

**The Evolution of
Sentencing
Guidelines**
*with a focus on
England and Wales*

***Hannover,
September 2023***

Professor Julian V. Roberts, K.C. (Hon.)



Overview of Presentation

- Sentencing in adversarial criminal justice systems
- Origins of sentencing guidelines
- 'Second generation' Guidelines
- Experience with sentencing guidelines in England and Wales

Unitary Sentencing Hearing: Extract from Knox judgment, first instance court

- Apart from the personal use of drugs. . there is no evidence of inappropriate behavior that harmed others . . [Both defendants] not only worked diligently and profitably at their studies, as their status as students required them to do . . but were also ready to help others . . . and accepted the duties of gainful employment .. By law these are significant factors [requiring mitigation of their punishment for the offense for which they have been convicted.] Both defendants are extremely young, and were still young at the time of the commission of the offense. The inexperience and immaturity natural to youth was accentuated by the context in which they found themselves, different from the context in which they had grown up and deprived of customary points of reference (family, friends, long-time acquaintances, their native region and city of origin) . . “

Why a separate hearing for sentence?

- Different issues to litigate at sentencing: not whether the accused is guilty, but how much punishment (and what type) is appropriate;
- Different evidentiary rules from the trial: aggravating factors to a criminal standard; mitigation – balance of probabilities.
- **And in order to allow Time:**
 - for the parties to devise their submissions;
 - for ancillary professionals to provide information to the court – e.g., Pre-Sentence Report (PSR)
 - for the victim to submit (or update) a Victim Personal Statement (VPS/ VIS) and be notified of the sentencing hearing.
 - for the defendant to make reparation and possibly to facilitate restorative justice.

Origins and Evolution of Guidelines

- 19th Century England:
- **Starting Points** from which the judge makes his reckoning – deviations from the normal limits would have to be justified’;
- US: ‘law without order’.. ‘capricious unruliness of sentencing’ (Judge Frankel, 1972)
- Parallel movement to structure parole decision-making: the parole grid became a sentencing matrix in 1980
- Offence-specific and other guidelines emerged in mid 1980s (Canada, then England and Wales) and now operate across about 20 jurisdictions.

Sentencing standards in Europe: Council of Europe Recommendations

- Assign offences to levels of seriousness;
- Provide sentence ranges and 'Starting Point' sentences within the ranges;
- Identify most important Aggravating and Mitigating factors;
- Limit the aggravating effect of prior convictions;
- Publish sentencing statistics to document sentencing practices levels of consistency.

US Guidelines: Limitations

- Little evolution or amendment over time
- Diverse offences squeezed into same seriousness level (11 in Minnesota)
- Questionable grid dimensions: crime seriousness and **previous offending**, rather than harm and culpability
- Power of criminal history cannot be justified by reference to risk or retribution and contributes to racial disparities in prison use;
- Only limited additional guidance in guidelines' manuals

Minnesota primary grid then and now: little has changed

IV. SENTENCING GUIDELINES GRID

Presumptive Sentence Lengths in Months

Italicized numbers within the grid denote the range within which a judge may sentence without the sentence being deemed a departure.

Offenders with nonimprisonment felony sentences are subject to jail time according to law.

SEVERITY LEVELS OF CONVICTION OFFENSE		CRIMINAL HISTORY SCORE						
		0	1	2	3	4	5	6 or more
Unauthorized Use of Motor Vehicle Possession of Marijuana	I	12*	12*	12*	13	15	17	19 18-20
Theft Related Crimes (\$250-\$2500) Aggravated Forgery (\$250-\$2500)	II	12*	12*	13	15	17	19	21 20-22
Theft Crimes (\$250-\$2500)	III	12*	13	15	17	19 18-20	22 21-23	25 24-26
Nonresidential Burglary Theft Crimes (over \$2500)	IV	12*	15	18	21	25 24-26	32 30-34	41 37-45
Residential Burglary Simple Robbery	V	18	23	27	30 29-31	38 36-40	46 43-49	54 50-58
Criminal Sexual Conduct, 2nd Degree (a) & (b) Intrafamilial Sexual Abuse, 2nd Degree subd. 1(1)	VI	21	26	30	34 33-35	44 42-46	54 50-58	65 60-70
Aggravated Robbery	VII	24 23-25	32 30-34	41 38-44	49 45-53	65 60-70	81 75-87	97 90-104
Criminal Sexual Conduct 1st Degree Assault, 1st Degree	VIII	43 41-45	54 50-58	65 60-70	76 71-81	95 89-101	113 106-120	132 124-140
Murder, 3rd Degree Murder, 2nd Degree (felony murder)	IX	105 102-108	119 116-122	127 124-130	149 143-155	176 168-184	205 195-215	230 218-242
Murder, 2nd Degree (with intent)	X	120 116-124	140 133-147	162 153-171	203 192-214	243 231-255	284 270-298	324 309-339

