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Sentencing Policy and Practice in England and Wales

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Sentencing Policy and Practice in England and Wales

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Much has changed in sentencing in the nations of the United Kingdom over the past 20 years. The most significant development has been the creation of sentencing councils and the introduction of statutorily-based guidelines. These reforms have changed sentencing in England and Wales (and Scotland) for the better. Sentencing is now more transparent, predictable and democratic. That said, the guidelines are largely descriptive in nature, reproducing rather than changing judicial practice. As a result, they have failed to prevent three key problems from arising: sentence inflation; prison overcrowding; or political interference. Over the course of this essay we document all three problems.

Overview of Essay

This essay discusses policy developments over the past decade and reviews sentencing practices over a 20-year time period. Part I first provides some background information on sentencing in this jurisdiction, noting the key role played by lay magistrates and other ways in which English sentencing departs from other common law systems. Part II summarises sentencing trends in the Crown Court and magistrates' courts over the past 20 years. We focus on the use of custody as a sanction, and the size of the prison population. We then document and explore the phenomenon of 'sentence inflation' – an increase in sentence severity due to

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multiple causes. This section presents analyses seeking to determine how much of the increase is a consequence of changes in sentencing policy or judicial practice – rather than changing patterns of offending or profiles of offenders. Part III describes key policy developments, including the emergency measures introduced in 2024 to address prison overcrowding, and changes to sentencing for murder. We also document minority disparities in sentencing outcomes and the remedial steps taken by one sentencing guidelines authority. Finally, the essay documents the emergence of greater political interference in the sentencing guidelines and sentencing more generally.

I. Sentencing Framework and Key Characteristics of English Sentencing

A. Court Structures and Powers

As with most common law jurisdictions, there are two levels of trial court in England and Wales: In the Crown Court, where the more serious offences are sentenced, a judge and jury adjudicate. Over two-thirds of Crown Court cases involve a guilty plea, and these are dealt with by judge alone -- juries play no part in sentencing in this jurisdiction.[2] Most cases are sentenced in the magistrates' courts, where the arrangements are different. While in other common law jurisdictions sentencing is conducted by professional judges sitting alone (or with a jury), the magistrates' courts in England and Wales rely largely on lay sentencers. A number of jurisdictions such as Germany and Italy use hybrid tribunals composed of professional judges and members of the public, and some countries use lay justices for certain decisions such as bail, but England is alone in using lay magistrates to both hear trials and sentence offenders. The lay magistracy has existed for over six centuries in this jurisdiction. There are currently approximately 15,000 sitting magistrates. This number has declined from almost 30,000 in

[2] In a small number of US jurisdictions juries play a role in felony sentencing, but the common law norm is for sentencing by professional judges.

2005.[3] Lay magistrates receive some limited training on appointment and then ongoing training from the court's legal advisor. Magistrates usually sit in benches of three.[4] (Some magistrates' courts, particularly in large cities, employ a professional Judge who sits alone and hears the more complex or controversial cases).

The maximum sentence that may be imposed in a magistrates' court is currently 12 months' imprisonment, although the government is considering raising jurisdiction of this level of court to two years. The importance of the magistrates' courts is reflected by the fact that over 90% of all offenders sentenced are sentenced at that level (Ministry of Justice 2024). Thus all cases begin in the magistrates' courts, and almost all end there. If the court believes that its sentencing powers are inadequate, it may decline jurisdiction and commit the case to the Crown Court for sentencing. Appeals against sentence in the magistrates' courts result in a *de novo* hearing in the Crown Court; appeals from the Crown Court are heard by the Court of Appeal (Criminal Division).

B. Role of the Prosecutor

Another unique characteristic of English sentencing is the more circumscribed role of the prosecutor. Although specific (and robust) sentencing submissions from both parties are the norm in most common law countries[5], English prosecutors have historically limited themselves to highlighting the important aggravating circumstances and providing information that may be

[3] The decline in the number of magistrates reflects the closure or amalgamation of many magistrates' courts. Magistrates now often travel to sit outside their local area, thereby undermining one of the alleged benefits of lay adjudication: localism.

[4] Legal advisors play a critical yet hidden role in shaping sentencing in the magistrates' courts. For example, magistrates may consult them for advice on the appropriate sentence to impose.

[5] Australia is the exception. The decision in *Barbero* re-affirmed a long-standing view that prosecutors should not make sentence recommendations.

useful to the court at sentencing including any appellate precedents.[6] This more modest prosecutorial role has changed in response to the emerging guidelines. Prosecutors now make submissions on the offence category in the sentencing guidelines that they believe is appropriate to the case at bar, although they stop short of routinely recommending specific sentences (as is common practice in North American jurisdictions). In short, sentencing hearings are generally less adversarial in England and Wales than Canada or the US.

C. Sentence Appeals

One other anomaly concerns State sentence appeals. As with other jurisdictions, the State enjoys appeal rights at sentencing, known as 'Attorney General references.' The Attorney General may appeal a sentence under the 'Unduly Lenient' scheme (ULS). These cases are commonly called an Attorney General's reference. This is because it is primarily the Attorney General who has the power to refer a case to the Court of Appeal to be considered. However, cases can also be referred to the Court of Appeal by the Solicitor General. It is unclear why State sentence appeals are launched by the Attorney General rather than the more obvious candidate -- Director of Public Prosecutions (DPP) who is head of the Crown Prosecution Service (CPS). The Law Commission is currently consulting on this arrangement and may recommend reforms to the Unduly Lenient Scheme (ULS). The powers of the Court of Appeal are extremely wide regarding sentence: it can impose any sentence available at first instance, save for – taking the case as a whole – treating the offender more harshly than they were treated in the lower court.

One unique feature of the ULS scheme is that for many serious offences, the crime victim -- or indeed any member of the public -- may request a review of a sentence. The range of

[6] See the Criminal Procedure Rules, Rule 37.10(3) available at http://www.cps.gov.uk/legal/s_to_u/sentencing_-_general_principles/#a01

offences for which this is possible has expanded in recent years[7] and is likely to expand further to include all fatal offences following the Law Commission's current consultation. The latest statistics demonstrate that a significant minority of public requests for a review ultimately result in an unduly lenient sentence appeal.

Beyond their conventional appeal rights, defendants in England and Wales may also seek a sentence review after the statutory appeal period has elapsed by applying to the *Criminal Cases Review Commission* (CCRC). Unlike similar organizations in other countries such as Canada, the CCRC in England and Wales receives applications for a miscarriage of justice relating to sentence. The CCRC may refer cases to the Court of Appeal, and if it does so the Court must conduct a hearing.[8] Since its inception, the CCRC has received and successfully referred cases for a sentence review, although sentence referrals only comprise a small percentage of cases. The total current caseload of the CCRC is in excess of 1,000 applications annually.[9] In 2021, the CCRC received 1,142 applications. Of these, approximately 5% were referred to the Court of Appeal. Sentence only appeals accounted for 12% of referrals over the past 5 years, but a significant number of applications included both conviction and sentence. The only analysis of applications for referral of sentence (published in 2008) concluded that the concern 'that sentence cases would clog up the commission's activities has not been realised in practice'.[10] The limited statistics published since then suggest that this remains true today.

[7] These offences are specifically listed in legislation in the Criminal Justice Act 1988 (Reviews of Sentencing) Order 2006 (SI 2006/1116). They include most serious sexual offences, offences related to producing or supplying controlled drugs, modern slavery and terrorism offences, and certain offences relating to stalking and domestic violence.
[8] Even if the appellant is long deceased, as in the case of Ruth Ellis, the last woman executed in England and Wales.
[9] The annual report contains a limited amount of statistical information, see https://ccrc.gov.uk/corporate-information-and-publications/.
[10] Laurie Elks, *Righting Miscarriages of Justice? 10 years of the CCRC* (London: Justice 2008) 274.

Applications relating to sentence account for a much higher proportion of the Scottish Commission (SCCRC) referrals. The SCCRC made 144 referrals from 2,802 applications over the period 1999-2020. Of these, almost half (44%) involved sentence-only referrals (Scottish Criminal Cases Review Commission, 2020). One explanation for the higher volume of sentence applications and referrals is that the criterion for referral is more liberal in Scotland. The SCCRC can refer cases to the High Court of Justiciary if it believes a miscarriage of justice may have occurred and it is in the interests of justice to do so. Over the lifetime of the SCCRC to 2018, the success rate of sentence referrals was significantly higher than for conviction referrals (88% vs 50% of referred cases).

