Scottish Sentencing Council

The Methodological Challenges of Comparative Sentencing Research

Literature Review

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Scope of Research

The Scottish Sentencing Council commissioned the University of Strathclyde in November 2021 to examine methodological issues in comparative sentencing research. The research team, led by Prof Cyrus Tata (University of Strathclyde), was asked to review and report on the evidence on the issues in comparing sentences 'across jurisdictions and modalities.'

This report addresses questions arising in relation to any comparison of sanctions across jurisdictions. Ultimately, the goal is to contribute not only to more evidence-based guideline development, but to improve knowledge about the opportunities and challenges involved in making valid inter-jurisdictional comparisons and how this can facilitate greater public understanding and confidence in sentencing. While this report covers key issues and highlight relevant research, comparative sentencing is a vast topic. Therefore, our scope here must be focused. To do this we primarily draw on a single comparative jurisdiction with Scotland: England and Wales. It should be noted that there are other jurisdictions where useful comparative insights might be sought. However, each new comparator requires careful consideration of its distinct features. Moreover, in some cases, there will be greater differences in legal structures that render comparisons even more challenging.

Key Findings – A Summary

- Direct one-to-one comparisons between jurisdictions are fraught with difficulty, whether the measure is sentencing trends, the use of custody as a sanction or public attitudes towards sentencing.
- Although difficult, international comparisons are possible and extremely valuable. This is particularly the case when developing guidelines. Jurisdictions at an early stage of guideline development can benefit from the experiences of existing sentencing councils and commissions, if only to avoid mistakes.
- The challenges facing researchers attempting to compare specific disposals across jurisdictions has led some to seek a common metric for punishment, one which would permit more robust comparisons in terms of relative punitiveness.
- Four principal approaches to a single scale of sentences can be identified: *ordinal scales*; *magnitude estimation*; *data-driven methods*; and *paired comparisons*. The report identifies the main assumptions on which they are each based and discuss their strengths and weaknesses. Importantly, however, any unidimensional scaling of punishment severity fails to acknowledge social

inequalities and their effect on people experiencing legal punishments. It is, therefore, unable to recognise how as a result of these unequal conditions there will be differences in the perception and experience of punishments. In order to remedy this, research should consider an approach that is able to incorporate individual differences in the perception of punishment. To this end, comparative research could fruitfully examine the perceptions of people who have experienced different sentences in different jurisdictions.

- Comparing sentence types is complex and while there are similarities there are also notable differences between England and Wales and Scotland. Notably, the suspended sentence order (SSO) in England and Wales may be considered roughly equivalent in some key respects to the community payback order (CPO) in Scotland. However, the way they are respectively officially labelled as 'custodial' and 'non-custodial' poses a challenge to determining if, or where, the SSO would fit within Scottish sentencing options. Moreover, it is important that the technical label of 'custodial' attached to the SSO is not misunderstood as immediate imprisonment.

- To the extent that the SSC may choose to adopt a broadly similar sentencing guideline structure, the guidelines of England and Wales may assist in establishing what has and had not worked successfully. For example:

    - The guidelines' mitigating and aggravating factors relevant to sentencing offer examples to consider in the development of any Scottish guideline.

    - The spacing of sentence ranges for related offences of different levels of seriousness (e.g., assault offences of varying seriousness) as well as offences of differing seriousness within a specific offence (e.g. three levels of assault, each of which attracts its own category range in the guidelines) can inform guideline development.

- Despite the relative similarity of the two jurisdictions, to date, research directly comparing Scotland and England and Wales is limited. Without such comparative research employing a single methodology common to both jurisdictions, one has to rely on trying to infer comparisons from individual, ad hoc studies in each of the two jurisdictions, and where each study has employed differing research methodology.

- The paucity of direct comparative work is unfortunate as it could significantly benefit the development of sentencing research and policy in both jurisdictions. For instance, it would be of immediate practical benefit to address through comparative research at least the following two issues:

- *The relative effectiveness of different sanctions*. Where the sanctions are sufficiently similar in both jurisdictions, comparative research would be beneficial. The community order (in England and Wales) and the community payback order (in Scotland) are broadly comparable (see Chapter 3). Accordingly, any research evidence on the effectiveness of various requirements associated with these sanctions would be useful. Effective practices in one country can then be informed by lessons learned in another.

