opportunity for judges, see Consultative Council of European Judges op cit (n 171).

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the creation of a new Division would inevitably provoke significant challenges.

(i) *Tradition*

Some objections to the idea of additional Divisions of the High Court are borne of tradition. As Lord Devlin noted in 1979,[201] there is 'no inclination' in this jurisdiction to 'see that cases in a particular field are allotted to [High Court] judges with experience in that field'. Despite the eminence of the source, perhaps that view can be summarily dismissed as it sat alongside his Lordship's view that:

> New judges, chosen from the specialist bar, begin by thoroughly understanding the background and *need no training*. There are, as I have noted, specialist judges within the Queen's Bench Division, but their subjects are parochial compared with crime. Crime would require a criminal division of the High Court at least as big as the Family Division. … I need not pursue this for no one has suggested anything of the sort.[202]

Thankfully things have moved on. Life, law and judging are all more complex.

The opposition to specialist appellate criminal courts has a long history. There was sustained hostility to the creation of a Criminal Court of Appeal through most of the nineteenth century.[203] As is well known, various high-profile miscarriages finally served as a sufficient catalyst for the legislative change introduced in 1907.[204] Interestingly, when the decision to create a dedicated criminal appeal court was being debated in what was to become the Criminal Appeal Act 1907, the original proposal was to make all (then) Queen's Bench Division (QBD) judges eligible to sit. At the Council of Judges' suggestion, it was subsequently accepted that only those judges of the QBD who sat in the Court for Crown Cases Reserved (with experience of criminal appeals) should

[201] P. Devlin, *The Judge* (OUP 1979), 21.

[202] P. Devlin, *The Judge* (OUP 1979), 45. Since then, the idea of a Criminal Division has been advanced by at least one eminent criminal judge: Sir Richard Henriques noted the idea in his memoirs, *From Crime to Crime* (Hodder & Stoughton 2020), 262.

[203] The arguments included those of cost, practicality and judicial capacity to deal with the anticipated flood of appeals, as well as the principled concerns that the deterrent effect of criminal trials would diminish with a lack of finality as well as a desire to protect the sacrosanct nature of jury verdicts. See generally W. Craies, 'Criminal Appeal in England' (1907) 8 J Soc Comp Legis 93; H. Cohen, *The Criminal Appeal Act, 1907* (Jordan & Sons 1908); and Pattenden (n 59), Ch. 1.

[204] The cases of Adolf Beck and George Edalji were the most egregious; on which see Pattenden (n 59), 27–30; and Schiff and Nobles (n 177), Ch 3.

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sit.[205] That, it could be argued, reflects a recognition of the benefits of staffing such a specialist court with judges with experience of dealing with criminal appellate work.[206] Ultimately, in 1908 for practical reasons it was decided that the Lord Chief Justice should select any eight QBD judges to sit in the newly formed Court of Criminal Appeal.[207]

There is also the more general point underlying the arguments: i.e., the assumption noted at the introduction to this paper that crime can be 'picked up' by judges as they go along. This is of long-standing and is multifaceted. One of the reasons for some senior judges' opposition to the creation of a Court of Criminal Appeal was their prejudiced perception that criminal law lacked intellectual challenge.[208] Today, traces of that perception continue to exist in some quarters in respect of criminal judging in the KBD. Historically, that might have flowed from a view that there was less *judging* in criminal cases, but as discussed in Part I, that cannot now be sensibly contended.

The origins of this prejudice are unclear. Such an assumption may have taken root at a time when judges appointed to the High Court would have been highly likely, as junior barristers practising in common law, to have had a broad practice including some criminal trial work.[209] Even as an argument based on such tradition, the attempted justification can be readily rebutted. First, it was never the case that *all* HCJs had such experience. Secondly, even for those who did, a breadth of historical experience as a junior advocate reveals nothing about expertise and experience in criminal judgecraft at trial or in an appellate capacity decades later.[210] Thirdly, the argument from traditional common law experience falters because we are no longer appointing as many HCJs with a broad common law background. Indeed, many are now from a public law background, where the nature of litigation is very different.

[205] The Court for Crown Cases Reserved, established in 1848, provided appellate scrutiny where a case was stated by the courts of quarter sessions and in other limited circumstances. It could quash a conviction if there was an error of law at trial, but lacked the power to alter a sentence. For more information see P. Handler, 'The Court for Crown Cases Reserved 1848-1908' (2011) 29(1) LHR 259; and J. Stephen, *A History of the Criminal Law of England* (Macmillan 1883), 308–311.

[206] The merits of a specialist Court of Criminal Appeal are examined in detail in Pattenden (n 59), 6–16.

[207] See JUSTICE, 'Criminal Appeals' (1964), 8.

[208] P. Handler (n 205), 281—coupled with their lack of expertise and experience in crime, one might add.

[209] It may have its origins in the expectation, historically, that counsel would rarely decline a brief, being confident they could 'swot up' on the subject adequately.

[210] The HCJ may, as noted, have accrued some criminal experience sitting part time as a Recorder.

