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# Secondary Data Analysis for Sentencing Research

Jose Pina-Sánchez



# Introduction

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- Arguably the most important stage of the Criminal Justice system
- A field traditionally dominated by doctrinal, normative and theoretical research
- Currently in a process of transformation, providing great opportunities to empirical researchers



# The Relevance of Sentencing

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- Every single stage in the CJ process is important
  - It could be argued that any other stage is more resource and time intensive
  - crime reporting/detection → arrest → prosecution → sentencing  
→ prison/probation → parole



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Discussion

- Every single stage in the CJ process is important
  - It could be argued that any other stage is more resource and time intensive
  - crime reporting/detection → arrest → prosecution → sentencing → prison/probation → parole
- Sentencing is the most visible and symbolic stage
  - The institutionalised representation of how we deal with wrongdoing
  - At the core of two crucial concepts, *punishment* and *justice*
  - With vast ramifications to the legitimacy and trust of the Criminal Justice system, the public budget, victim and offender well-being, and future crime rates

# The Complexity of Sentencing

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- Sentencing is a complex process
- Seeking to achieve competing goals
  - Retributive
  - Incapacitating
  - Deterring
  - Rehabilitative
  - Restorative
- Governed by rather elusive (and often competing) principles
  - Consistency
  - No discrimination
  - Individualisation
  - Proportionality
  - Equity



# Sentencing As an Art not a Science

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Discussion

- Sentencing is a complex process
- Seeking to achieve competing goals
  - Retribution (punishment)
  - Rehabilitation
  - Incapacitation
  - Restoration, ...
- Governed by principles that are difficult to define
  - Consistency
  - Individualisation
  - Proportionality, ...



# Sentencing As an Art not a Science

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- Hence, sentencing is thought by practitioners - and many researchers - as an art not a science
  - It cannot be coded
  - It certainly cannot be measured
  - The sentencing process cannot be expressed mathematically (Freiberg, 2016)
  - *“There could never be a ‘right’ sentence in the same way as there can never be a ‘right’ work of art or a ‘right’ poem.”* (see Sir Anthony Hooper 2015)



# Sentencing As an Art not a Science

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## Discussion

- Hence, sentencing is thought by practitioners - and many researchers - as an art not a science
  - It cannot be coded
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  - The sentencing process cannot be expressed mathematically (Freiberg, 2016)
  - *“There could never be a ‘right’ sentence in the same way as there can never be a ‘right’ work of art or a ‘right’ poem.”* (see Sir Anthony Hooper 2015)
- A practice traditionally hostile to quantitative research
  - Very difficult for researchers to ‘break into court’
  - Sentencers prevented from being contacted by researchers by the Judicial Office
  - Several examples of official data been censored
  - The French ban on data analytics



# Implications

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- UK sentencing research principally dominated by normative and doctrinal approaches

# Implications

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- UK sentencing research principally dominated by normative and doctrinal approaches
- Immersed in circular discussions
  - Arguing which sentencing principles are more dominant
  - Discussing which goals should be prioritised
- Throwing around untested claims
  - E.g. the E&W sentencing scheme being ‘gender neutral’
  - Being governed by the principle of proportionality
  - Sentencing Guidelines improve consistency,
  - but they hinder individualisation
  - We cannot possibly know how judges weight different factors
  - Judges in E&W have got more discretion than in the US



# Research Implications

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- I believe the view of ‘sentencing as an art’ has been instrumentalised
  - To maintain the status/prestige of the judiciary
  - To preserve their autonomy
  - And to avoid accountability
- Some of the above can be demonstrated by the traditional hostility shown towards empirical research
  - Very difficult for researchers to ‘break into court’
  - All research with members of the judiciary needs to be previously approved by the Judicial Office
  - Several examples of official data been censored
  - The French ban on data analytics



# Research Implications

- Sentencing research dominated by normative, theoretical, historical and doctrinal approaches
  - Useful to provide perspective

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## Discussion

- Sentencing research dominated by normative, theoretical, historical and doctrinal approaches
  - Useful to provide perspective
- However, the absence of empirical research gives rise to circular discussions, commonly based on untested claims
  - E.g. the E&W sentencing scheme being ‘gender neutral’
  - governed by the principle of proportionality
  - guidelines improve consistency
  - but they hinder individualisation, which in turn affects sentencing severity
  - the importance of personal mitigating factors has been relegated in favour of aggravating factors
  - judges in E&W have got more discretion than in the US