4.A. Sentencing Guidelines Grid

Presumptive sentence lengths are in months. Italicized numbers within the grid denote the discretionary range within which a court may sentence without the sentence being deemed a departure. Offenders with stayed felony sentences may be subject to local confinement.

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; Drive-By-Shootings)</i>	11	306 261-367	326 278-391	346 295-415	366 312-439	386 329-463	406 346-480 ²	426 363-480 ²
<i>Murder, 2nd Degree (Unintentional) Murder, 3rd Degree (Depraved Mind)</i>	10	150 128-180	165 141-198	180 153-216	195 166-234	210 179-252	225 192-270	240 204-288
<i>Murder, 3rd Degree (Drugs) Assault, 1st Degree (Great Bodily Harm)</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 ^{2,3}
<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 ¹	15	18	21 21-28	24 21-28	27 23-32	30 26-36
<i>Theft Crimes (Over \$5,000)</i>	3	12 ¹	13	15	17 17-22	19 17-22	21 18-25	23 20-27
<i>Theft Crimes (\$5,000 or less) Check Forgery (\$251-\$2,500)</i>	2	12 ¹	12 ¹	13	15	17	19	21 18-25
<i>Assault, 4th Degree Fleeing a Peace Officer</i>	1	12 ¹	12 ¹	12 ¹	13	15	17	19 17-22

Second Generation Guidelines

- Use more appropriate dimensions of harm and culpability (the elements of a proportional sentence);
- Employ a step-by-step approach which ensures a more orderly methodology and greater transparency;
- Are offence-specific – each offence has its own aggravating and mitigating factors (although many common to all guidelines).
- Offer much additional guidance for courts on issues such as multiple offence sentencing; suspended sentences; mentally disordered offenders; sentencing youth.

Uganda

Unlawful Act Manslaughter Section 187 of the Penal Code Act, Cap 120

Maximum Sentence: Imprisonment for Life

Bracket	Starting Point Sentencing Range	
Most serious: Very violent/use of a firearm; or Offender foresaw the risk of really serious harm; or Aggravating factors outweigh mitigating factors	15	13 years- life imprisonment
Medium: Some violence, with no foresight of death or serious harm; or No significant imbalance between the aggravating and the mitigating factors	10	7 years- 13 years
Less serious: Unlawful act was minor or unlikely to cause death; or Mitigating factors outweigh aggravating factors.	5	3 years- 7 years

Korea

01¹ RAPE (OF VICTIM THIRTEEN YEARS OF AGE OR OLDER)

TYPE	CLASSIFICATION	MITIGATED SENTENCING RANGE	STANDARD SENTENCING RANGE	AGGRAVATED SENTENCING RANGE
1	Standard Rape	1 yr. 6 mos. - 3 yrs.	2 yrs. 6 mos. - 5 yrs.	4 yrs. - 7 yrs.
2	Rape by Relative/Rape After Intrusion Upon Habitation, etc. /Special Rape	3 yrs. - 5 yrs. 6 mos.	5 yrs. - 8 yrs.	6 yrs. - 9 yrs.
3	Rape After Robbery	5 yrs. - 9 yrs.	8 yrs. - 12 yrs.	10 yrs. - 15 yrs.

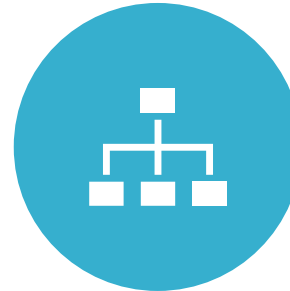
Sentencing Council of England and Wales (2004)

- Origins, background, & Composition
- *Principal* Statutory Duties
 - Issue guidelines;
 - Monitor effect of guidelines;
 - Assess cost implications of government sentencing proposals;
 - Other functions: promote public confidence in sentencing;

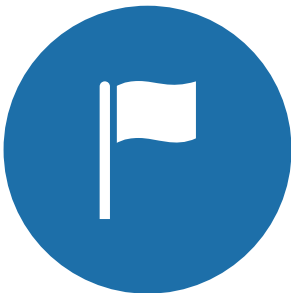
Relationship between Council and Court of Appeal



All courts, including CA, must 'follow any relevant guideline... unless it would be contrary to the interests of justice to do so.'