D. Sentencing Guidelines in the United Kingdom

England and Wales

English sentencing has evolved significantly since 2004 when courts began to apply the first definitive sentencing guidelines. A generation later, these offence-specific guidelines cover all common crimes. The guidelines authority – the Sentencing Council of England and Wales – has also issued a range of general guidelines applicable across all cases. Throughout the period 2004-2025, the Court of Appeal and the Sentencing Council have worked together to issue guidance. The Sentencing Council draws heavily upon judgments from the Court of Appeal when devising the content of its guidelines. The sentencing ranges, starting point sentences and sentencing factors in the guidelines reflect current judicial practice. The English (and Scottish see below) guidelines are therefore largely descriptive rather than prescriptive.[11]

[11] This said, for some guidelines the Council has attempted (and succeeded) in changing judicial practice. This has been done to ensure proportionality in sentencing outcomes rather than to achieve a policy goal such as reducing the use of imprisonment (see discussion in Roberts, Freiberg and Hester 2025, Chapter 4).

For its part, the Court of Appeal continues to issue guidance, and this often provides more nuance to the guidelines. On a few occasions the Court of Appeal has recommended that the Council issue further guidance for selected offences. The Coroners and Justice Act 2009 requires the Council to consider any such proposals made by the Court of Appeal or the Lord Chancellor. (We return to the relationship between the Council and the government in the concluding section of the essay.)

Sentencers in this jurisdiction now have more guidance than their counterparts in other jurisdictions. Sentencing is also more transparent because all the guidelines are publicly available on the Council's website.[12] Members of the public can easily access the sentence ranges recommended by the guidelines, along with other issues such as the magnitude of sentence reductions for a guilty plea. The English Council website also provides a comprehensive account of the methodology followed in creating or revising guidelines. The regime can reasonably be deemed more democratic since all key stakeholders have the opportunity to provide input into the guidelines through extensive public and professional consultations. Finally, legislative oversight of the Council and its activities is provided by the cross-party House of Commons Justice Select Committee. In most other common law jurisdictions, sentencing guidance is provided by the appellate courts without nonjudicial oversight or stakeholder participation.

Scotland

A second nation of the United Kingdom has also created a sentencing council with the authority to issue guidelines. The Scottish Sentencing Council (SSC) has 12 members, half of whom are members of the judiciary. In addition to representatives of solicitors, barristers and the

[12] https://www.sentencingcouncil.org.uk/.

prosecution branch, members include: a police officer, a victims' representative and one other who is 'not qualified as a judicial or legal member'. The Scottish and English guidelines share a number of common elements, principally in the use of a step-by-step process, and offence-specific guidelines. They have also both adopted an evidence-based approach to guideline development. The SSC meets less frequently than the English Council and this may explain the slower roll-out of guidelines since its creation in 2015. To date, the SSC has issued only one offence-specific guideline and three guidelines applicable to all cases.[13] Structured sentencing in Scotland differs from the English approach in several ways. For example, the compliance requirement is less stringent in Scotland (for further information, see Roberts and Gormley (2025); Roberts, Freiberg and Hester (2025), Chapter 4).

Another key difference between the systems is that the English guidelines provide starting point sentences to accompany their sentence ranges. The purpose is to ensure that all courts begin the sentencing exercise by entering the range at a common point, thereby promoting greater consistency of approach. Starting points create a point of reference for a sentencing judge. The SSC provided several reasons for not including starting point sentences in its guidelines. Starting points were perceived to be inconsistent with the traditions of the Scottish judiciary: the High Court does not normally provide starting points in sentence appeals in the same way as, for example, Ireland does.

Northern Ireland

The remaining jurisdiction in the United Kingdom has also adopted guidelines, albeit of a more restricted scope. Northern Ireland does not operate a Sentencing Council per se. Instead, there is a 13-member Sentencing Group which advises the Chief Justice. The current guidance takes two

[13] See Approved guidelines | Scottish Sentencing Council)

forms. First, for most key issues (such as sentence reductions for a guilty plea) the judiciary's website summarises key case law. Second, the website provides judgments pertaining to categories of offending.[14] Third, more detailed guidelines containing recommended sentences and starting point sentences exist for the Magistrates. Offence-specific guidelines now exist for all common offences sentenced in the Magistrates' courts in Northern Ireland.[15] The guidelines are based on the model created by the Sentencing Guidelines Council in England and Wales. For each offence the guideline defines levels of seriousness based on specific conduct. For example, the assault guideline provides three levels of seriousness. The least serious is defined as 'Assault resulting in relatively minor injury but amounting to actual bodily harm', while the highest level is described as an 'Assault involving gratuitous violence (e.g. kicking or stamping victim when on the ground) OR an Assault [which] was motiveless.'[16] The guidelines provide less content than the Scottish or English equivalents. Typically, they provide fewer sentencing factors. Thus, the guideline for assault occasioning actual bodily harm contains only one mitigating factor (provocation by the victim).

The stated purpose of the guidelines is to 'enhance both transparency of justice and consistency in decision-making by the courts.'[17] The guidelines reflect current sentencing practice in the magistrates' courts. Although the guidelines do not have the force of law, they are deemed relevant to a magistrates' court when sentencing an offender. A court may depart from the guidelines where, in the individual circumstances of the offence or the offender, the interests of justice require and will give reasons for so doing. It remains to be seen whether Northern

[14] Sentencing guidelines - Violent Offences | Judiciary NI
[15] Sentencing Guidelines – Magistrates' Court | Judiciary NI
[16] Assault Occasioning Actual Bodily Harm.pdf (judiciaryni.uk)
[17] Magistrates' Courts Sentencing Guidelines Introduction and General Principles | Judiciary NI

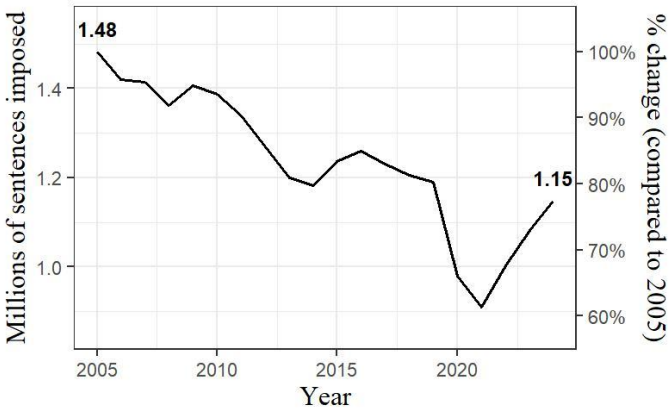
Ireland will ultimately follow the approach in other UK jurisdictions and create an independent sentencing council with a mandate and resources to issue a greater range of guidance for courts.

Other publications have described the evolution and impact of the guidelines across the UK (Bottoms 2017; Roberts, Freiberg and Hester 2025; Roberts and Ashworth 2016; Ashworth and Roberts 2013). For this reason, we do not discuss the guidelines further in this essay.

II. Trends in the Use of the Principal Sanctions

Before noting 20-year trends in the use of sanctions, Figure 1 reveals the decline in the volume of cases sentenced over the period. This trend is the result of a series of changes in the criminal justice system, including an increase in the use of 'Out of Court' disposals and a drop in a number of high-volume crime categories. This figure also shows the recent reversal of this trend, partly due to the accumulated caseload following the 2020 pandemic.

Figure 1 Number of Sentences Imposed, All Courts, England and Wales, 2005-2024



A. Trends in the Use of the Principal Sanctions

Table 1 summarises the use of the principal sanctions over the 20-year period, 2005-2024, across all courts. This reveals several important trends. Overall, the use of immediate and suspended

prison sentences has been relatively stable. Immediate prison sentences accounted for around 7% of the whole period. Suspended sentence orders (SSOs) increased steadily following removal of a legislative restriction on their use in 2003 and have now stabilised to account for about 4% of cases. A SSO is deemed a sentence of imprisonment; a court must determine that the 'custody threshold' has passed before it may impose an SSO.

The numbers and rates summarised in Table 1 reveal that while the volume of prison sentences has declined, the proportionate use of imprisonment (including SSO) has increased, from 8% in 2005 to 11% in 2024. The proportionate use of community orders has declined, from a high of 14% at the start of the period, to 6% in 2024. Fines have increased from 69% of all sanctions imposed to 79%.

If we turn our focus to indictable offences – the most serious offence types - the picture changes. Table 2 shows that the use of immediate custody increased from around 67% of all cases at the beginning of the period to approximately 74% in 2022-2024. The proportionate use of community orders declined significantly, from 26% in 2005 to 12% in 2024. The reasons for this decline in the use of community-based sanctions are unclear. One explanation relates to the increase in the use of out of court disposals. This would reduce the volume of less serious indictable offences sentenced – those which previously attracted a community order. This change in prosecutorial decision making would mean that the overall profile of cases appearing for sentence in the Crown Court would become more serious. We explore this possibility later in the essay.