- *Public attitudes to and knowledge of sentencing*. Public attitudes in the two jurisdictions are eminently comparable, though may be different in certain respects. Research dedicated to comparing public attitudes in the two jurisdictions simultaneously would be highly informative. Currently, however, it is difficult to make definitive comparisons from individual studies (each with their own methodologies and conducted at different times) in the two jurisdictions.

- Research which is dedicated to such comparisons in terms of public attitudes to and knowledge of sentencing would employ a common methodology so as to examine simultaneously perceptions and attitudes in both jurisdictions. This could cover both general attitudes (e.g. to the aims of sentencing) as well as similar specific offences and sanctions. Such research could help to address the longstanding difficulty in improving public knowledge of, and confidence in, sentencing. However, it would also enable the development and direction of sentencing guidelines and policy to be more accurately informed by any differences (or similarities) between public attitudes in the two jurisdictions.

Structure of Report

Chapter 1 summarises and discusses the general challenges involved in making comparisons between jurisdictions, where sentencing options can vary, and notes relevant studies in this area. We document the difficulties in drawing direct sentencing trend comparisons between jurisdictions.

Chapter 2 discusses one solution to the problem of the potential incommensurability of sanctions. Researchers have proposed and tested a way of comparing sentencing outcomes in different jurisdictions. This covers relevant aspects of existing academic work on theories of punishment and sentencing relevant to a scale of severity.

Chapter 3 contextualises sentencing in Scotland and England and Wales. We compare the principal sanctions employed by courts in Scotland and England and

Wales and the ways that these can be served differently (such as through the application of so-called 'early release' schemes relating to sentences of imprisonment). We also review findings from the limited literature which compares sentencing patterns in Scotland with England and Wales and how suspended sentences can be conceptualised within sentencing as a whole. This is accomplished with the assistance of an additional series of tables provided in the appendix of this report.

Chapter 4 provides a discussion of how the concepts and work detailed in earlier chapters could be applied to the Scottish sentencing context - with reference to comparisons to England and Wales by way of example to two specific offences common to both jurisdictions (causing death by careless or inconsiderate driving and the offence of rape). We summarise the use of the principal sanctions imposed by courts for these offences and, using these examples, we highlight some of the difficulties that can arise when making limited comparisons across the two jurisdictions.

Chapter 5 draws conclusions from this research review and suggests research priorities. It notes that while comparative work offers useful insights when creating guidelines, such comparisons should be made with care. Even in closely related jurisdictions, there may be differences between them that complicate comparative work.

Chapter 1: Introduction to Methodological Challenges of Comparing Sentences Between Jurisdictions

1.1 The Problem of Penal 'Apples and Oranges'

When drawing comparisons between sentences in different cases, it is necessary to identify the most salient features of a case that affect sentencing to ensure one is comparing like with like. Often, legally relevant factors are defined through sources such as case law and standardised and typified into various classifications. Some commonly salient factors include the harm caused to victims, the culpability of the offender, the prior criminal history of the offender, etc.

The wide range of possible variables/factors means that identifying what makes cases similar and what differentiates cases is a complex task. Questions such as this have formed the basis of many appeals in various jurisdictions. However, while comparing cases *within* jurisdictions is complex, comparing cases *between* jurisdictions raises additional challenges and there is limited scholarly literature seeking to compare sentencing across different jurisdictions[1]:

> "International comparative criminological analyses of statistics harbour innate problems because of the issue how nations differ in criminal justice structures and organisation, legal definitions and concepts, and the collection and presentation of their statistics."

Scholars warn of the problem of drawing erroneous conclusions following comparisons involving dissimilar sanctions or regimes.[2] Differences (sometimes subtle) can exist between the legal definition of offences; the quality and comprehensiveness of public statistical data; the legal definition of sanctions; and release provisions for sentences of immediate imprisonment. These issues can mean that, unless great care is taken, one can end up comparing apples to oranges.

