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The England & Wales Sentencing Guidelines Experience:  
How they Managed to Enhance Consistency without  
Undermining Individualisation, and Incidentally Transformed  
Empirical Research in the Jurisdiction

Jose Pina-Sánchez



# Introduction

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- The origin of the England & Wales sentencing guidelines
- How they work
  - An example from the assault guidelines
- What has been their effect
- How they have contributed to research on sentencing
  - An example on the question of gender disparities

# Origins of the Guidelines

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- It was believed that sentencing in England & Wales was a bit of a black box
  - Unstructured
  - Restricted by certain statutory minima and maxima
- Unrestrained judicial discretion considered problematic
  - Inconsistencies ('postcode lottery')
  - Unpredictability, lack of transparency, etc.
- A Sentencing Working Commission was created in 2008
  - Composed of judges and researchers (from the civil service and academia)
  - Mandated to explore options to promote consistency
  - Considering experiences from other jurisdictions



## Conclusions from the Commission

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- The Commission rejected the adoption of US-style guidelines
  - Based on grids, where a sentence range is prescribed according to two criteria: crime seriousness and criminal history
  - Achieves consistency by undermining proportionality and individualisation
  - Consistency of *outcome*



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  - Based on grids, where a sentence range is prescribed according to two criteria: crime seriousness and criminal history
  - Achieves consistency by undermining proportionality and individualisation
  - Consistency of *outcome*
- Instead, the Commission recommended focusing on consistency of *approach*
  - Lead to the creation of a permanent Sentencing Council
  - In charge of the design and evaluation of offence-specific guidelines
  - Sentencing guidelines based on multiple steps and factors
  - Maintaining judicial discretion in how these factors are used



# Minnesota Sentencing Guidelines

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SEVERITY LEVEL OF CONVICTION OFFENSE (Example offenses listed in italics)		CRIMINAL HISTORY SCORE						
		0	1	2	3	4	5	6 or more
<i>Murder, 2nd Degree (intentional murder; drive-by-shootings)</i>	11	306 261-367	326 278-391	346 295-415	366 312-439	386 329-463	406 346-480 <sup>2</sup>	426 363-480 <sup>2</sup>
<i>Murder, 3rd Degree (unintentional murder)</i>	10	150 128-180	165 141-198	180 153-216	195 166-234	210 179-252	225 192-270	240 204-288
<i>Assault, 1st Degree</i>	9	86 74-103	98 84-117	110 94-132	122 104-146	134 114-160	146 125-175	158 135-189
<i>Agg. Robbery, 1st Degree; Burglary, 1st Degree (w/ Weapon or Assault)</i>	8	48 41-57	58 50-69	68 58-81	78 67-93	88 75-105	98 84-117	108 92-129
<i>Felony DWI; Financial Exploitation of a Vulnerable Adult</i>	7	36	42	48	54 46-64	60 51-72	66 57-79	72 62-84 <sup>2,3</sup>
<i>Assault, 2nd Degree; Burglary, 1st Degree (Occupied Dwelling)</i>	6	21	27	33	39 34-46	45 39-54	51 44-61	57 49-68
<i>Residential Burglary; Simple Robbery</i>	5	18	23	28	33 29-39	38 33-45	43 37-51	48 41-57
<i>Nonresidential Burglary</i>	4	12 <sup>1</sup>	15	18	21	24 21-28	27 23-32	30 26-36
<i>Theft Crimes (Over \$5,000)</i>	3	12 <sup>1</sup>	13	15	17	19 17-22	21 18-25	23 20-27
<i>Theft Crimes (\$5,000 or less); Check Forgery (\$251-\$2,500)</i>	2	12 <sup>1</sup>	12 <sup>1</sup>	13	15	17	19	21 18-25
<i>Assault, 4th Degree; Fleeing a Peace Officer</i>	1	12 <sup>1</sup>	12 <sup>1</sup>	12 <sup>1</sup>	13	15	17	19 17-22



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# Assault Definitive Guideline

DEFINITIVE GUIDELINE



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**STEP ONE****Determining the offence category**

The court should determine the offence category using the table below.