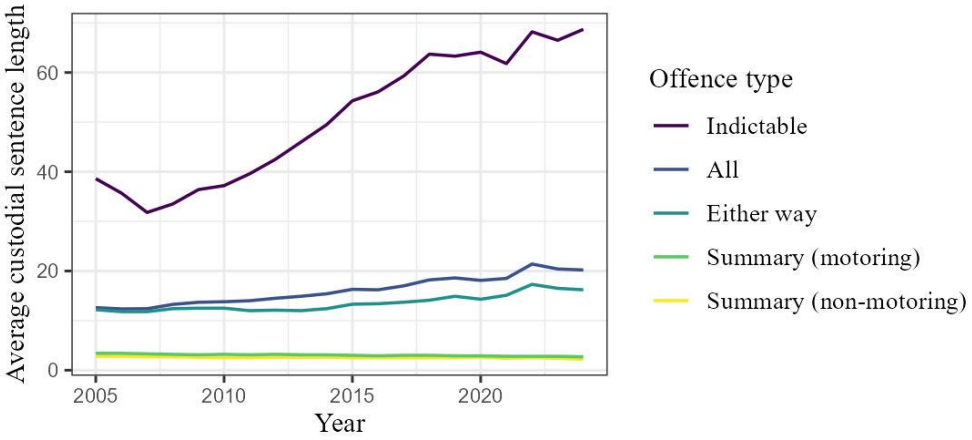
The increase in the use of SSOs is even more striking in the context of indictable offences. This sanction accounted for only 2% of sentences in 2005, rising to 12% in 2024. The

SSO has been imposed for an increasing percentage of more serious cases, a development which has so far escaped the attention of politicians or the news media.

Tables 1 and 2 here

Imprisonment lengths also increased significantly for indictable offences over the period, as can be seen in Figure 2. The Average Custodial Sentence Length in 2005 was 2.8 months for summary (non-motoring) convictions offences and 38.6 months for indictable offences. The comparable statistics for 2024 are 2.2 and 68.7 months. As consequence of these changes in sentencing patterns, the prison population rose steadily over the period and forced the government to introduce a series of emergency measures in 2024 (discussed later in the essay).

Figure 2 Average Custodial Sentence Length, 2005-2024



Sentence Inflation

The rise in the use of imprisonment has attracted considerable public attention following an unprecedented intervention by three former Lord Chief Justices and a senior judge. The four judges published a report decrying the rise in sentence severity, describing it as *sentence inflation* (Howard League, 2024). The judges concluded that 'there is nothing that justifies the doubling of

sentence lengths.' (2024, p. x). Sentence inflation simply defined occurs when sentence severity for an offence increases over a relatively short period of time. If sentence lengths for, say, sexual offences are 50% higher now than in 2015, this represents 'raw' or natural sentence inflation.

Where the average seriousness of any category of crime coming before the courts has grown, the resultant increases in severity for that category cannot be regarded as unjustified sentence inflation. These changes represent what we regard as *natural* or legitimate inflation. If sentence severity increases in response to more serious offending or a higher proportion of repeat offenders, this is appropriate.[18] The reasons for the increase in gravity for that category may be found in changes in detection rates or charging practice, or in real changes in offending.

Other key drivers of sentence inflation include changes to the sentencing framework, such as increases in maximum sentences, the introduction of mandatory sentences, and legislated increases to the proportion of time that must be served in prison. This form of sentence inflation might be called 'politically-driven' sentence inflation. A different form of sentence inflation arises if sentencers respond to the 'climate of opinion' about crime and punishment by increasing sentence severity. This might be called 'judicially-led' sentence inflation, even if the climate of opinion is at least in part politically shaped.

Measuring The Use of Imprisonment

Two variables directly affect the use of imprisonment (and the size of the prison population): *Prison Admissions* (PA, the immediate custody rate) and *Prison Durations* (PD, usually measured by the Average Custodial Sentence Length (ACSL). PA inflation occurs when the custody rate for an offence increases without changes in any legally-relevant characteristics; PD

[18] Of course, there is also a question as to whether the existing levels of severity – which increase as crimes get more serious – were themselves too high. We should not blithely assume that custody rates and sentence lengths in, say 2005, were appropriate. This question raises the issue of cardinal proportionality.

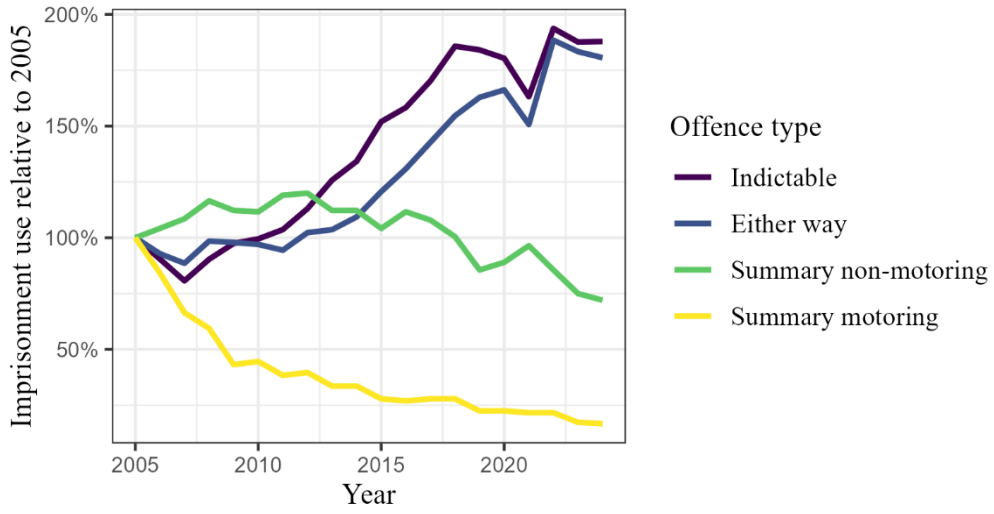
inflation arises when average sentence lengths increase without such changes. Both dimensions of punitiveness need to be considered when measuring sentence inflation.

PD increased at a much higher rate than PA over the period 2005-2024. PD (the average custodial sentence length) increased by 78% compared to only 6% for PA (the custody rate). These figures relate only to indictable offences. For summary offences, PA and PD both declined over this period. Two key conclusions from these analyses are: (i) longer sentences have contributed more to sentence inflation than higher custody rates; and (ii) there has been modest sentence *deflation* in the magistrates' courts.

In order to take both components into account (the custody rate and the ACSL), we employ an **Imprisonment Index**.[19] This is created by multiplying the probability of an immediate custodial sentence by the ACSL. Combining imprisonment rates and average prison sentences to form an Imprisonment Index provides a more robust measure of the use of custody as a sanction. For example, as shown in Figure 3, using the imprisonment index we can appreciate more clearly the diverging pattern of punitiveness followed by different offence groups.

[19] It can be expressed mathematically as: $Y_{i,t} = C_{i,t} \cdot L_{i,t}$, with Y referring to sentence severity, C to custody rate, L to average sentence length, with subindexes i and t used to distinguish across offence types and years.

Figure 3 Change in the Use of Imprisonment, relative to 2005, by offence group



Effect of Changes in Offence Seriousness

Our analyses test one key potential explanation of what we term legitimate sentence inflation: an increase in seriousness of cases appearing for sentencing. For example, taking all sexual offences of any level of seriousness, if the proportion of rape cases had increased over time, this would explain an increase in the severity of sentencing outcomes for this category of offending. Using 2005 as the baseline year, we employed the Office for National Statistics crime severity score to examine changes in the mix of crimes appearing for sentencing. This is an independent measure of the seriousness of cases being sentenced.

Measuring Sentence Severity and Offence Seriousness

To estimate the level of crime seriousness for each offence category and year we used the ONS Crime Severity Score (CSS). At the core of the CSS is a weighting system, based on sentencing data, designed to reflect the seriousness of each crime type (Bangs, 2016).

The seriousness scale combines sentence ranges in the sentencing guidelines, actual sentencing outcomes from court data, and expert judgements.[20] For crimes resulting in prison sentences, the length of the sentence (measured in months) determines the weight.[21] For crimes leading to community order and financial penalties, the length of time to complete the order and the size of the fine are converted into an equivalent harm measure. Crimes that rarely result in prosecution or sentencing are assigned weights based on expert judgment or analogous offences. The resulting weights are standardised, ensuring that crimes of greater harm (e.g., homicide or grievous bodily harm) attract higher values than less serious offences (e.g., shoplifting or graffiti). A more detailed example of how crime seriousness weights are calculated for the case of shoplifting can be found here, and the full list of crime severity scores for each offence type here.[22, 23]

When we compare trends in sentence severity and crime seriousness across all offences, a clear pattern of increasing divergence between offence seriousness and sentence severity emerges over time (Figure 4). The only exception is the pandemic period, which caused a sharp decline in sentence severity, followed by an equally significant rebound the following year. Specifically, we estimate that, in England and Wales, since 2005, sentence severity has increased

[20] For more information on the methodology, see 'Crime Severity Score data tool'.