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- Sentencing research dominated by normative, theoretical, historical and doctrinal approaches
  - Useful to provide perspective
- However, the absence of empirical research gives rise to circular discussions, commonly based on untested claims
  - E.g. the E&W sentencing scheme being ‘gender neutral’
  - governed by the principle of proportionality
  - guidelines improve consistency
  - but they hinder individualisation, which in turn affects sentencing severity
  - the importance of personal mitigating factors has been relegated in favour of aggravating factors
  - judges in E&W have got more discretion than in the US
- Which hinders progress in the discipline
  - while “*sentencing policy evolves in a vacuum*” (Roberts and Hough, 2015)



# The Role of the Sentencing Council

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- Things are starting to change
- The Sentencing Council for England and Wales has played a key role



# The Role of the Sentencing Council

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## Discussion

- Things are starting to change
- The Sentencing Council for England and Wales has played a key role
  - Founded in 2011
  - In charge of the design of ‘sentencing guidelines’
  - Which, to an extent, represent a codification of the sentencing practice
  - Also in charge of evaluating the impact of their guidelines
  - Employing a team of 7 social researchers and statisticians
- Followed by the creation of the Scottish Sentencing Council, and others



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- Generating important resources (the CCSS)
- The MoJ statistics



# Sentencing Guidelines: Assault

## STEP ONE

### Determining the offence category

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

<b>Category 1</b>	Greater harm (serious injury must normally be present) <b>and</b> higher culpability
<b>Category 2</b>	Greater harm (serious injury must normally be present) <b>and</b> lower culpability; or lesser harm <b>and</b> higher culpability
<b>Category 3</b>	Lesser harm <b>and</b> lower culpability

The court should determine the offender's culpability and the harm caused, or intended, by reference **only** to the factors 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 racially or religiously aggravated

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

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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	12 years' custody	9–16 years' custody
Category 2	6 years' custody	5–9 years' custody
Category 3	4 years' custody	3–5 years' custody

The table below contains a **non-exhaustive** list of additional factual elements providing the context of the offence and factors relating to the offender. Identify whether any combination of these, or other relevant factors, should result in an upward or downward adjustment from the starting point. In some cases, having considered these factors, it may be appropriate to move outside the identified category range.

#### 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

Exploiting contact arrangements with a child to commit an offence

Previous violence or threats to the same victim

Established evidence of community impact

Any steps taken to prevent the victim reporting an incident, or 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



# An Impact Gold Mine

- Sentencing research in the UK is now a field where the possibility of achieving wide-reaching impact is very real

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- Sentencing research in the UK is now a field where the possibility of achieving wide-reaching impact is very real
- A genuine commitment to ‘evidence-based policy’ from the part of the Council
  - Consultations about their guidelines at different stages (pre-design stage, definition of terms, impact evaluations)
  - Commissioning empirical research
  - Organising and participating in academic conferences



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- The iterative nature of the sentencing guidelines
  - In E&W those guidelines identified as problematic during the evaluation stage will be replaced first

# An Impact Gold Mine

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  - Consultations about their guidelines at different stages (pre-design stage, definition of terms, impact evaluations)
  - Commissioning empirical research
  - Organising and participating in academic conferences
- The iterative nature of the sentencing guidelines
  - In E&W those guidelines identified as problematic during the evaluation stage will be replaced first
- Examples of ‘impact’ achieved by our research
  - Evaluations of consistency based on multilevel modelling
  - Evaluations of severity based on our new scale of sentence severity
  - Identifying aggravating and mitigating factors inconsistently applied (e.g. ‘remorse’, ‘alcohol intoxication’)



## Examples of 'Impact'

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- Examples of impact achieved by sentencing researchers recently
  - Martin Waseek's impact case on the adoption of proportionality as the anchoring principle for the development of sentencing guidelines, plus the rejection of numerical US-style grids-based guidelines in favour of a more narrative format
  - Shona Minson's ESRC impact prize based on putting children's right at the forefront of sentencing parents
  - Carly Lightowler's clarification of the aggravating factor 'offence committed under the influence of alcohol or drugs'
  - Identification of guideline factors double counted (e.g. 'remorse', 'previous convictions')
  - New analytical framework to evaluate the effect of the guidelines on sentence severity
  - New analytical framework to evaluate the effect of the guidelines on sentence consistency



## Weight of Guideline Factors

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- Can we estimate the weight attributed to different factors?
  - This is key to understand how the guidelines are applied (e.g. Step One factors ought to be more important than Step Two factors)
  - *“Judges are not required to provide details of their calculations but simply to list those factors which they have taken into account. It will therefore be impossible to find out the degree of influence which any individual factor had on the judicial assessment of seriousness.”* (Hutton, 2013)