**Category 1** Greater harm (serious injury must normally be present) **and** higher culpability

**Category 2** Greater harm (serious injury must normally be present) **and** lower culpability;  
or lesser harm **and** higher culpability

**Category 3** Lesser harm **and** lower culpability

The court should determine the offender's culpability and the harm caused, or intended, by reference **only** to the factors identified in the table below (as demonstrated by the presence of one or more). These factors comprise the principal factual elements of the offence and should determine the category.

**Factors indicating greater harm**

Injury (which includes disease transmission and/or psychological harm) which is serious in the context of the offence (must normally be present)

Victim is particularly vulnerable because of personal circumstances

Sustained or repeated assault on the same victim

**Factors indicating lesser harm**

Injury which is less serious in the context of the offence

**Factors indicating higher culpability****Statutory aggravating factors:**

Offence motivated by, or demonstrating, hostility to the victim based on his or her sexual orientation (or presumed sexual orientation)

Offence motivated by, or demonstrating, hostility to the victim based on the victim's disability (or presumed disability)

**Other aggravating factors:**

A significant degree of premeditation

Use of weapon or weapon equivalent (for example, shod foot, headbutting, use of acid, use of animal)

Intention to commit more serious harm than actually resulted from the offence

Deliberately causes more harm than is necessary for commission of offence

Deliberate targeting of vulnerable victim

Leading role in group or gang

Offence motivated by, or demonstrating, hostility based on the victim's age, sex, gender identity (or presumed gender identity)

**Factors indicating lower culpability**

Subordinate role in group or gang

A greater degree of provocation than normally expected

Lack of premeditation

Mental disorder or learning disability, where linked to commission of the offence

Excessive self defence



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Injury (which includes disease transmission and/or psychological harm) which is serious in the context of the offence (must normally be present)	Intention to commit more serious harm than actually resulted from the offence
Victim is particularly vulnerable because of personal circumstances	Deliberately causes more harm than is necessary for commission of offence
Sustained or repeated assault on the same victim	Deliberate targeting of vulnerable victim
<b>Factors indicating lesser harm</b>	Leading role in group or gang
Injury which is less serious in the context of the offence	Offence motivated by, or demonstrating, hostility based on the victim's age, sex, gender identity (or presumed gender identity)
<b>Factors indicating higher culpability</b>	<b>Factors indicating lower culpability</b>
<i>Statutory aggravating factors:</i>	Subordinate role in group or gang
Offence motivated by, or demonstrating, hostility to the victim based on his or her sexual orientation (or presumed sexual orientation)	A greater degree of provocation than normally expected
Offence motivated by, or demonstrating, hostility to the victim based on the victim's disability (or presumed disability)	Lack of premeditation
<i>Other aggravating factors:</i>	Mental disorder or learning disability, where linked to commission of the offence
A significant degree of premeditation	Excessive self defence



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## STEP TWO

### Starting point and category range

Having determined the category, the court should use the corresponding starting points to reach a sentence within the category range below. The starting point applies to all offenders irrespective of plea or previous convictions. A case of particular gravity, reflected by multiple features of culpability in step one, could merit upward adjustment from the starting point before further adjustment for aggravating or mitigating features, set out below.

Offence Category	Starting Point ( <i>Applicable to all offenders</i> )	Category Range ( <i>Applicable to all offenders</i> )
Category 1	1 year 6 months' custody	1 – 3 years' custody
Category 2	26 weeks' custody	Low level community order – 51 weeks' custody
Category 3	Medium level community order	Band A fine – High level community order



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## Factors increasing seriousness

*Statutory aggravating factors:*

Previous convictions, having regard to a) the nature of the offence to which the conviction relates and its relevance to the current offence; and b) the time that has elapsed since the conviction

Offence committed whilst on bail

*Other aggravating factors include:*

Location of the offence

Timing of the offence

Ongoing effect upon the victim

Offence committed against those working in the public sector or providing a service to the public

Presence of others including relatives, especially children or partner of the victim