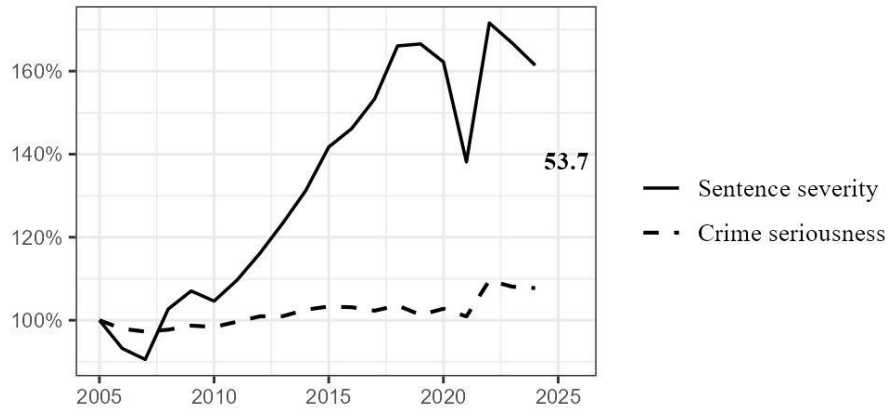
[21] Both our measures sentence severity and crime seriousness include a component of sentence data. However, any 'circularity bias' is avoided by the fact that the estimation of weights for the ONS crime seriousness score relies on cross-sectional data, namely average sentence outcomes in England and Wales from 2011 to 2015. That is, we only use one weight for each specific offence type, rather than updating the weights across the window of observation of our analysis.

[22] To estimate the changing levels of crime seriousness across time, which we denote as $X_{i,t}$, we use an arithmetic mean for each of the ten offence groups, so: $X_{i,t} = \frac{\Sigma(W_i \cdot n_{i,t})}{N_t}$, where W_i refers to the severity score allocated to a specific offence type, $n_{i,t}$ denotes the number of sentences imposed of the specific offence (e.g. indecent assault) within a year, and N_t the number of offences sentenced within the broader category under analysis (e.g. sexual offences) in a year.

[23] Offence types were not always consistently categorised in the MoJ reports and the ONS CSS. We therefore selected only offence types that were unequivocally labelled across those three datasets and recoded into broader categories some of the offence types more granularly defined, so they could be compared. The specific offence types considered in our analysis and their respective weights are available as part of the online supplementary materials.

by 62%, while the seriousness of crimes processed through courts has only increased by 8%. This means that 87% of the increased sentence severity was due to genuine sentence inflation. Put differently, we estimate that sentence severity increased in England and Wales by 54% since 2005.

Figure 4 Trends in Sentence Severity and Crime Seriousness (2005 as baseline)

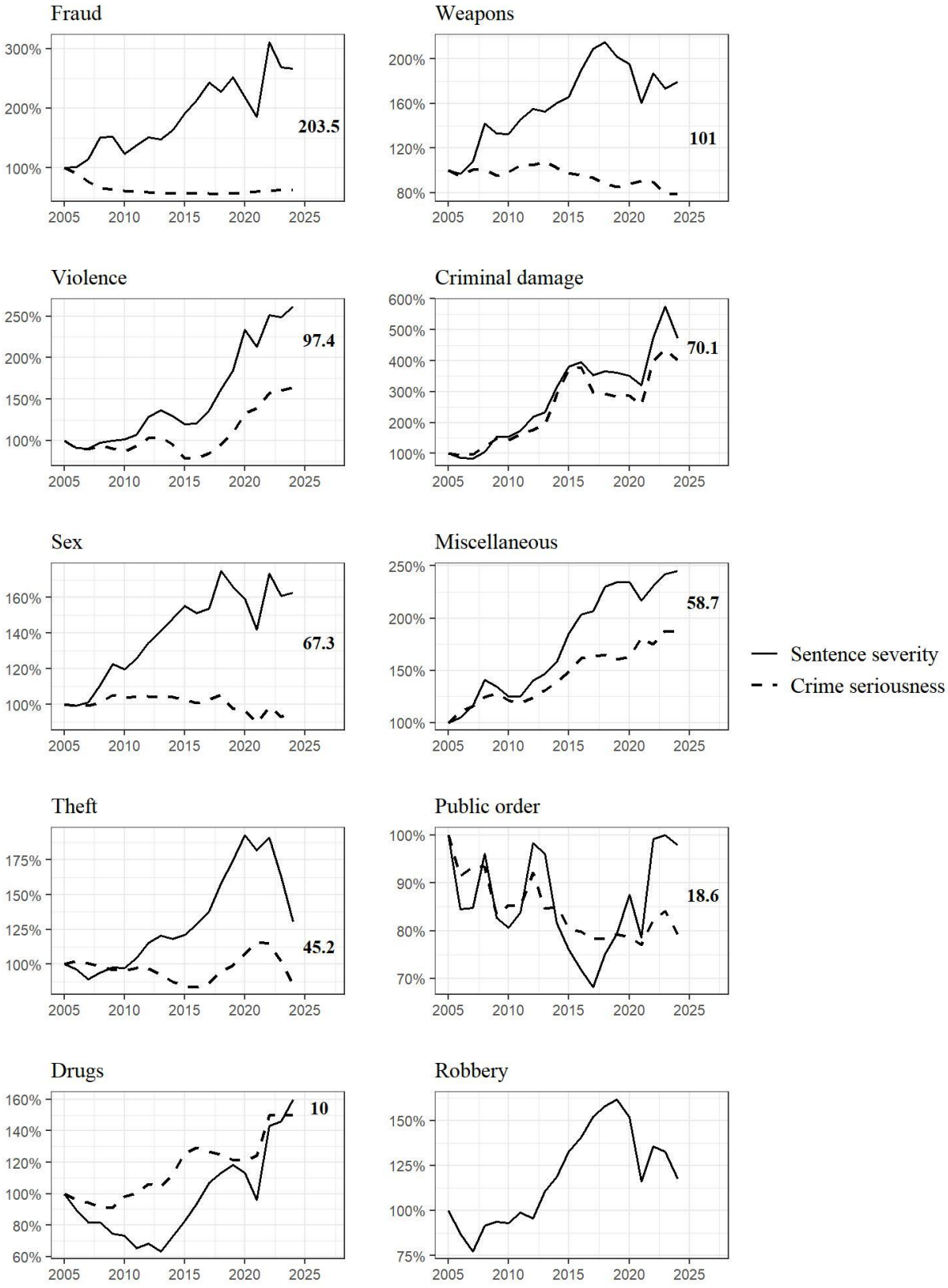


Sentence Inflation Varies Across Offences

Figure 5 illustrates offence-specific trends and reveals that sentence inflation has been far from uniform.[24] No sentence inflation can be detected for drug offences and public order offences, at least until 2021. However, we observe significant sentence inflation affecting offences involving violence, weapons, and fraud. Specifically, we estimate that sentence outcomes for violent and weapons-related offences are now twice as severe as in 2005. Sentences for fraud offences have tripled in severity.

[24] Changes in crime seriousness within Robbery offences could not be calculated as this offence group is composed of a single offence type.

Figure 5 Offence-specific Trends in Sentence Severity and Crime Seriousness



To summarise, the increase in sentence severity observed in England and Wales over the last two decades cannot be attributed to a more serious mix of cases processed through the courts. It is possible that our findings are affected by some other factors reflecting offence seriousness that we failed to control. For example, if the criminal histories of offenders appearing for sentencing had become more serious over the past 20 years, this would explain some of the increase in sentence severity. Similarly, if there had been an increase in the proportion of offenders pleading not guilty, this would also contribute to an increase in sentence severity. Offenders with more serious criminal histories and offenders convicted following a trial (rather than having pled guilty) normally receive more severe sentences. However, this said, there is no evidence to suggest that the seriousness of criminal histories or guilty plea rates have changed significantly over the period covered by our analyses.

III. Sentencing Policy Developments

Crisis in the Prisons

The most significant development relating to sentencing and in particular the use of imprisonment passed unnoticed by politicians and policy-makers from both major political parties. This was the increase in penal severity and the resulting pressure on the prison population documented earlier in this essay. The current government finally awoke to the problem when prison governors warned that their institutions were about to exceed maximum capacity. The adult male prison population had been running at over 99% capacity for much of the 18 months from 2023. As a result, in 2024 the government lowered the automatic release point for Standard Determinate Sentences (SDS) for a range of offences from 50% to 40%. The

early release of thousands of prisoners attracted widespread media coverage[25], and much criticism of the sentencing process. The government pledged to review the reform 18 months after implementation. Despite this measure, the prison population was still projected to increase by an average of 3,000 prisoners annually over the coming years – the equivalent capacity of two large prisons per year.