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  - *“Judges are not required to provide details of their calculations but simply to list those factors which they have taken into account. It will therefore be impossible to find out the degree of influence which any individual factor had on the judicial assessment of seriousness.”* (Hutton, 2013)
- Potential research designs
  - Experimental designs: Asking judges to sentence one of two identical cases with the exception of one of the factors being present/omitted
  - Great internal validity but limited to a few judges and factors
  - Multivariate models: Using official statistics, court records, or court observations
  - $Y = \beta_1 X_1 + \beta_2 X_2 + \beta_3 X_3 + \dots + \beta_K X_K + \epsilon$
  - Great external validity, questionable internal validity (confounding effects?)



# Thinking Empirically about Sentencing

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## Discussion

- The approach we have taken to explore empirically some of the principles governing the sentencing practice
  - Consistency
  - Individualisation
  - Severity
  - Proportionality



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## Discussion

- The approach we have taken to explore empirically some of the principles governing the sentencing practice
  - Consistency
  - Individualisation
  - Severity
  - Proportionality
- These are rather elusive concepts
  - Not more complex than other concepts explored by Social Scientists, like poverty or happiness
  - Even if not been able to measure them perfectly, it is still worth trying to estimate them

# Thinking Empirically about Sentencing

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## Discussion

- The approach we have taken to explore empirically some of the principles governing the sentencing practice
  - Consistency
  - Individualisation
  - Severity
  - Proportionality
- These are rather elusive concepts
  - Not more complex than other concepts explored by Social Scientists, like poverty or happiness
  - Even if not been able to measure them perfectly, it is still worth trying to estimate them
- The structure I will follow
  - How we thought about operationalising these concepts
  - Present our main findings
  - Point at important issues to be resolved

# Consistency in Sentencing

- Can we estimate the degree of consistency in sentencing?

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# Consistency in Sentencing

- Can we estimate the degree of consistency in sentencing?
  - Traditionally measured using experimental designs, assessing the variability of sentences imposed to a simulated case (see Tarling 2006)  
How representative are those few cases used in an experimental design?

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- Can we estimate the degree of consistency in sentencing?
  - Traditionally measured using experimental designs, assessing the variability of sentences imposed to a simulated case (see Tarling 2006)  
How representative are those few cases used in an experimental design?
  - Alternatively we could use official stats to measure the variability across courts in sentences to similar cases, e.g. GBH (see Reid and MacAlister 2018)  
Some of that variability will reflect differences in the case-mix sentenced in different courts (e.g. offenders with more previous convictions in one particular court)



# Consistency in Sentencing

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### Discussion

- Can we estimate the degree of consistency in sentencing?
  - Traditionally measured using experimental designs, assessing the variability of sentences imposed to a simulated case (see Tarling 2006)
 

How representative are those few cases used in an experimental design?
  - Alternatively we could use official stats to measure the variability across courts in sentences to similar cases, e.g. GBH (see Reid and MacAlister 2018)
 

Some of that variability will reflect differences in the case-mix sentenced in different courts (e.g. offenders with more previous convictions in one particular court)
  - Using multivariate models to differentiate between legitimate and illegitimate disparities

$$Y = \underbrace{\beta_K X_K}_{\text{legitimate}} + \underbrace{\epsilon}_{\text{illegitimate}}$$

80.8% of custodial sentences imposed in the Crown Court can be predicted accurately (Pina-Sánchez and Grech 2018)

4% of the residuals in sentence length could be attributed to between court disparities (Pina-Sánchez and Linacre 2013)



# Consistency: Operationalisation

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- The main goal of the sentencing guidelines
- There isn't a universal definition
  - The extent to which 'like cases are treated alike'



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## Discussion

- The main goal of the sentencing guidelines
- There isn't a universal definition
  - The extent to which 'like cases are treated alike'
- Which we operationalised as follows
  - Defining 'like cases' as those sharing the same combination of guideline factors (including harm, culpability, mitigating, aggravating and other relevant personal factors)
  - Then, the extent to which sentences deviate from the expected outcome for that given case (e.g. the residuals of a regression model) could be considered a measure of 'inconsistency'