Overlapping membership of SC and CA;



Council bases guidelines on appellate judgments; CA interprets guidelines, issues any related guidance, and flags issues for the Council to consider;



Council guidelines should facilitate appellate review and reduce caseload of the CACD



The English sentencing guidelines

Compliance Requirement in England and Wales (S 59, Sentencing Act)

- (1) Every court—
 - (a) *must, in sentencing an offender, follow any sentencing guidelines which are relevant to the offender's case, and*
 - (b) must, in exercising any other function relating to the sentencing of offenders, follow any sentencing guidelines which are relevant to the exercise of the function,unless the court is satisfied that it would be contrary to the interests of justice to do so.

Primary Dimensions of a Proportionate Sentence

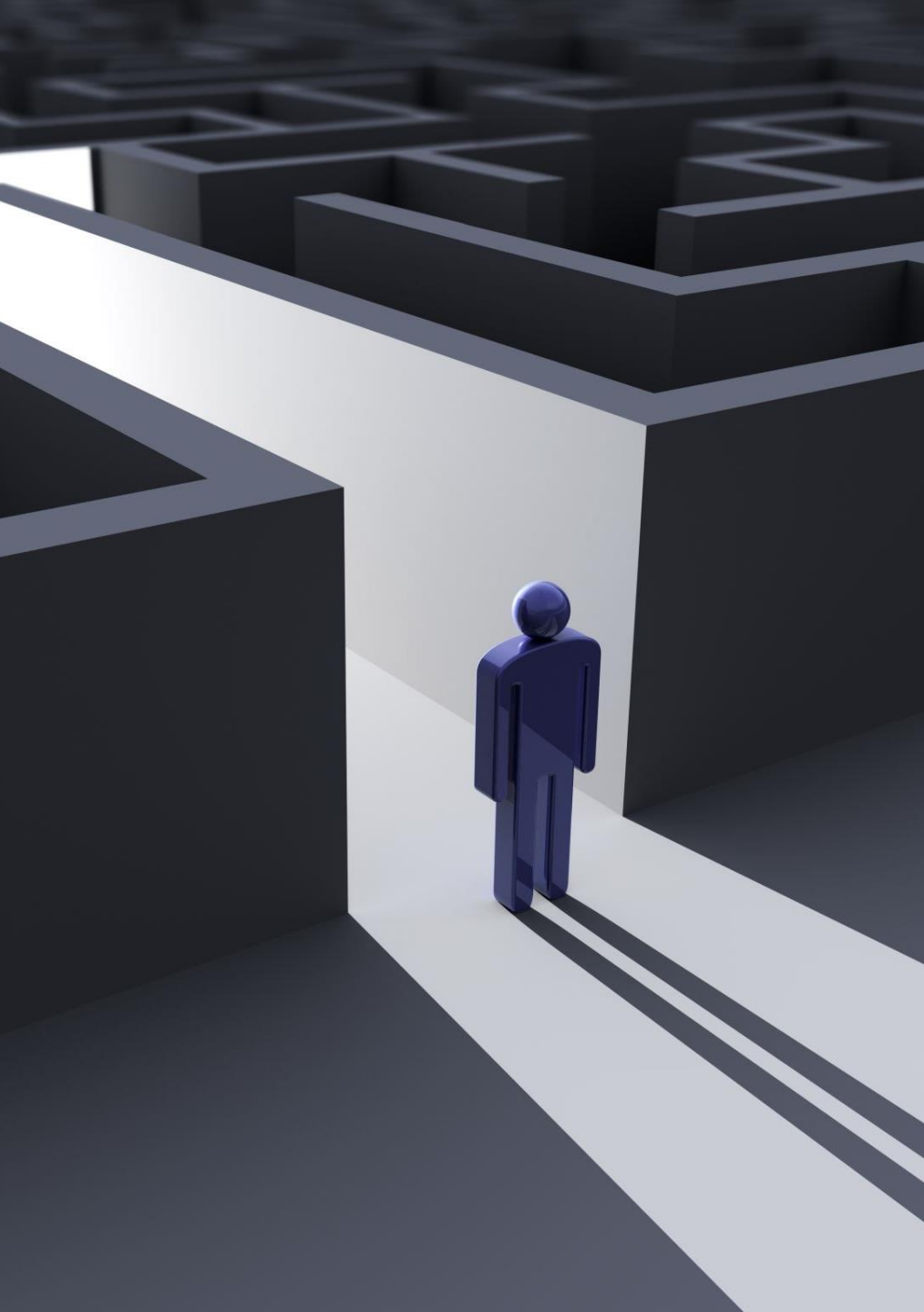
(Sentencing Act,
England and Wales)