Gratuitous degradation of victim

In domestic violence cases, victim forced to leave their home

Failure to comply with current court orders

Offence committed whilst on licence

An attempt to conceal or dispose of evidence

Failure to respond to warnings or concerns expressed by others about the offender's behaviour

Commission of offence whilst under the influence of alcohol or drugs

Abuse of power and/or position of trust

Exploiting contact arrangements with a child to commit an offence

Established evidence of community impact

Any steps taken to prevent the victim reporting an incident, obtaining assistance and/or from assisting or supporting the prosecution

Offences taken into consideration (TICs)

## Factors reducing seriousness or reflecting personal mitigation

No previous convictions or no relevant/recent convictions

Single blow

Remorse

Good character and/or exemplary conduct

Determination and/or demonstration of steps taken to address addiction or offending behaviour

Serious medical conditions requiring urgent, intensive or long-term treatment

Isolated incident

Age and/or lack of maturity where it affects the responsibility of the offender

Lapse of time since the offence where this is not the fault of the offender

Mental disorder or learning disability, where **not** linked to the commission of the offence

Sole or primary carer for dependent relatives



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**STEP THREE****Consider any other factors which indicate a reduction, such as assistance to the prosecution**

The court should take into account sections 73 and 74 of the Serious Organised Crime and Police Act 2005 (assistance by defendants: reduction or review of sentence) and any other rule of law by virtue of which an offender may receive a discounted sentence in consequence of assistance given (or offered) to the prosecutor or investigator.

**STEP FOUR****Reduction for guilty pleas**

The court should take account of any potential reduction for a guilty plea in accordance with section 144 of the Criminal Justice Act 2003 and the *Guilty Plea* guideline.

**STEP FIVE****Dangerousness**

Assault occasioning actual bodily harm and racially/religiously aggravated ABH are specified offences within the meaning of Chapter 5 of the Criminal Justice Act 2003 and at this stage the court should consider whether having regard to the criteria contained in that Chapter it would be appropriate to award an extended sentence.

**STEP SIX****Totality principle**

If sentencing an offender for more than one offence, or where the offender is already serving a sentence, consider whether the total sentence is just and proportionate to the offending behaviour.

**STEP SEVEN****Compensation and ancillary orders**

In all cases, the court should consider whether to make compensation and/or other ancillary orders.

**STEP EIGHT****Reasons**

Section 174 of the Criminal Justice Act 2003 imposes a duty to give reasons for, and explain the effect of, the sentence.

**STEP NINE****Consideration for remand time**

Sentencers should take into consideration any remand time served in relation to the final sentence. The court should consider whether to give credit for time spent on remand in custody or on bail in accordance with sections 240 and 240A of the Criminal Justice Act 2003.



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- What do we know? Did the guidelines work?
- Exploring the sentencing practice empirically is always a challenge
  - Sentencing aims to reconcile multiple - often competing - goals: rehabilitation, incapacitation, retribution, restoration,...
  - Considering multiple offence and offender characteristics

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  - Sentencing aims to reconcile multiple - often competing - goals: rehabilitation, incapacitation, retribution, restoration,...
  - Considering multiple offence and offender characteristics
- The sentencing guidelines have contributed to clarify the latter
  - Providing lists of relevant factors that ought to be considered
  - Publishing lots of sentencing data openly



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- What do we know? Did the guidelines work?
- Exploring the sentencing practice empirically is always a challenge
  - Sentencing aims to reconcile multiple - often competing - goals: rehabilitation, incapacitation, retribution, restoration,...
  - Considering multiple offence and offender characteristics
- The sentencing guidelines have contributed to clarify the latter
  - Providing lists of relevant factors that ought to be considered
  - Publishing lots of sentencing data openly
- Making it possible to estimate...
  - the effect of sentencing factors (e.g. remorse)
  - the effect of offenders' demographic characteristics (e.g. gender)
  - whether cases are processed consistently across courts
  - changes in punitiveness, and more



# Findings on Consistency & Individualisation

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- On consistency we find that...
  - 80.8% of custodial sentences imposed in the Crown Court can be predicted accurately
  - Only 4% of unexplained disparities in sentence length could be attributed to between court disparities
  - Most factors are consistently applied across courts