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  - The extent to which 'like cases are treated alike'
- Which we operationalised as follows
  - Defining 'like cases' as those sharing the same combination of guideline factors (including harm, culpability, mitigating, aggravating and other relevant personal factors)
  - Then, the extent to which sentences deviate from the expected outcome for that given case (e.g. the residuals of a regression model) could be considered a measure of 'inconsistency'
- Such estimate of consistency/inconsistency is far from perfect
  - Particularly since the guidelines do not include an exhaustive list of aggravating and mitigating factors
  - To remedy this problem - albeit only partially - we've also suggested elevating the unit of analysis to explore disparities between courts



# Consistency: Findings & Impact

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Discussion

- Using factors listed in the assault guidelines we find that...
  - 80.8% of custodial sentences imposed in the Crown Court can be predicted accurately
  - Unexplained disparities fell by 7% following the introduction of the new assault guidelines
  - Roughly 4% of the residual disparities in sentence length could be attributed to between court disparities
  - Identified those courts that might be following a different approach
  - Most factors are consistently applied across courts



# Consistency: Findings & Impact

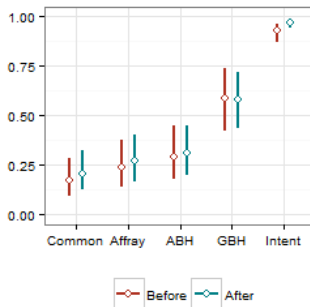
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Fig1. Probability of custody in the Crown Court before and after the introduction of the assault guideline (95% confidence intervals representing between court disparities)





# Severity: Operationalisation

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Discussion

- Five main sentence outcomes (aka disposal types)
  - *discharge < fine < community order < suspended sentence < custodial sentence*
- Most of those disposal types use different units of measurement
  - e.g. pounds for fines, days for custodial sentences, conditions for community orders

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- Most of those disposal types use different units of measurement
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- For reasons of convenience we tend to focus on custodial sentences
  - However these represent only 7% of the sentences imposed in England and Wales
  - Creating a problem of selection bias

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- Most of those disposal types use different units of measurement
  - e.g. pounds for fines, days for custodial sentences, conditions for community orders
- For reasons of convenience we tend to focus on custodial sentences
  - However these represent only 7% of the sentences imposed in England and Wales
  - Creating a problem of selection bias
- Alternatively some studies focus on the probability of custody
  - This involves reducing the sentence outcome to a (0,1) variable
  - A huge loss of information



# Severity: Operationalisation

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- We have explored estimating a scale of severity
  - So we can analyse 100% of the sentences
  - while making the most of the information available



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## Discussion

- We have explored estimating a scale of severity
  - So we can analyse 100% of the sentences
  - while making the most of the information available
- We used...
  - The ‘sentencing ladder’
  - A sample of 21 magistrates
  - Pairwise comparisons (Thurstone method)



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Table2. Severity scores

Sentence outcome	Severity score
absolute discharge	0
conditional discharge	0.97
fine	1.33
community order	2.13
1-month custody 6-months suspended	2.34
1-month custody 12-months suspended	3.66
6-months custody 6-months suspended	3.78
12-months custody 24-months suspended	5.74
1-month custody	5.05
2-months custody	5.75
3-months custody	6.45
12-months custody	13.45
5-years custody	47.05
20-years custody	173.05



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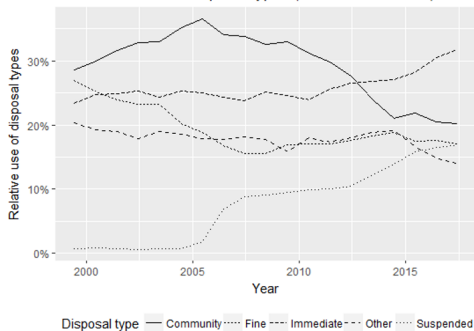
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Fig3. Relative use of disposal types (indictable offences)





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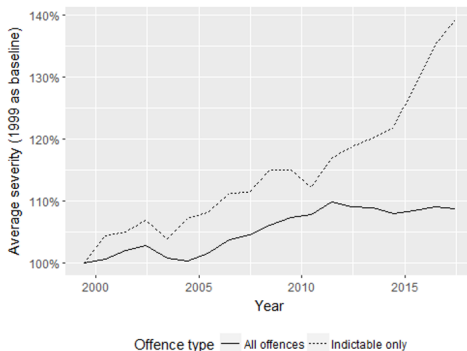
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Fig5. Trends in sentence severity in E&W