The prisons crisis generated calls for a Royal Commission to conduct a thorough review of the criminal justice system including sentencing.[26] The last such Commission was conducted over 30 years earlier (Royal Commission 1993). The government rejected these appeals and instead created what it termed a short-term, *Independent Review of Sentencing*, led by a former politician. The Review conducted a hasty public consultation in early 2025 and we await publication of the report as this essay is written. The review is guided by three principles: First, that sentences must punish offenders and protect the public; second, that sentences must encourage offenders to turn their backs on a life of crime, cutting crime by reducing reoffending, and thirdly, that there should be an expanded use of punishments served in the community rather than prison.

At the same time, a leading national newspaper, the London Times conducted its own 'Crime and Justice Commission' which heard evidence from a range of stakeholders. The Times Commission published its report in April 2025, containing several recommendations to reform sentencing. The Commission recommended creation of an arms-length advisory body which would 'depoliticise the process [of reform] and offer advice to the government on proposed changes to legislation.' (Times Commission on Criminal Justice, 2025, p. 2). Other

[25] TV cameras set up outside major prisons filmed friends and relatives awaiting the release of prisoners, with many popping champagne corks in welcome.
[26] By the Criminal Bar Association among other key stakeholders.

recommendations included a statutory presumption against short prison sentences, and a comprehensive review of sentencing for murder. This last issue has attracted a great deal of critical commentary from academics and practitioners since the current regime came into force in 2003. The fact that a Conservative newspaper would make such recommendations reflects the broad consensus that the sentencing process is in great need of reform.

Sentencing for Murder

As with almost all common law jurisdictions, the offence of murder carries a mandatory sentence of life imprisonment. A court is able to achieve a degree of proportionality through the exercise of judicial discretion regarding the minimum term that a prisoner must serve before becoming eligible to apply to the Parole Board of England and Wales for release on licence. There is no minimum period that must be served, and minimum terms for murder range from a few years (for what may be termed 'merciful intention' murders) through to 50 years or longer for the most serious cases which do not attract the most severe sentence of life without parole (known as a 'Whole Life Order').

Murder sentencing changed dramatically as a result of the Criminal Justice Act 2003. Schedule 21 of the Act created a new structure for determining the minimum term to be served as part of a life sentence for murder. It introduced a tiered structure consisting of three[27] different starting points to assist a court in determining the minimum term that a life prisoner must serve.[28]

[27] Whole life order; 30-years; and 15-years. There is a separate starting point for young offenders. Subsequent amendment added an additional 25 year starting point (see text).

[28] The Court of Appeal has reiterated in a number of judgments that the Schedule's starting points represent only a point of departure for courts deciding the minimum term for murder (e.g., R. v. Sullivan [2005] EWCA Crim 1762. [2005] 1 Cr App R (S) 67). It is unclear how closely minimum terms actually imposed track the starting points. A very close correspondence between the starting points and the minimum terms actually imposed may suggest excessive deference to the statute. On the other hand, if minimum terms are very discrepant from the appropriate starting point, this may suggest judicial resistance to the fixed structure of the schedule.

The appropriate starting point is determined by key aggravating features, including the offender's motive and the mode of killing. The system is simple in structure yet fundamentally flawed.

Proportionality requires a correspondence between two scales or dimensions: the seriousness of the offence and the severity of the punishment. This entails a scale or ladder of crimes arrayed according to the relative seriousness, and punishments ranked in order of their relative severity. *Ordinal Proportionality* mandates appropriate spacing between crimes and between punishments. If two crimes diverge greatly in terms of their seriousness, the severity of their punishments should be comparably different. Small differences in seriousness should correspond to minor discrepancies in severity.

With respect to murder sentences, ordinal proportionality requires that cases of different gravity attract minimum terms of commensurately disparate severity. The more serious forms of murder should attract longer minimum terms, and the distances between the minimum terms imposed should correspond to differences in the relative seriousness of cases of murder. Since minimum terms are greatly influenced by the statutory starting points, ordinal proportionality should also be evident in the structure and severity of starting point sentences. Schedule 21 creates a categorical hierarchy of seriousness: the most heinous murders attract a whole life order as a starting point, and less serious murders by adult offenders carry lesser starting points of 30, 25 or 15 years. Yet the different starting points do not conform to a rational ranking of seriousness or culpability. Murders of roughly comparable seriousness attract markedly different starting point sentences – this violating ordinal proportionality. The spacing between different types of murder are inconsistent with a proportionality analysis. If the starting points violate proportionality, it will become much harder for minimum terms to conform to the principle.

Many anomalies arise as a result of the statutory starting points in Schedule 21. Consider these hypothetical examples.

D1: kills his victim after 'a significant degree of planning and premeditation' as stipulated in paragraph 10(a) of Schedule 21. The offence occurs without any of the circumstances which trigger the whole life, 30, or 25-year starting points. This intent to kill murder would therefore 'normally' attract a starting point sentence of 15 years.

D2: during a commercial burglary, the offender is unexpectedly confronted by a security guard. The offender hits the victim with a tool found in the warehouse, intending to cause serious harm, yet the victim dies. The appropriate starting point is now normally 30 years, following paragraph 5(2)(c) of the Schedule.

Determining the relative seriousness of these two cases and hence the minimum term is a matter for judicial discretion; the starting point sentences constitute a guide, a point of departure. It is therefore open to a court to impose a shorter minimum term on D2, or a longer minimum term on D1. The point however is that Schedule 21's statutory starting points are inconsistent with ordinal proportionality: Few would argue that D2's culpability was sufficient to justify a starting point double that of D1. In all likelihood, most people would consider D1 to be more blameworthy as he had undertaken 'significant' planning. In contrast, D2 may have taken steps to avoid encountering security personnel – for example by committing the burglary in the early hours when the facility was likely to have been deserted. The explanation for the presence of what may be termed 'felony murder' (i.e., a murder committed during the course of another offence) lies in Parliament's desire to deter other potential offenders. This is but one example of the many anomalous outcomes arising as a result of the Schedule's starting points.

A second example relates to the starting point for 'weapon to the scene' murders. If the crime was insufficiently serious to attract a whole life order or 30 year starting point (paragraph 4(1) of Schedule 21 where the seriousness of the murder was 'exceptionally high'), did not fall within paragraph 5(1) as a murder of particularly high seriousness, but fell within the circumstances enumerated in paragraph 5A(2), a 25-year starting point is appropriate if:

> *the offender took a knife or other weapon to the scene intending to—*
>
> *(a) commit any offence, or*
>
> *(b) have it available to use as a weapon,*
>
> *and used that knife or other weapon in committing the murder.*

Taking a weapon to the scene therefore has the potential to almost double the starting point sentence, from 15 years to 25 years. This circumstance cannot justify such a jump in severity. Creating a much higher starting point for murders committed with a weapon brought to the scene creates additional anomalies. Imagine D1 spontaneously picks up a knife in his own kitchen, walks next door and murders a neighbour. D2 in contrast goes next door and seizes a knife in the neighbour's kitchen to commit murder. The harm inflicted is the same but is there a culpability difference between D1 and D2? It may be argued that taking a weapon to the scene is evidence of planning on the part of D1, and this implies enhanced culpability. This being the case, a slightly higher starting point may be appropriate. Yet if this is the case, taking a weapon to the scene is evidence of, or a proxy for, enhanced culpability through planning and premeditation – a factor already captured in Schedule 21.[29] From the perspective of proportionality, the two defendants would appear to be roughly equally blameworthy. If the offender who brings his own

[29] Section 4(2)(a)(i) of the Schedule identifies 'a substantial degree of premeditation or planning' as a factor which determines whether a whole life order is normally the starting point sentence. Section 10(a) notes that 'a significant degree of planning or premeditation' constitutes an aggravating circumstance.

knife to kill is more culpable, this can hardly justify an extra ten years in prison. By inserting a 25-year starting point for cases in which a weapon was taken to the scene, Parliament significantly undermined the proportional structure of the murder sentencing regime laid down by Schedule 21. It introduced a deterrence-based severity premium which is at odds with the concepts of harm and culpability.[30] Since the two offenders share a common degree of culpability for the crime, very divergent minimum terms also violate the principle of parity.

The incidence of killing with knives did not decline[31] following introduction of the new starting point for knife crime, questioning the deterrent effect of increasing sentence severity. There is no evidence in the annual homicide statistics that the drastic increase in the minimum term for this kind of murder has had any deterrent effect on other potential offenders. Reviews of the deterrence literature conclude that increases in sentence severity do not deter other offenders. A recent (and comprehensive) review concluded that: 'higher average levels of punishment severity do not reduce crime' (cites). So much for general deterrence. Although special or individual deterrence was seldom discussed in the Parliamentary debates on sentencing for murder, the research evidence is no more encouraging. There is a consensus among reviews of the literature that longer sentences are not associated with low re-offending rates (e.g, Kleck and Sever).