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- On consistency we find that...
  - 80.8% of custodial sentences imposed in the Crown Court can be predicted accurately
  - Only 4% of unexplained disparities in sentence length could be attributed to between court disparities
  - Most factors are consistently applied across courts
- Regarding individualisation we find that...
  - 56% of the custodial sentences imposed are concentrated within ten common outcomes
  - That proportion decreased from 58.3% to 53.7% after the new assault guidelines were introduced
  - Judges seems to use a wider range of sentences after the guidelines were introduced
  - Which we believe could be a side-effect of the requirement to spell out all the relevant factors considered ('nudge the judge?')



# Gender Disparities: Background

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- Sentencing in England & Wales is thought to be gender neutral
- Multiple voices advocating for a differential scheme for women
  - Charities (e.g. The Howard League) but also government (e.g. the Ministry of Justice)
- Based on a series of factors differentiating female offenders
  - Women commit less serious crimes
  - Are more likely to self-harm while in custody
  - Higher prevalence of mental illness
  - Often the primary or sole carers
  - Lower recidivism rates
  - Lower risk to harm others
- We question, however, the validity of the premise that sentencing in England & Wales is gender neutral
  - Before deciding where we want to go we should understand where we are





# Gender Disparities: Findings

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- We model the probability of imprisonment for drugs, burglary, and assault offences
- Male offenders roughly 2.5 times more likely to be incarcerated
  - After committing the same crime
  - Controlling for factors such as ‘mental illness’ or ‘caring responsibilities’
  - Rehabilitation only partially controlled (probation officers’ reports not included)
  - Perhaps can be attributed to higher harm of custody on women, or the fewer female prisons
- This evidence can help to frame the normative debate
  - Currently sentencing in England and Wales is not gender neutral
  - Is a 2.5 odds ratio a large enough disparity?

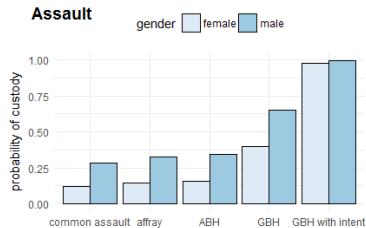
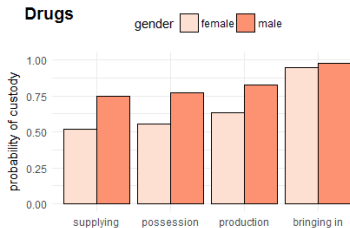
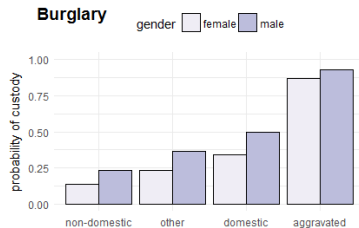
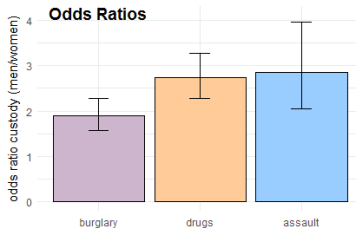


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  - Structuring the sentencing process
  - Enhancing transparency, predictability, and consistency
  - Without unduly restraining judicial discretion
  - Inspired other jurisdictions (South Korea, Israel, South Africa, Australian States, ...)



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  - Inspired other jurisdictions (South Korea, Israel, South Africa, Australian States, ...)
- The guidelines have also lead to an explosion of empirical research on sentencing
  - Which in turn adds further transparency
  - By challenging important misconceptions
  - Such as that sentencing is a ‘postcode lottery’
  - Or that sentencing is gender neutral
  - Empirical research has in turn helped redesign guidelines that had lead to punitive inflation
  - And factors found problematic (e.g. offence committed under intoxication)



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  - Empirical research has in turn helped redesign guidelines that had lead to punitive inflation
  - And factors found problematic (e.g. offence committed under intoxication)
- If interested in this kind of work join the Empirical Research on Sentencing Network (EROS@JISMAIL.AC.UK)