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Secondary Data Analysis for Sentencing Research

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Introduction to Sentencing

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- The most visible and symbolic stage in the CJ process
 - crime reporting/detection → arrest → prosecution → **sentencing** → prison/probation → parole

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 - crime reporting/detection → arrest → prosecution → **sentencing** → prison/probation → parole
- A process that has been transformed radically over the last decade through the design and imposition of guidelines
 - Seeking to ‘structure’ judicial discretion
 - Started in earnest in 2011 for England and Wales, now exported to South Korea, Scotland and many other jurisdictions
 - Expected to cover all main offences in England and Wales by the end of the year

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 - Started in earnest in 2011 for England and Wales, now exported to South Korea, Scotland and many other jurisdictions
 - Expected to cover all main offences in England and Wales by the end of the year
- A process lead but also evaluated by the Sentencing Council
 - With a statutory duty to assess the impact of its guidelines
 - In so doing they have collected and shared some of the best sentencing data worldwide
 - Which indirectly has transformed sentencing as a research subject



A Field Traditionally Hostile to Empirical Research

- Sentencing is a complex process
 - Seeking to achieve competing goals (retribution, rehabilitation, incapacitation, etc.)
 - Governed by elusive principles (consistency, individualisation, proportionality)
 - Considered an art, not a science: *“The sentencing process cannot be expressed mathematically”* (Freiberg, 2016)

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- The absence of data makes it harder
 - Court observations are incredibly time-consuming
 - Court transcripts are not always published
 - The only official data is not available at the individual level (MoJ statistics)

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- As a result → a very small pool of empirical evidence
 - A field dominated by theoretical and doctrinal research
 - Affected by circular debates, filled by unsubstantiated claims

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- The field has now been transformed radically
 - Mostly as a result of the key role played by the Sentencing Council
 - To monitor their guidelines ended up creating the best sentencing survey ever
- The Crown Court Sentencing Survey (CCSS)
 - Crown Court judges were requested to fill a form for every case sentenced
 - Covering the 2011 to 2015 period
 - Around 1/4 million cases
 - Capturing > 40 factors defining each case
 - Made public - although with some important restrictions

Sentencing Guidelines: Assault

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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 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

Sentencing Guidelines: Assault

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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 (Applicable to all offenders)	Category Range (Applicable to all offenders)
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



The CCSS Questionnaire

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Recorder for the **PRINCIPAL OFFENCE ONLY**

SEE NOTES OVERLEAF

3. Definitive guideline - Step 1

- (a) Factors indicating greater harm
- Injury/fear of injury which is serious in context of the offence
 - Victim particularly vulnerable
 - Sustained or repeated assault on same person
- (b) Factors indicating lesser harm
- Injury/fear of injury which is less serious in context of the offence
- (c) Factors indicating higher culpability
- Statutory aggravating factors
- Offence motivated by/demonstrating hostility to:
- Race/religion
 - Disability
 - Sexual orientation
 - Transgender identity
- Other aggravating factors
- Significant degree of premeditation
 - Threatened/actual use of weapon/equivalent
 - Intention to cause more serious harm
 - Deliberately causes more harm than necessary
 - Targeting of vulnerable victim(s)
 - Leading role in group or gang
 - Offence motivated by/demonstrating hostility to age or sex
- (d) Factors indicating lower culpability
- Subordinate role in group or gang
 - Greater degree of provocation
 - Lack of premeditation
 - Mental disorder/learning disability where linked to the commission of the offence
 - Excessive self defence

4. Offence seriousness SEE NOTES OVERLEAF, INCLUDING GUIDANCE ON OFFENCES THAT FALL BETWEEN TWO CATEGORIES

- Category 1
Most serious
- Category 2
- Category 3
Least serious
- No guideline

- (b) Factors reducing seriousness or reflecting personal mitigation
- No previous relevant convictions
 - Single blow
 - Remorse
 - Good character/exemplary conduct
 - Determination/demonstration to address addiction/behaviour
 - Serious medical conditions
 - Isolated incident
 - Age/lack of maturity affecting responsibility
 - Lapse of time not fault of offender
 - Mental disorder/learning disability where not linked to the commission of the offence
 - Sole/primary carer for dependent relatives
 - Other factors (please specify in box below)

6. Indication of guilt/guilty plea SEE NOTES OVERLEAF

Was guilt indicated at police station?

- Yes
- No
- Don't know

Was a guilty plea entered for the principal offence?

- Yes
- No

Where was guilty plea entered?

- At magistrates' court
- At early guilty plea hearing
- Prior to PCMH
- At PCMH
- After PCMH/prior to day of trial
- At/after day of trial

Was the guilty plea entered at the first reasonable opportunity?