Where a court is determining the seriousness of any offence, it must consider—

*(a) the offender's **culpability** in committing the offence, and*

*(b) any **harm** which the offence –*

(i) caused, (ii) was intended to cause, or (iii) might foreseeably have caused.



Steps of Guideline -9 key steps

- Step 1: determine culpability and harm using guideline factors related to both concepts;
- Step Two: consider additional mitigating and aggravating factors and derive provisional sentence from table;
- Proceed through remaining steps

Robbery – street and less sophisticated commercial

Theft Act 1968 (section 8(1))

This is a serious specified offence for the purposes of section 224 of the Criminal Justice Act 2003.

Triable only on indictment
Maximum: Life imprisonment

Offence range: Community order – 12 years' custody

STEP ONE

Determining the offence category

The court should determine the offence category with reference **only** to the factors listed in the tables below. In order to determine the category the court should assess **culpability** and **harm**.

The court should weigh all the factors set out below in determining the offender's culpability.

Where there are characteristics present which fall under different levels of culpability, the court should balance these characteristics to reach a fair assessment of the offender's culpability.

Culpability demonstrated by one or more of the following:

A – High culpability	<ul style="list-style-type: none">• Use of a weapon to inflict violence• Production of a bladed article or firearm or imitation firearm to threaten violence• Use of very significant force in the commission of the offence• Offence motivated by, or demonstrating hostility based on any of the following characteristics or presumed characteristics of the victim: religion, race, disability, sexual orientation or transgender identity
B – Medium culpability	<ul style="list-style-type: none">• Production of a weapon other than a bladed article or firearm or imitation firearm to threaten violence• Threat of violence by any weapon (but which is not produced)• Other cases where characteristics for categories A or C are not present
C – Lesser culpability	<ul style="list-style-type: none">• Involved through coercion, intimidation or exploitation• Threat or use of minimal force• Mental disability or learning disability where linked to the commission of the offence

Harm

The court should consider the factors set out below to determine the level of harm that has been caused or was intended to be caused to the victim.

Category 1	<ul style="list-style-type: none">• Serious physical and/or psychological harm caused to the victim• Serious detrimental effect on the business
Category 2	<ul style="list-style-type: none">• Other cases where characteristics for categories 1 or 3 are not present
Category 3	<ul style="list-style-type: none">• No/minimal physical or psychological harm caused to the victim• No/minimal detrimental effect on the business

STEP TWO

Starting point and category range

Having determined the category at step one, the court should use the corresponding starting point 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 or harm in step one, could merit upward adjustment from the starting point before further adjustment for aggravating or mitigating features, set out on the next page.

Consecutive sentences for multiple offences may be appropriate – please refer to the *Offences Taken into Consideration and Totality* guideline.

Harm	Culpability		
	A	B	C
Category 1	Starting point 8 years' custody	Starting point 5 years' custody	Starting point 4 years' custody
	Category range 7 – 12 years' custody	Category range 4 – 8 years' custody	Category range 3 – 6 years' custody
Category 2	Starting point 5 years' custody	Starting point 4 years' custody	Starting point 2 years' custody
	Category range 4 – 8 years' custody	Category range 3 – 6 years' custody	Category range 1 – 4 years' custody
Category 3	Starting point 4 years' custody	Starting point 2 years' custody	Starting point 1 year's custody
	Category range 3 – 6 years' custody	Category range 1 – 4 years' custody	Category range High level community order – 3 years' custody

The table on the next page 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 sentence arrived at so far. In particular, relevant recent convictions are likely to result in an upward adjustment. In some cases, having considered these factors, it may be appropriate to move outside the identified category range.