# Severity: Findings

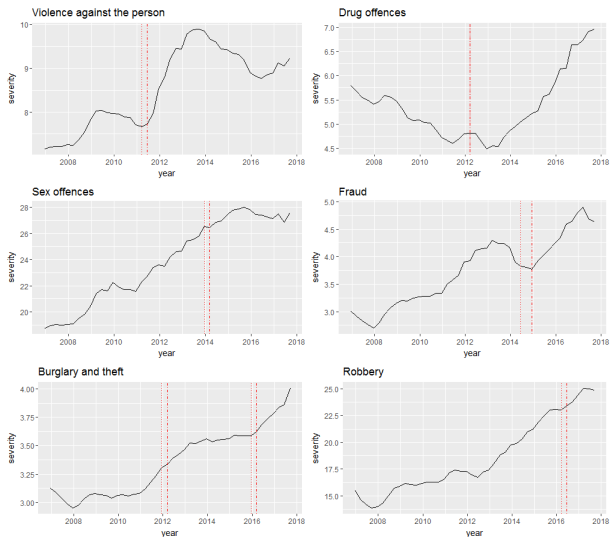
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Fig6. Assessing the impact of the guidelines





# Severity: Findings

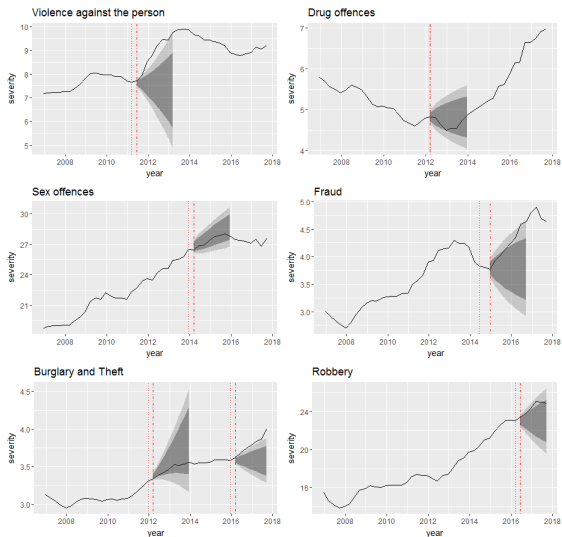
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Fig6. Assessing the impact of the guidelines





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- Can the principle of proportionality be estimated?



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## Discussion

- Can the principle of proportionality be estimated?
  - Probably the hardest principle to operationalise because of its subjectivity  
Yet, arguably, the most important principle of them all  
Said to be the bedrock of the sentencing practice/guidelines in England & Wales



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## Discussion

- Can the principle of proportionality be estimated?
  - Probably the hardest principle to operationalise because of its subjectivity  
Yet, arguably, the most important principle of them all  
Said to be the bedrock of the sentencing practice/guidelines in England & Wales
  - Estimating a scale of crime seriousness/harm and assessing how it correlates with sentence severity
  - Estimating the share of the weight of harm and culpability factors on the final sentence



# Proportionality: Operationalisation

- Probably the hardest principle to operationalise because of its subjectivity
  - Normally understood as the extent to which sentence severity matches the seriousness of the crime

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## Proportionality: Operationalisation

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### Discussion

- Probably the hardest principle to operationalise because of its subjectivity
  - Normally understood as the extent to which sentence severity matches the seriousness of the crime
- Yet, arguably, the most important principle
  - Said to be the bedrock of the sentencing practice/guidelines in England & Wales
  - A seemingly perpetual debate going on about whether this is desirable
  - A debate based on anecdotal/partial evidence
  - The extent to which this principle is upheld is unknown



# Proportionality: Operationalisation

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## Discussion

- Probably the hardest principle to operationalise because of its subjectivity
  - Normally understood as the extent to which sentence severity matches the seriousness of the crime
- Yet, arguably, the most important principle
  - Said to be the bedrock of the sentencing practice/guidelines in England & Wales
  - A seemingly perpetual debate going on about whether this is desirable
  - A debate based on anecdotal/partial evidence
  - The extent to which this principle is upheld is unknown
- I have started playing with two approaches to explore this concept empirically
  - Estimating a scale of crime seriousness/harm
  - Estimating the weight of retributive factors on the sentence outcome



# Proportionality: Measuring Crime Harm

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Discussion

- We already have a scale of sentence severity
  - If we can estimate an index of crime harm
  - We could monitor proportionality across time and offences



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## Discussion

- We already have a scale of sentence severity
  - If we can estimate an index of crime harm
  - We could monitor proportionality across time and offences
- To avoid problems of circularity we cannot use the existing scales of crime harm
  - Bangs' and Sherman's scales are based on sentence data and the sentencing guidelines