Effect of Schedule 21 on Minimum Terms for Murder and Sentences for Other crimes of violence

Since Schedule 21 came into effect, the average length of a minimum term for murder rose from 12.5 years in 2003 to 21 years in 2021 (Bromley Briefing, 2025). The increase was noted by the

[30] Wasik (2000) describes 'the nature of the weapon which was used to kill' as an example of a neutral factor which 'should *not* be regarded as having a significant impact on the sentence imposed'. (emphasis in original).

[31] The continued rise in offences involving a knife or bladed instrument is documented in Crime in England and Wales, year ending June 2019, Figure 3. ONS. Recorded offences involving a knife or sharp instrument rose by 17% over the period 2008-2018; Table 15, Ministry of Justice.

Sentencing Council in submissions to the Justice Select Committee: '…*sentences for the vast majority of murder cases increased substantially. A case that may previously have attracted a life sentence with a tariff of 10 years before the change might attract a tariff of double that afterwards.*'[32] Since there was no evidence of an increase in the gravity of murders committed, or culpability of offenders, the cause must be Schedule 21.

Schedule 21 has also contributed to increasing sentence lengths for other offences, including attempted murder, manslaughter, and causing grievous bodily harm with intent.[33] The average custodial sentence length (ACSL) for manslaughter almost doubled from 5.4 years in 2007 to 8.8 years in 2017[34] while the average prison sentence for sexual offences increased by 50%.[35] These trends have contributed to the burgeoning prison population noted earlier. In its evidence to the Justice Committee the Sentencing Council identified Schedule 21 as one of the most significant legislative changes which had affected the increase in the prison population. The Council noted the highly significant increases in minimum terms along with the '*recalibration of the sentencing of those offences closest to it in gravity'*.[36]

Schedule 21 preceded the creation of the statutory guidelines' authorities and the introduction of the offence-specific guidelines. It was a legislative rather than commission-based sentencing guideline and illustrates the dangers of Parliamentary reform and the need for an expert body to devise guidelines for courts. Many of the anomalies of the schedule could be

[32] Para 72 of the report of the House of Commons Justice Committee 'Prisons population 2022: planning for the future'. HC 483.
[33] See Barot [2007] EWCA Crim 1119; Hunter [2007] EWCA Crim 3424; Duffy and others [2008] EWCA Crim 1436; Appleby and others [2009] EWCA.
[34] Sentencing Council, https://www.sentencingcouncil.org.uk/publications/item/manslaughter-data-tables; Table 1.3.
[35] Report of the House of Commons Justice Committee 'Prisons population 2022: planning for the future'. HC 483, 36.
[36] Report of the House of Commons Justice Committee 'Prisons population 2022: planning for the future'. HC 483, 36.

addressed if Council issued a guideline for determining minimum terms for murder in the same format as its offence-specific guidelines. To date it has declined to do so.[37]

Racial Disproportionality

Imprisonment rates for minority defendants from various communities have been higher than for Whites for many years now, and evidence of differential sentencing has been slowly accumulating since 1992. Minority offenders from various communities in England and Wales have for decades attracted higher custody rates and longer prison sentences. Several government and independent reports have documented and discussed disproportionality in the sentencing process and the criminal justice system more generally (for example, Young 2014; Lammy 2017; Independent Commission on Race and Ethnic Disparities 2021).

Recent Trends

Over the period 2009 to 2022, all visible minority groups had higher levels of imprisonment than the White group. Asian and Black offenders had the longest Average Custodial Sentence Lengths (ACSL) (25.4 months and 25.7 months), both above the average for White offenders (17.9 months). The ACSL for White offenders has been consistently lower than all other ethnic profiles, and the gap between ACSLs has increased over time. These comparisons are unadjusted for a range of factors including criminal history. Analyses which control for offender and offense-related factors confirm these ethnicity-based sentencing differences. Hopkins, Uhrig and Colahan (2016) found that offenders who self-reported as Asian or Black had a higher likelihood of imprisonment (relative to White offenders). This difference

[37] The Council has taken the view a murder guideline was unnecessary due to the existence of Schedule 21. It would seem rather that a guideline is needed precisely because of the legislative bungling evident in the schedule.

was ‘statistically significant and medium sized’ (p. 5).[38] Isaac (2020) employed the Crown Court Sentencing Survey, a database in which sentencers themselves identified the principal factors that they had considered at sentencing (the Crown Court Sentencing Survey). The analysis was thus able to control for all mitigating and aggravating factors cited by the judge. For the drug offenses studied, an offender’s ethnicity was associated with a statistically significant increase in the likelihood of receiving an immediate prison sentence, after controlling for ‘many (but not all) of the main factors that sentencers are required to take into account when sentencing these offenses’ (Isaac 2020, p. 1). The odds of a Black offender receiving an immediate custodial sentence were 40 percent higher than for a White offender. More recent research on other guidelines found no consistent or strong evidence of disparities for minority ethnic groups (Chen et al. 2023). This inconsistent pattern of findings suggests that racial bias is not widespread, but highly concentrated in the sentencing of drug offences (Pina et al., 2024).

Finally, practitioners’ perceptions align with findings from statistical research. Veiga, Pina-Sanchez, and Lewis (2022) found that all barristers interviewed believed that indirect discrimination was a problem in English sentencing. The researchers concluded that ‘the evidence of discrimination in sentencing is undeniable’ (p. 13). Monteith et al. (2022) report that over half the participants in their research involving legal professionals had witnessed judges acting in a ‘racially biased way towards a defendant’ (p. 6).[39]

Legislative and Judicial Responses

[38] Black and minority ethnic defendants were less likely to plead guilty and therefore less likely to benefit from plea-based sentence reductions. However, the discrepancies remained statistically significant even after controlling for plea and other legally relevant variables.

[39] Caution must be exercised in interpreting the findings from this study as the sample was self-selected and unrepresentative of the criminal bar.

Sentencing guidelines commissions across the US or operating in other jurisdictions have done little to acknowledge or address racial or ethnic disparities or over-incarceration of minorities. The Sentencing Council has recently taken some modest remedial steps. The Council has a Public Sector Equality Duty (set out in section 149 of the Equality Act 2010) which requires public authorities to have 'due regard' to the need to eliminate discrimination, harassment, victimization, and any other conduct prohibited under the 2010 Act. Understanding any unintended effects of the guidelines on racial and ethnic minority defendants clearly falls within this duty. The Sentencing Council has inserted references in its guidelines to differential sentencing outcomes.

For example, the following direction is provided in the guideline for firearms offenses: *'Sentencers should be aware that there is evidence of a disparity in sentence outcomes for this offence which indicates that a higher proportion of Black and Other ethnicity offenders receive an immediate custodial sentence than White and Asian offenders… There may be many reasons for these differences, but to apply the guidelines fairly, sentencers may find useful information and guidance at the Equal Treatment Bench Book (ETTB))*'.[40] (Sentencing Council 2021, p. 3).

The ETBB documents the over-representation of Black and minority ethnic people at various stages of the criminal process, and the lower levels of confidence and trust in criminal justice found in BAME communities (Judicial College 2022, Chapter 8). The ETBB is informative but fails to indicate *how* sentencers can ensure fairness in applying the guidelines. Instead, it implies that sentencers should stand back and consider whether an offender's ethnicity has (directly or indirectly) influenced the sentence imposed. The Council's direction is

[40] This document is used by courts with the goal of ensuring that "all those in and using a court leave it conscious of having appeared before a fair-minded tribunal" (Judicial College 2021, p 2).

not intended as an automatic or categorical reduction in sentence to reflect black and minority ethnic overrepresentation in criminal justice system statistics.

More recently the Council has published research examining the impact of its guidelines and advice on sentencing minority offenders (Chen et al. 2023). This work is comparable to the "racial impact" analyses published in the US (see also Mauer 2009). The Sentencing Council has also commissioned research to determine whether (and to what extent) its guidelines contribute to racial differentials.

Penal Populism Rides Again

The Sentencing Council has done more than any other sentencing commission to document and address the problem of ethnic disparities. Paradoxically, it is one of its initiatives that has triggered a rift between the Council and politicians from both principal parties.

Since its creation, the Sentencing Council has operated without interference or pressure from government or politicians.[41] Neither has paid much attention to the Council or its guidelines. Until now. Within a single week in March 2025, the Lord Chancellor and the opposition Shadow Minister both expressed strong opposition to an element of a recently-issued guideline. The Shadow Secretary of State for Justice Minister went further, introducing a private member's Bill which would amend the Coroner's and Justice Act 2009. The amendment would require the Sentencing Council to seek the consent of the Secretary of State prior to issuing a

[41] In an appearance before the House of Commons Justice Select Committee in 2016, the Chair of the Council, Lord Justice Treacy was asked about 'the role that the Government play in interacting with you and the Sentencing Council. How much communication or interference—whatever word you prefer to use—do the Government give you and your colleagues?' Lord Justice Treacy responded that 'We have no interference and we are strongly independent.' Oral evidence - The work of the Sentencing Council - 1 Mar 2016

guideline.[42] The Secretary of State would then have the power to determine the content of the guideline or indeed to prevent the Council from issuing a guideline.[43]

The cause of this sudden (and critical) political interest in the Sentencing Council surprised many, especially the Sentencing Council. The Council had recently issued a revised guideline regarding the use of community and custodial sentences (Sentencing Council 2024). Within this guideline, the Council offered guidance on the use of a pre-sentence report. More specifically, the guideline notes that a pre-sentence report will normally be considered necessary if the offender belongs to one of a list of enumerated cohorts. The purpose of this guidance is clearly stated in the guideline which notes that a pre-sentence report is necessary if the court believes it has insufficient information about the offence and the offender.