Factors increasing seriousness

Rectangular Ship

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:

High value goods or sums targeted or obtained (whether economic, personal or sentimental)

Victim is targeted due to a vulnerability (or a perceived vulnerability)

Significant planning

Steps taken to prevent the victim reporting or obtaining assistance and/or from assisting or supporting the prosecution

Prolonged nature of event

Restraint, detention or additional degradation of the victim

A leading role where offending is part of a group activity

Involvement of others through coercion, intimidation or exploitation

Location of the offence (including cases where the location of the offence is the victim's residence)

Timing of the offence

Attempt to conceal identity (for example, wearing a balaclava or hood)

Commission of offence whilst under the influence of alcohol or drugs

Attempts to conceal/dispose of evidence

Established evidence of community/wider impact

Failure to comply with current court orders

Offence committed on licence

Offences taken into consideration

Failure to respond to warnings about behaviour

Factors reducing seriousness or reflecting personal mitigation
No previous convictions or no relevant/recent convictions
Remorse, particularly where evidenced by voluntary reparation to the victim
Good character and/or exemplary conduct
Serious medical condition requiring urgent, intensive or long-term treatment
Age and/or lack of maturity where it affects the responsibility of the offender
Mental disorder or learning disability (where not linked to the commission of the offence)
Little or no planning
Sole or primary carer for dependent relatives
Determination and/or demonstration of steps having been taken to address addiction or offending behaviour

STEP THREE

Consider any factors which indicate a reduction for 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

The court should consider whether having regard to the criteria contained in Chapter 5 of Part 12 of the Criminal Justice Act 2003 it would be appropriate to impose a life sentence (section 224A or section 225) or an extended sentence (section 226A). When sentencing offenders to a life sentence under these provisions, the notional determinate sentence should be used as the basis for the setting of a minimum term.

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 overall offending behaviour in accordance with the *Offences Taken into Consideration and Totality* guideline.

STEP SEVEN

Compensation and ancillary orders

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

Where the offence involves a firearm, an imitation firearm or an offensive weapon the court may consider the criteria in section 19 of the Serious Crime Act 2007 for the imposition of a Serious Crime Prevention Order.

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 time spent on bail

The court must consider whether to give credit for time spent on bail in accordance with section 240A of the Criminal Justice Act 2003.

SENTENCE REDUCTIONS FOR A GUILTY PLEA

Why is Guidance necessary?

- So defendants can make informed decisions about their plea
- So lawyers can advise their clients
- So victims can be prepared for the sentence that will ultimately be imposed.

Statutory Foundation for Plea-based Sentence Reductions s. 144 CJA 2003:

- *In determining what sentence to pass on an offender who has pleaded guilty.. A court must take into account:*
- *(a) the stage in the proceedings...at which he indicated his intention to plead guilty, and*
- *(b) the circumstances in which this indication was given.*

Guilty Plea Guideline in England and Wales

In each category, there is a presumption that the recommended reduction will be given unless there are good reasons for a lower amount.