To illustrate the difficulties of making comparisons between jurisdictions, we will note some of these issues that may emerge. Our specific focus here is the challenges

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[1] Sarah Armstrong and Yarin Eski, *Scottish Crime, Punishment and Justice: Cost Trends in Comparative Context* (Scottish Centre for Crime and Justice Research 2011) 3.
[2] For a discussion, see for example, Richard S Frase, *Sentencing in Germany and the United States: Comparing Äpfel with Apples* (edition iuscrim 2001); Arie Freiberg, 'What's It Worth? A Cross-Jurisdictional Comparison of Sentencing Severity', *Sentencing and Society: International Perspectives* (Ashgate Publishing Limited 2002).

encountered when comparing Scotland to England and Wales, but some of the themes have broader applicability.

1.2 Inter-Jurisdictional Differences

When constructing guidelines, authorities draw upon a range of sources of information. Comparative research has a role to play in this process, particularly when a neighbouring jurisdiction has broadly similar legal structures, as is the case within the United Kingdom.

Somewhat uniquely, the UK is a 'Union State' rather than a federation. Although a constituent part of the UK, Scotland's system of criminal law and justice is separate. Scotland has distinct criminal justice institutions and procedures. For instance, in contrast to England and Wales, most cases are heard not by lay magistrates, but by 'sheriffs', who are judges and legally qualified lawyers by professional background. Unlike a federal system, (where some matters are dealt with at the national court level and other matters are required to be dealt with by the constituent states), there is no UK-wide sentencing system.[3] Appeals about criminal matters are heard within Scotland and, (unlike the rest of the UK), not by the UK Supreme Court.[4] In that way, it makes little sense, as sometimes the media and some otherwise excellent textbooks do, to talk of 'the UK criminal justice system': there really is no such thing.

That said, although the two jurisdictions are separate, they are relatively similar. While, in the absence of research employing a single common methodology, it can be inappropriate to simply draw *direct* comparisons between England and Wales and Scotland, the sentencing guidelines issued by the English and Welsh Council may offer guidance regarding the kinds of sanctions appropriate to specific offences and the aggravating and mitigating factors relevant to sentencing a particular offence. Comparisons between jurisdictions can also be useful to determine the relative severity of sanctions appropriate to offences of differing seriousness. For example, how much more harshly should dangerous driving causing death be sentenced

[3] Cyrus Tata 'Sentencing and Penal Practices: is Scotland losing its distinctiveness?' (2010) in Croall, H, Munro (eds) Criminal Justice in Scotland (Willan)

[4] However, where the legal issue relates to strictly non-criminal matters, for example, a devolution question, UK legal decision-making can and does *indirectly* impact on Scottish criminal law and procedure.

relative to causing death by careless or inconsiderate driving?

1.2.1 Criminal Justice Policies and Cultures

Between different jurisdictional contexts, not only can legal structures vary, but criminal justice policies and cultures can also differ. Criminal justice policies and cultures are difficult to precisely define and concisely summarise. However, even within the UK, there are jurisdiction-specific considerations:[5]

> "Scotland merits close attention in its own right, not only because it has a separate criminal justice and penal system from that of England/Wales, but also because it has a distinctive history in terms of crime control, penal policy and criminological scholarship."

Various policies and attitudes[6] to the justice system may have important impacts to consider when making comparisons. Notably, it has historically been the case that Scotland has been regarded as less populist and more welfarist in various aspects of its criminal justice policies. Factors such as these could affect the nature of cases coming before the courts, attitudes to offences, and the sentences ultimately imposed.

However, adding to the complexity of making comparisons, while rhetoric and received wisdom in Scotland has long suggested a less punitive stance with regard to criminal sanctions,[7] research (in 2012) suggested that:[8]

> "Compared to neighbouring countries, Scotland had the lowest total sanction rate, but the highest rate of custody (as a proportion of all sanctions used). England and Wales had a higher total sanction rate than Scotland, yet imposed almost three times fewer custodies on adults. Thus among all the sanctions available to it, Scotland makes the most use of prison than similar neighbouring jurisdictions."