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As Lord Justice Singh observes in his powerful collection of essays, *The Unity of Law,* in practice in judicial review which is the staple of the public lawyer, 'it is rare for evidence to be taken from live witnesses and for there to be cross-examination'.[211] That is a quite different scenario from the criminal trial.

As an aside, it is worth recording, parenthetically, that the argument for the creation of a new Criminal Division would be wholly different from those that led to the Family Division in 1971. The Family Division was created from the fragmentation of the old 'Probate, Divorce and Admiralty Division'. In other words, it was not created to fulfil a particular need.[212]

### (ii) *Some practical objections*

*Recruitment.* Some might argue that recruitment would be difficult (although that is doubtful for the reasons discussed above). More of a concern on staffing, and one that cuts across possible gains in job satisfaction, is the risk that a Criminal Division of the High Court (CDHC) would lead to judges becoming more insular and isolated—as is an acknowledged risk with some specialist courts.[213] Those suggestions might be countered. First, this is not the creation of a *narrow* specialist Division such as a bankruptcy court; crime is wide ranging. For that reason, one can perhaps be confident in dismissing the risk of 'clannishness' that could develop between a judge and members of a narrow specialist bar.[214] Moreover, as noted, any risk of insularity must be weighed against the potential benefits secured from the depth of judicial expertise and experience enhancing sound principles of criminal law being developed more swiftly and robustly.

*An inferior Division?* A new Division might prove unpopular to applicants if perceived as an 'inferior' court by comparison with the other Divisions of the High Court.[215] Such a claim is difficult to test but can be countered by two points. First, the criminal circuit

[211] *The Unity of Law* (Hart 2021), 10.

[212] See generally S. Brown, 'Reform and the Rise of Family Law' (1989–1990) 14 Holdsworth L Rev 59.

[213] n 154.

[214] Legomsky (n 145). See also Opeskin (n 126), 174 describing the associated risks of 'regulatory capture' which again seems inapplicable here.

[215] See Oldfather (n 134), 857.

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judge facing no other prospect of promotion is unlikely to be overly concerned about whether the CDHC is perceived as inferior to the unattainable KBD. Secondly, we already have different Divisions and surely no one thinks that, e.g., the Family Division is an inferior Division to any other.

*Legislation.* There is also the legislative foundation to consider. Section 5 of the Senior Courts Act 1981 stipulates that there 'shall be three divisions of the High Court', but by s 7 'His Majesty may from time to time, on a recommendation of the Lord Chancellor and the [LCJ, PKBD, MR, PFD and Chancellor] by Order in Council direct that—(a) any increase or reduction in the number of Divisions of the High Court'. No primary legislation would therefore be required to make this change.

*Insular and case-hardened judges.* More practically, there could be concerns that judges appointed to the CDHC become so case-hardened[216] that there is no increase in accurate s 31 determinations. Alternatively, CDHC judges may prove so good at identifying trial errors that the permissions are granted to such an extent as to overburden the CACD (although that should not be seen as a negative outcome in terms of achieving justice). Neither of these seems a compelling objection. There is no evidence that the few HCJs who are appointed from full-time criminal judicial posts have demonstrated such traits.

*Definition and boundaries.* Could criminal law be defined with sufficient precision to be clear about which judges had jurisdiction over which cases? Would there be so called 'boundary disputes'?[217] Mainstream criminal appeals would be straightforward, but what of extradition and many of the other crime-related applications made before the High Court? This should not, it is submitted, be seen as a major obstacle (although admittedly it would be non-existent if the specialist subdivision was created). The question of whether a case is a 'criminal cause or matter' is well-trodden ground.[218] Moreover, the point could be seen as an opportunity for creativity in redistributing

[216] Oldfather (n 134), 860.
[217] See Opeskin (n 126), 171.
[218] See *Belhaj & Anor v DPP* [2018] UKSC 33.

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the appellate work and that of the High Court, as discussed above.

*Costs.* There would inevitably be cost implications if the total number of judges of the High Court needs to increase (which it would at least initially, although in the longer term it could mean fewer appointments to the KBD). There would also be the costs of establishing a suitable appointment process and effective training. Arrayed against that, there would be some efficiency gains in the CACD in particular, and no other capital outlay would be involved (with no new buildings, etc., required).[219]

### (iii) *Policy objections to specialisation*

A far more important challenge to the creation of a new Division is one of policy. Does the creation of a CDHC represent a move towards overspecialisation in judging?

This brings us more directly into the much wider debate about the merits of specialist judges and specialisation. I am certainly not the first to argue that, with careful implementation by design not inadvertence,[220] specialisation has many advantages in judging, as elsewhere in society. As Brian Opeskin put it when delivering a CLP lecture just last year, with 'careful institutional design, especially through hybrid specialisation, [it] can deliver significant benefits while minimising costs'.[221]

A formidable opponent to such moves towards specialisation is Lord Justice Rabinder Singh who puts the counter in characteristically lucid terms in *The Unity of Law* referred to above.[222] One argument he advances is that the law is stronger because of the opportunities for cross-pollination of ideas from different branches of the law. A specialist Criminal Division might inhibit that with judges having similar backgrounds and experience (although the objection is not as strong as it would be with some niche specialisms).[223] It is undoubtedly true that

[219] There is currently a statutory cap on the total number of HCJs across all divisions at 108: s 4(1)(e) of the Senior Courts Act 1981.