First reasonable
opportunity

After a trial
date is set

Door of the court/
after trial has begun

===== | ===== | ===== |

recommended 1/3

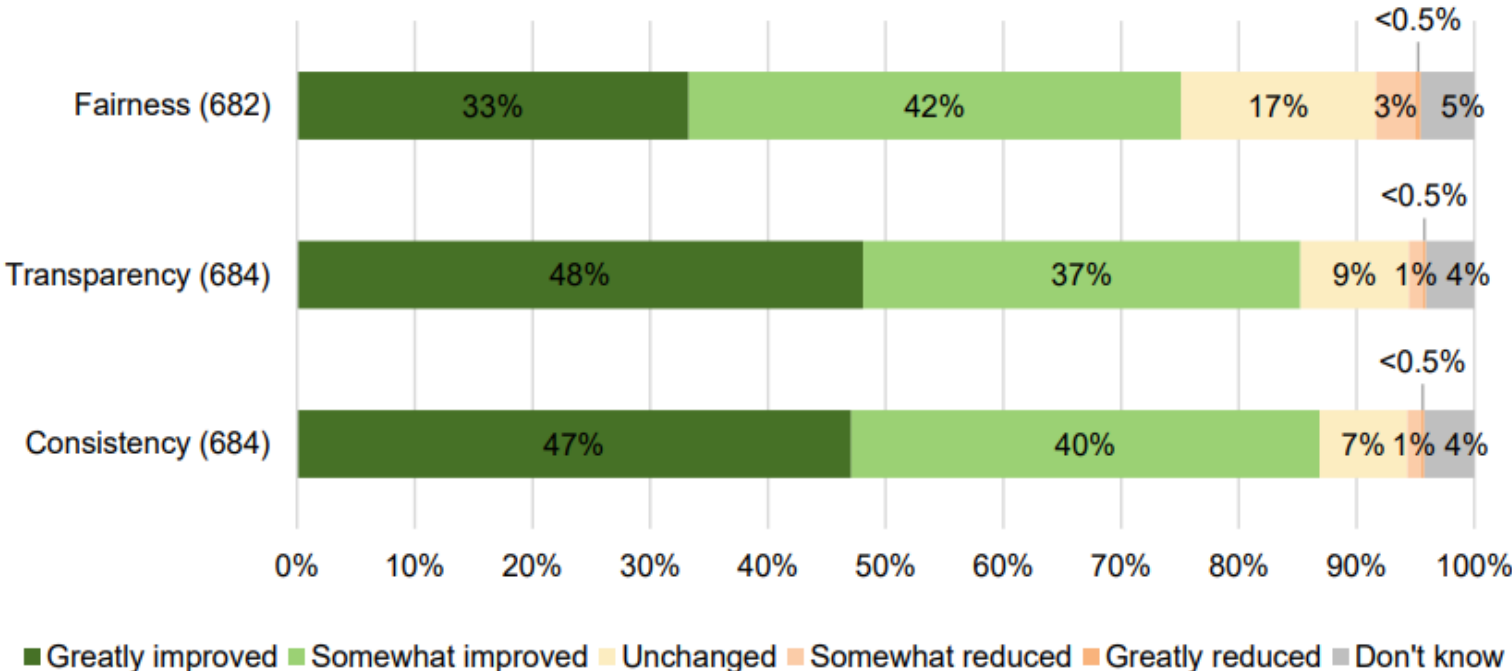
recommended 1/4

recommended 1/10

Sentence Reductions for a Guilty Plea by Timing of Plea

	None	1-10%	11-20%	21-32%	33% or more	Expected Sentence Reduction
First opportunity	<1%	<.05%	2%	9%	88%	33%
After first opportunity but before trial date	<1%	6%	22%	34%	37%	24%
On or after day of trial	6%	48%	24%	9%	12%	12%

Figure 6: To what extent do you think the introduction of the Sentencing Council's guidelines improved or reduced: fairness, transparency and consistency in the sentencing process; or has there been no change?²³



Critiques of the Council and its Guidelines

Guidelines in general have failed to constrain the use of custody;

Council has failed to discharge its duty to have regard to the costs and effectiveness of sanctions;

Council has no representative of defendants;

Council has failed to adequately consider impact of guidelines on visible minority defendants;

Lessons from England?

Guidelines acceptable to the judiciary if the Sentencing Council has a judicial majority, and judges largely construct the guidelines;

Guidelines must allow a significant degree of judicial discretion;

Guidance must involve more than just sentence ranges and starting points – courts need guidance on many other issues;

Guidelines increase transparency of sentencing decisions – people can see more clearly how the sentence was derived.

Lessons for Deutschland and Civil law jurisdictions?

- Hornle: German preference for legislative foundation for criminal law may inhibit adoption of a sentencing commission
- Concern in European countries about violating principle of separation of powers

Thank you for your attention today and for more information...

Roberts, J.V. and Padfield, N. (2020) Sentencing in England and Wales: Current Developments. In: Kai Ambos (ed.) *Strafzumessung / Sentencing. Angloamerikanische und deutsche Einblicke / Anglo-American and German Insights*. Göttingen: Göttingen University Press.

Ashworth, A. and Roberts, J.V. (Eds.) (2013) *Sentencing Guidelines: Exploring the English Model*. Oxford: Oxford University Press.

Roberts, J.V. (2019) The Evolution of Guidelines: Comparing Minnesota and England and Wales. *Crime and Justice*, 48: 187-254.

---- (2018) Individualisation at Sentencing: The Effects of Guidelines. *Criminal Law Review*, 2: 123-136.

Roberts, J.V. and Harris, L. (2019) Sentencing Guidelines Outside the United States. In: *Handbook on Sentencing Policies and Practices in the 21st Century*. New York: Routledge.

---- (2021) Promoting Proportionality Through Sentencing Guidelines. In: *Proportionality in Crime Control and Criminal Justice*. Oxford: Hart Publishing.