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## Discussion

- We already have a scale of sentence severity
  - If we can estimate an index of crime harm
  - We could monitor proportionality across time and offences
- To avoid problems of circularity we cannot use the existing scales of crime harm
  - Bangs' and Sherman's scales are based on sentence data and the sentencing guidelines
- We are exploring creating a new scale using the CSEW
  - Questions where participants were asked to rank the harm of different crimes
  - This ranking can be modelled using pairwise comparison methods to ascertain an underlying continuous scale behind them
  - More statistically principled and less arbitrary than the scales of crime harm currently used
  - Higher face validity: *sentence severity*  $\neq$  *crime seriousness*



# Proportionality: Measuring Retribution

## Introduction

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Discussion

- An alternative route would be to estimate and compare the effect of different types of factors on the sentence outcome
  - What is the share of the variability explained by harm and culpability factors?
  - How does that compare to the variability explained by factors of other nature, e.g. personal mitigating factors?
  - How does that ratio vary by offence type, court location, etc.?
  - How has it changed across time, after the introduction of new guidelines, etc.?



# Proportionality: Measuring Retribution

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### Discussion

- An alternative route would be to estimate and compare the effect of different types of factors on the sentence outcome
  - What is the share of the variability explained by harm and culpability factors?
  - How does that compare to the variability explained by factors of other nature, e.g. personal mitigating factors?
  - How does that ratio vary by offence type, court location, etc.?
  - How has it changed across time, after the introduction of new guidelines, etc.?
- This would be really informative and yet relatively easy to do
  - I am surprised no one has looked into that
  - Perhaps explained by the widely held belief amongst sentencing scholars that the weight attributed to different factors cannot be estimated



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	Step One: Assessed Seriousness	Step Four: Guilty Plea Reduction	Final Sentence
Assessed seriousness			
Guilty plea reduction			
<i>Step One Factors</i>			
Deliberate harm			
Intent, serious harm			
Leading role gang			
Hostility age/gender			
Premeditation			
Racially motivated			
Hostility orientation			
Targeting vulnerable			
Use of a weapon			
Serious injury			
Sustained assault			
Vulnerable victim			
Lack premeditation			
Mental disorder			
Provocation			
Self-defence			
Subordinate role			
Injury less serious			
<i>Step Two Factors</i>			
Previous convictions (1-3)			
Previous convictions (4-9)			
Abuse of trust			
Against public			
On bail			
Dispose of evidence			
Victim forced leave			
Community impact			
Failure warnings			
Failure court orders			
Gratuitous degradation			
Location			
Whilst on licence			
Ongoing effect			
Presence of others			
Previous violence			
Timing of offence			
Under drugs/alcohol			
Address addiction			
Lack of maturity			
Good character			
Isolated incident			
Lapse of time			
Medical condition			
Mental disability			
No relevant convictions			
Primary carer			
Genuine remorse			
Single blow			
<i>Step Four Factors</i>			
First opportunity			
At magistrates			
Prior to PCMH			
At PCMH			
After PCMH			



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- Sentencing is not just an art
  - In fact, it is a relatively well defined decision-making process
  - Probably not just a science either, but we can certainly detect lots of patterns in it
  - Which tells us that quantitative research has a place in this field
- Using quantitative methods we have...
  - Challenged important misconceptions (such as the widely held view that sentencing is a ‘postcode lottery’)
  - Identified factors applied inconsistently, some of them have been redefined in the guidelines
  - Designed some analytical protocols adopted by the Sentencing Council to evaluate their guidelines



# Discussion

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- We need a cultural/pedagogical change
  - We need to promote the quantitative training of future social scientists
  - We need sentencing researchers trained in quantitative methods
- The example of the US, where sentencing research is mostly quantitative
  - Which has contributed shed light on issues like institutional racism
  - Or to assess the effect of different guidelines in increasing (or decreasing) the prison population
- If you found any of this interesting give me a shout or join our new network ERoS



# If you Want to Go Further

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## Discussion

- These are important sentencing datasets
  - Official sentencing statistics from the MoJ
  - One-off data release capturing defendant's ethnicity
  - The Crown Court Sentencing Survey
- These are useful repositories of sentencing records
  - Judgements from the Courts and Tribunals Judiciary
  - Sentencing remarks from The Law Pages
- The field is growing steadily, still only a few researchers outside the US using empirical methods
  - If you want to keep up to date with the latest research on the field you are welcome to join our research network ERoS