[220] See Baum (n 146), 213.

[221] Opeskin (n 126), 137.

[222] *The Unity of Law* (n 211), Ch. 1.

[223] Opeskin (n 126) argues that new courts face 'greater challenges in supporting *just outcomes* because of heightened intellectual isolation from mainstream courts and fewer safeguards regarding the quality of appointees' (see p. 180). It is submitted that a CDHC would be quite different as a court with jurisdiction across criminal law.

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there are great benefits from cross-pollination of legal ideas, particularly in the Supreme Court where disputes have been honed to refined points of law or policy. It is less obvious, however, that there is as much to be gained in routine criminal permission applications, or indeed in a murder trial. Secondly, it may also be doubted whether *the judge* is typically the source of such cross-pollination or whether it is more usually the ingenuity of counsel bringing to bear arguments from other branches of law. Even if the judge is the cross-pollinator, it may be queried how often that (usefully) happens in criminal cases below the Supreme Court or *perhaps* the CACD. How likely is it that a dispute in a murder trial is resolved because of a concept being transposed from another branch of law *by the judge*? That seems far less likely than the prospects of it being resolved satisfactorily because there is a criminal expert on the bench.

His Lordship also rightly points to the fact that KB judges can be trained and that they are quick learners. That is not really in dispute, but it does not detract first from the point made above that currently the training is minimal (and for financial reasons unlikely to increase), and secondly that in this context what can be acquired most immediately by training is knowledge of the law; yet (as I argue) what is needed is the acquisition of criminal judicial experience. Accepting that some judicial skills can be taught—how to draft rulings, writing judgments, witness handling, etc.—and that these are transferable, there is a distinctive criminal judgecraft which has to be acquired largely by experience at trial and appellate level.

A third argument advanced by Singh LJ is that 'points of law are points of law'[224] capable of being resolved by any good judge. In response, first, it is worth repeating that the decisions made by the KB judges in trying murders and on s 31 applications bear many of the characteristics which scholars have suggested merit specialisation. More broadly, one might ask: does generalism in this context maximise the values promoted by efficient and quality decision-making if that is more likely to follow with a specialist judge?

His Lordship takes the view that the KBD judges should not be seen as 'generalists' but as 'versatile specialists'.[225] That may be true insofar as it relates to their skills as lawyers, but as judges, depending on their prior *judicial* background they may well be no more than

[224] *The Unity of Law* (n 211), 11.

[225] *The Unity of Law* (n 211), 11. The question of how specialist a judge might be expected to be has long been debated: see H. J. Friendly, 'Reactions of a Lawyer—Newly Become Judge' (1961) 71 Yale LJ 218 (1961).

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inexperienced generalists.[226] Can we really apply the label 'versatile specialist judge' to a newly appointed KB judge, or are they more accurately seen as specialist lawyers whom we hope will evolve into versatile expert judges?

These wider questions of policy about how specialist in discipline we want our High Court and its Judges to be might legitimately prompt the response: 'It depends on how distinctive are the tasks they are asked to perform'. We have come, therefore, full circle to the question I set out at the beginning. Is criminal judging distinctive enough to be treated differently? I have argued that the answer to this question is yes. Consequently, the more radical solution of creating a new Criminal Division would recognise and respect, in full, the distinctiveness of the decision-making required in criminal judging, and criminal appellate work in particular.

## 7. *Conclusion*

To repeat the central argument—in trying and dealing with appeals in criminal cases what matters is surely not whether we have the best legal minds in post, but whether we have the best criminal *judges* in place. Some of the judges appointed to the KBD will fit that description borne of years of experience as a criminal judge at first instance. Others will, of course, acquire such expertise from years of experience as an HCJ trying murders and sitting in the wings of the CACD, particularly where that builds on years of experience as a criminal practitioner. It would be nonsensical to deny that criminal judicial expertise can be acquired. Nor can it be denied that with sufficient exposure to criminal trials and appellate criminal sitting those skilful enough to be appointed to the KBD may, *after time*, come to excel in criminal judgecraft. But that does not detract from the central focus: viewed as a body of decision-makers, are we confident that the KBD judges are *all* optimal decision-makers on the criminal matters they are expected to resolve?

More generally, whatever the merits of reform of the High Court, we should reflect on the risks that the current expectation that all KB judges

[226] I acknowledge that may be possible for a DHCJ appointed with a public law practice.

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can 'pick up' crime is borne of a deeper, ill-justified assumption that 'crime is easy'. The 'systems' of judicial appointments and judicial training, and the 'institutions' involved—the senior judiciary, the JAC and MOJ, etc.—should avoid approaches to recruitment and deployment of judges that reinforce any assumptions that 'crime is easy'.

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