- Yes
- No

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- Using the CCSS and multivariate models we have
 - Shed light on the sentencing practice
 - Influenced the design and evaluation of the sentencing guidelines
 - Demonstrated that sentencing is a bit like a science too



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- Using the CCSS and multivariate models we have
 - Shed light on the sentencing practice
 - Influenced the design and evaluation of the sentencing guidelines
 - Demonstrated that sentencing is a bit like a science too
- We have identified the effect of each guideline factor across the sentencing process
 - The consensus amongst the ‘elders of sentencing research’ was that this is impossible
 - In doing so we have identified some problems of compliance with the guidelines
 - The new version of the guidelines now specifically requests sentencers not to double count factors



Recent Research

- Dr Lightowlers has identified that *'under the influence of drugs/alcohol'* was applied inconsistently
 - Depending on whether in conjunction with *'isolated incident'*
 - And the offender's gender
 - The new guidelines provide additional context to this factor

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- Dr Lightowlers has identified that *'under the influence of drugs/alcohol'* was applied inconsistently
 - Depending on whether in conjunction with *'isolated incident'*
 - And the offender's gender
 - The new guidelines provide additional context to this factor
- We have found that sentencing is not gender neutral
 - The odds of incarceration are 2X higher for male offenders
 - Doesn't seem to be explained by differences in dangerousness
 - The Sentencing Council found that the odds of incarceration for BAME offenders are 40% to 50% higher than for whites

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 - The Sentencing Council found that the odds of incarceration for BAME offenders are 40% to 50% higher than for whites
- We have managed to estimate sentence consistency
 - Using multilevel models and between court variability
 - Found that the guidelines seem to be enhancing consistency
 - A method adopted by the Sentencing Council

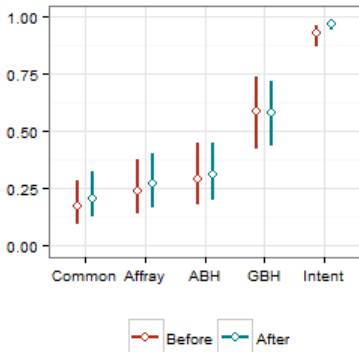
Estimating Between-Court Consistency

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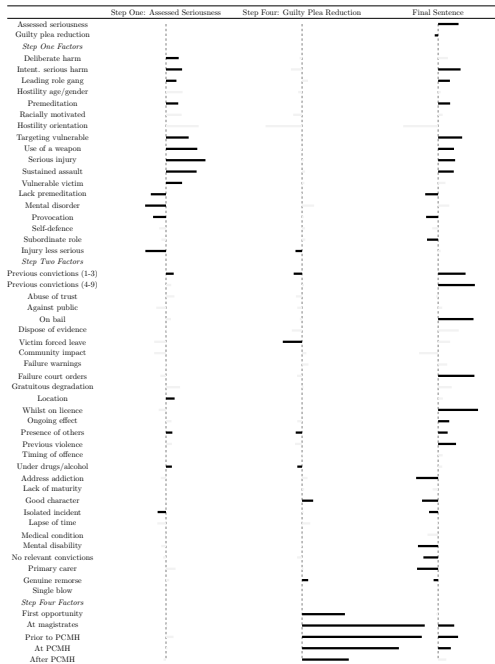


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- In conclusion...
 - Yes, sentencing is complex
 - But not more so than most other subjects in the Social Sciences, e.g. the measurement of crime, poverty, human development, etc.
 - We have shown all we need is some proper data

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 - Yes, sentencing is complex
 - But not more so than most other subjects in the Social Sciences, e.g. the measurement of crime, poverty, human development, etc.
 - We have shown all we need is some proper data
- Still much more could be done with this data
 - Lots of crucial questions remain unanswered
 - What is causing the increase in sentence severity?
 - Is the principle of proportionality the bedrock of the sentencing scheme in England and Wales?
 - Have the guidelines undermined the effect of personal mitigating factors?

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- We need more researchers with quants skills in this area
 - Very few sentencing scholars can use data
 - We need new generations of criminologists/sociologists doing what you are doing

Future Developments

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- The CCSS only reaches up to 2015, but new data is underway
 - The Sentencing Council has been collecting data from Magistrates courts
 - Due to be released soon (or so I keep being told)
 - The MoJ and CPS are also working on a data sharing agreement to comply with the recommendations from the Lammy Review
 - The Parole Board has started releasing their decisions in text



Future Developments

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 - The MoJ and CPS are also working on a data sharing agreement to comply with the recommendations from the Lammy Review
 - The Parole Board has started releasing their decisions in text
- Lots of new opportunities for secondary data analysis in the Criminal Justice system
 - To carry out ground-breaking research
 - And to have impact, help improve things even if a little
 - Make Criminal Justice a little less awful and a bit more evidence-based