Council has taken the position that courts may need more information about certain profiles of offender and the pre-sentence report is the means by which to elicit this information. The list of cohorts is non-exhaustive, and the guideline emphasises that a PSR may still be necessary even if the individual does not fall into one of the specified cohorts. The cohort which has triggered critical political commentary refers to offenders from an ethnic minority cultural minority and or faith minority communities (see discussion in Roberts, Freiberg, and Hester 2025; Roberts, Watson and Hester 2023).[44] This guidance is rooted in previous reports which

[42] "(7) Before issuing guidelines within subsection (3) or subsection (4) as definitive guidelines, the Council must obtain the consent of the Secretary of State. (8) The Secretary of State may— (a) consent to the issuing of a guideline as a definitive guideline, (b) refuse consent for the issuing of a guideline as a definitive guideline, or (c) direct the Council to issue a guideline in an amended form.

(8A) Where the Secretary of State has consented to the issuing of a guideline under subsection (8)(a) or has directed the Council to issue a guideline in an amended form under subsection (8)(c), the Council must issue the guideline as a definitive guideline in the appropriate form.

(8B) For the purposes of this section, a definitive guideline is a guideline which has come into effect.".

[43] Individual members of Parliament such as Esther McVey have called for the abolition of the Council and the repeal of its guidelines.

[44] Curiously, the cohort 'female offenders' attracted no criticism although it would appear to provoke the same potential criticism of constituting a two-tier sentencing regime.

have highlighted the need for courts to have more information before sentencing minority defendants. As the Council noted in its 100-page 'Response to Consultation' document, this proposal met with the approval of most respondents, including the Magistrates' Association, the House of Commons Justice Select Committee, and voluntary sector organizations such as the Sentencing Academy. It was also 'road-tested' with members of the judiciary who approved its content.

The issue in contention – whether cohorts of offenders should be identified in the Council's guidance regarding the use of PSRs – is less important than the underlying principle of the Council's independence. The political reaction is surprising because the advice is consistent with guidance offered provided to courts through the Judicial College, and in part because the Council conducted a protracted professional and public consultation on its proposals. Neither the Lord Chancellor nor the opposition politician responded to the consultation and only appeared to have noticed the council's position once the guideline had been issued and reported in the news media.

The Council's guidance is rooted in previous reports which have highlighted the need for courts to have more information before sentencing minority defendants. For example, the landmark report by MP David Lammy concluded that pre-sentence reports 'may be particularly important for shedding light on individuals from backgrounds unfamiliar to the judge. This is vital considering the gap between the difference in backgrounds – both in social class and ethnicity – between the magistrates, judges and many of those offenders who come before them.' Lammy p. 34). This conclusion is echoed in the *Equal Treatment Bench Book* issued by the Judicial College. This important resource for courts notes that: 'Pre-sentence reports (PSRs) may be particularly important for shedding light on individuals from cultural backgrounds

unfamiliar to the judge. This was vital considering the gap between the difference in backgrounds – both in social class and ethnicity[45] – between the magistrates, judges and many of those offenders who come before them.' (Equal Treatment Bench Book, p. 170). This guidance is a rare example of concordance involving a report by an elected politician and the authority responsible for providing ongoing training for judges.

Relationship between Sentencing Commissions, the Executive and the Legislature

In considering the relationship between the legislature and the guidelines authority, the experience in another guidelines jurisdiction is instructive. The Minnesota legislature exercises considerable control over the Commission's guidelines. Since 1984, all changes to the guidelines proposed by the Commission (the equivalent of the English Council revising a guideline) must be submitted to the legislature (Frase 1993). They will become effective unless the legislature provides otherwise. Restricting the role of the judiciary, allowing political control over appointments to the Commission and the guidelines has politicised sentencing practices and contributed to the high levels of incarceration. And racial disproportionality. As a result of the minority judicial absence, and the degree of legislative control over the guidelines, the US Commissions been under constant political pressure since their creation. Scholars and practitioners alike have criticised the political nature of the federal Sentencing Commission. Judge Nancy Gertner for example noted that the commission 'could not pretend to independence from the political forces surrounding it' (2008, p. 108) while Rachel Barkow described it as 'an agency finely attuned to the political preferences of its overseers' (2005, p. 767).

[45] As of April 2024, ethnic minority individuals together constituted 10% of all judges and 13% of all magistrates. Diversity of the judiciary: Legal professions, new appointments and current post-holders - 2024 Statistics - GOV.UK, Figures 18 and 46.

The Sentencing Council of England and Wales is constituted to remain independent of Parliament and the Executive. It appears that the government may now, in the wake of the 'Two Tier' sentencing controversy, legislate greater political control over the Council. This may involve changes to the way that members are appointed or requiring the Executive or Parliament to approve each guideline or revisions to existing guidelines.

In England and Wales, the issue of legislative scrutiny and approval of guidelines was explored by the Sentencing Commission Working Group headed by Lord Justice Gage in 2008. The Working Group concluded that the advantages of placing guidelines before Parliament for review and approval would be outweighed by the disadvantages (2008, p. 32). If guidelines were reviewed by Parliament, even within the negative resolution framework, they would attract continual debate, and members critical of the Council or the concept of guidelines would easily mobilise members to disapply the guidelines. When this occurred, the Council would have to reconsider the blocked guideline, revise and conduct a second consultation exercise before returning to Parliament with a second version. The steady progression of guidelines to date would soon slow to a crawl.

Most importantly, allowing Parliament the ability to rewrite guidelines issued by an independent, primarily judicial body headed by the Lord Chief Justice would generate judicial opposition. The Council of HM Circuit Judges made it clear in their submission to the Sentencing Commission Working Group that while they 'agree that [...] Parliament and Ministers should be consulted [with respect to the guidelines] the Sentencing Guidelines Council, as an independent body, should make the final decision.'[46] The support of the judiciary is vital to the success of any guidelines' regime. The international experience makes it clear that

[46] The Sentencing Guidelines Council was replaced by the current Sentencing Council in 2010. Council of HM Circuit Judges. 2008. *Response to the Sentencing Commission Working Group Consultation*, 30 May 2008.

judges will be far more likely to follow guidelines that have been devised and issued by the judiciary. Indeed, judicial opposition to legislative or other nonjudicial guidelines is the principal reason why this form of guidance has been rejected in many jurisdictions (see discussion in Roberts, Freiberg, and Hester (2025).

The work of the Council as well as the earlier guidelines authorities[47] has always been subject to legislative scrutiny. The Sentencing Commission Working Group recommended that consideration be given to 'enhancing parliament's existing role in scrutinising draft guidelines' (Sentencing Commission Working Group, 2008 Recommendation 8.26). Since the creation of the Sentencing Council the Justice Select committee has become more active in examining and responding to consultations on draft guidelines. The Select Committee is the ideal Parliamentary organ to ensure legislative accountability and scrutiny of the Council and its guidelines.

The cross-party House of Commons Justice Select Committee reviews draft guidelines as they are issued by the Council, responds to consultations on those guidelines[48], and holds periodic evidence sessions during which Parliamentarians may question and challenge the Chair and members of the Council who appear as witnesses. The Committee has also conducted inquiries into the Council's work.[49] As it noted in its 2008-2009 report to Parliament, the Committee 'provides Parliamentary comment on the guidelines by considering draft guidelines.' (House of Commons Justice Committee 2009, p. 3). In 2008 the Committee declared its intention to 'review sentencing guidelines in the wider context, seeking thereby to enhance the quality of scrutiny.'[50] And in recent years, the Committee has played a significant role in this regard. This

[47] The Sentencing Advisory Panel and the Sentencing Guidelines panel provided guidance until both were replaced by the Sentencing Council in 2010.
[48] Eg Sentencing Council: Changes to the drugs offences definitive guideline
[49] The work of the sentencing council - Committees - UK Parliament
[50] Ibid, page 64.

level of Parliamentary scrutiny and engagement with the Council's work seems appropriate and sufficient.

The Public and Key Stakeholders

Prior to issuing a guideline, the Coroners and Justice Act requires the Sentencing Council to conduct a protracted and comprehensive public and professional consultation exercise of any draft guideline.[51] In recent years, consultations have attracted a significant number of respondents. The draft Imposition guideline for example generated almost 150 individual and group responses.[52] The Council also conducts and publishes research into public views of its guidelines, the findings of which are then considered as the Council constructs a definitive guideline. In preparing its revised guideline regulating sentence reductions for a guilty plea, the Council commissioned a national survey of public attitudes to plea-based sentence reductions.[53] The use of systematic research ensures that community views are captured in a scientific manner. Once the consultation period closes, Council discusses responses and amends the draft guideline. A final, definitive guideline is then published, along with a detailed document[54] in which the Council responds to the respondents.

These consultation procedures provide all stakeholders (including elected politicians, if they are following the Council's work) with ample opportunity to review and respond to draft guidelines before they become definitive. As a result of these processes, every guideline may reasonably be described as a product of an open and transparent process. These procedures seem

[51] Consultations are generally open for 3 months.
[52] Imposition Guideline Consultation Response Document, pp. 73-76.
[53] Attitudes to Guilty Plea Sentence Reductions. The Scottish Sentencing Council has adopted a similar approach to understanding public opinion through the use of scientific surveys. Mixed methods Research on public opinions of sentences following a guilty plea.
[54] The Council's Response to consultation document regarding the Imposition guidelines runs to almost 100 pages; Imposition Guideline Consultation Response Document.

sufficient to ensure democratic accountability - unless elected politicians fail to discharge their duty to monitor and scrutinise the work of the Council.

To conclude, current arrangements are sufficient to ensure the democratic accountability of the Council. The government, and indeed all members of Parliament have the opportunity to influence the content of the guidelines and the work of the Council more generally.

We conclude this summary of the recent conflict between politicians and the Council by drawing a key lesson: populist punitiveness unites politicians across the political spectrum. Early scholarship ascribed punitive populism principally to Conservative 'law and order' politicians, those arguing that 'prison works' and advocating severe mandatory sentences. However, the latest populist threat to remove or restrict the Council's powers emerges from a Labour government early in its five-year mandate. It currently enjoys a significant Parliamentary majority which should provide sufficient protection from opposition criticism. Even more surprisingly, the Prime Minister supported the Lord Chancellor's plan to override the Council. Sir Keir Starmer had served on the Sentencing Council for several years, during which he had defended its independence. Clearly, principles fade in significance when votes are at stake.

Conclusion

Aside from this latest eruption of political interference, several indicators suggest that sentencing in England and Wales is moving in a positive direction. First, there is a consensus that it is necessary to create a body which would provide objective and disinterested advice to Parliament with a view to depoliticising the debate about sentencing reform. Second, there is growing recognition that the volume of prison sentences, particularly short terms of custody, needs to be reduced. A number of remedial measures have been proposed, including a statutory bar on the imposition of sentences under a certain threshold, as well as a presumption against the

imposition of such sentences. There is also growing interest in a range of alternatives to immediate imprisonment. Some of these involve the creation of new sanctions, while others draw upon existing measures.

Several organizations have advocated creation of new sanctions and new forms of custodial sentences. These proposals draw upon the Community Correction Order in Australia and the Conditional Sentence of Imprisonment in Canada. With respect to the existing sentencing options, there is increased judicial and stakeholder interest in deferred sentencing. Under current arrangements a court may defer sentence (through a 'deferment order') for two purposes: to have regard to the offender's conduct after conviction (including, where appropriate, the offender's making reparation for the offence) or any change in the offender's circumstances. This deferment must be for no more than six months. The caselaw makes it clear that if the defendant complies with the conditions of deferral the court will impose a noncustodial sentence in place of the immediate prison sentence that would otherwise have been ordered. Deferral is a useful way of avoiding immediate imprisonment for offenders whose lives are in transition or who are completing educational or other programs. It is particularly useful for young adults (Freer 2022; Roberts 2022).

Table 1 Volumes and Rates of Sentences, All Courts, England and Wales, 2005–2024

	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014
Immediate custody	101,236	96,013	95,206	99,525	100,231	99,550	103,752	103,768	94,060	92,650
	7%	7%	7%	7%	7%	7%	8%	8%	8%	8%
Suspended sentence	9,666	33,508	40,688	41,151	45,157	46,456	48,984	46,877	44,994	51,492
	1%	2%	3%	3%	3%	3%	4%	4%	4%	4%
Community order	204,247	190,818	196,424	190,172	195,977	188,854	184,618	166,255	134,073	116,288
	14%	13%	14%	14%	14%	14%	14%	13%	11%	10%
Fine	1,025,064	961,473	941,534	890,296	946,146	927,363	874,299	833,895	815,075	812,718
	69%	68%	67%	65%	67%	67%	65%	66%	68%	69%
Other*	142,240	138,665	140,890	140,920	119,394	125,231	127,824	118,055	110,643	109,906
	10%	10%	10%	10%	9%	9%	10%	9%	9%	9%
Total	1,482,453	1,420,477	1,414,742	1,362,064	1,406,905	1,387,454	1,339,477	1,268,850	1,198,845	1,183,054

	2015	2016	2017	2018	2019	2020	2021	2022	2023	2024
Immediate custody	90,601	90,826	90,128	86,630	80,256	67,291	63,305	65,227	66,682	75,342
	7%	7%	7%	7%	7%	7%	7%	7%	6%	7%
Suspended sentence	55,291	57,260	56,554	50,801	40,897	34,779	43,537	42,324	40,850	46,365
	5%	5%	5%	4%	3%	4%	5%	4%	4%	4%
Community order	109,193	106,742	98,362	92,532	91,403	66,259	74,153	70,561	68,402	73,425
	9%	9%	8%	8%	8%	7%	8%	7%	6%	6%
Fine	881,045	915,082	913,905	913,364	923,610	769,266	687,025	787,016	866,569	908,243
	71%	73%	74%	76%	78%	79%	76%	79%	80%	79%
Other*	101,137	89,481	71,821	61,841	54,213	41,490	41,927	37,707	38,983	44,399
	8%	7%	6%	5%	5%	4%	5%	4%	4%	4%
Total	1,237,267	1,259,391	1,230,770	1,205,168	1,190,379	979,085	909,947	1,002,835	1,081,486	1,147,774

Source: Data for the 2010 to 2024 period was derived from the Ministry of Justice ‘Criminal Justice Statistics quarterly: June 2024’. For the 2005 to 2009 period, we use data from ‘Criminal justice statistics quarterly: December 2014’. *Includes absolute discharge, conditional discharge, and otherwise dealt with.

Table 2 Volumes and Rates of Sentences, Indictable Offences, England and Wales, 2005–2024

	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014
Immediate custody	10,995	12,032	13,832	14,842	14,365	13,840	14,613	14,563	13,064	11,815
	68%	67%	67%	71%	71%	71%	69%	70%	72%	72%
Suspended sentence	321	1,031	1,541	1,688	1,727	1,662	1,991	1,912	1,946	2,018
	2%	6%	7%	8%	9%	8%	9%	9%	11%	12%
Community order	4,226	4,369	4,655	3,825	3,805	3,630	3,779	3,693	2,718	2,174
	26%	24%	23%	18%	19%	19%	18%	18%	15%	13%
Fine	83	88	101	54	41	43	43	14	39	47
	1%	0%	0%	0%	0%	0%	0%	0%	0%	0%
Other*	429	436	470	404	358	405	676	538	302	414
	3%	2%	2%	2%	2%	2%	3%	3%	2%	3%
Total	16,054	17,956	20,599	20,813	20,296	19,580	21,102	20,720	18,069	16,468

	2015	2016	2017	2018	2019	2020	2021	2022	2023	2024
Immediate custody	10,955	10,515	10,431	10,579	9,461	7,497	7,317	8,154	7,847	8,469
	74%	75%	76%	77%	77%	74%	70%	75%	75%	72%
Suspended sentence	1,723	1,642	1,474	1,443	1,191	984	1,190	1,268	1,077	1,363
	12%	12%	11%	11%	10%	10%	11%	12%	10%	12%
Community order	1,622	1,406	1,376	1,427	1,394	1,379	1,753	1,185	1,333	1,566
	11%	10%	10%	10%	11%	14%	17%	11%	13%	13%
Fine	37	43	30	14	20	14	13	20	17	16
	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
Other*	467	490	430	265	236	198	215	235	240	303
	3%	3%	2%	2%	2%	2%	2%	2%	3%	3%
Total	14,804	14,096	13,741	13,728	12,302	10,072	10,488	10,862	10,514	11,717

Source: Data for the 2010 to 2024 period was derived from the Ministry of Justice ‘Criminal Justice Statistics quarterly: June 2024’. For the 2005 to 2009 period, we use data from ‘Criminal justice statistics quarterly: December 2014’. *Includes absolute discharge, conditional discharge, and otherwise dealt with.