Thus, in the absence of research dedicated to comparing the two jurisdictions by using a common methodology, it is difficult to make generalised assumptions for the

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[5] Lesley McAra, 'Crime, Criminology and Criminal Justice in Scotland' (2008) 5 European Journal of Criminology 481, 489.
[6] For example, see Hazel Croall, 'Criminal Justice in Post-Devolutionary Scotland' (2006) 26 Critical Social Policy 587.
[7] Cyrus Tata, 'The Struggle for Sentencing Reform: Will the English Guidelines Model Spread?' (2013)
[8] Armstrong and Eski (n 1) 10.

purposes of comparative work. To illustrate this point further it is helpful to note comparative research on sentencing in England and Wales.[9]

1.3 Selecting Measures to Compare

Selecting measures to compare is challenging. If a simple measure such as the custody rate across all offences is used, it may misrepresent sentencing trends. For example, courts in one jurisdiction may use immediate prison sentences more often but impose shorter terms of custody. Nuances such as this make single simple measures limited.[10]

A better approach is to compare the custody rate for a specific offence such as domestic burglary.[11] Yet, even this method is subject to a number of assumptions including a degree of equivalence in definitions of the offence, the seriousness of individual incidents and characteristics of the offender population (e.g., the proportion of repeat offenders). In addition, discretionary decisions taken at earlier stages of the criminal process also need to be considered, including the degree to which prosecutors may decline to prosecute or initiate forms of pre-trial diversion. For example, in his German-American comparisons, Frase[12] noted that German prosecutors screen out a much higher percentage of cases, with the result that the sentenced cohort contained a more serious sample of cases than the US comparator.[13] In the UK, regulatory agencies can play a significant role in impacting the types of cases coming before the courts, and these agencies can have different working practices between jurisdictions.

The variables which need to be controlled for relate to the offence, the offender and the administration of justice:

- *The offence*: the seriousness of offences (degree of harm; quantity and nature of drug; loss to the victim; etc);

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[9] Though other comparisons have been made. E.g. James P Lynch, 'Comparison of Prison Use in England, Canada, West Germany, and the United States: A Limited Test of the Punitive Hypothesis' (1988) 79 J. Crim. L. & Criminology 180.

[10] For an overview see, Marc Mauer, 'Incarceration Rates in an International Perspective' <https://oxfordre.com/criminology/view/10.1093/acrefore/9780190264079.001.0001/acrefore-9780190264079-e-233>.

[11] For example, Freiberg (n 2). The comparability of various offences is discussed at 1.3.1.

[12] Frase (n 2).

[13] One solution to this problem involves tracking a sample of cases from initial report to the police through to disposition. An analysis of this kind is time-consuming and expensive, however, hence the emphasis in the literature on comparisons involving published sentencing statistics.

- *The offender*: number of previous convictions; guilty plea rates; volume and nature of any additional crimes being sentenced; age and gender of the defendant;
- *The CJS professionals*: relative charging rates; whether charging one offence precludes additional charges; frequency of plea agreements; use of pre-trial detention and credit arrangements for time served prior to sentence;
- *Sentence administration*: even in terms of imprisonment, the amount of time the prisoner spends in prison may vary greatly as a result of statutory and discretionary release programs, end of custody licence release, etc.

The lesson to be learned from the international comparative literature is that only broad conclusions may be drawn. For example, in his comprehensive study of German-American sentencing, Frase was able to conclude only that "Germany makes much greater use of non-custodial penalties for non-violent crimes".[14] Even this limited conclusion was qualified by a call to conduct 'further research to confirm the hypothesis.'[15]

1.3.1 Selecting Offences to Compare

A broad range of conduct is criminalised in various ways around the world.[16] In some cases, the same conduct may be in violation of several criminal laws within a jurisdiction. In such cases, different charging practices and prosecutorial discretion may be one variable to consider. Between jurisdictions, there are even more ways a given instance of conduct may be criminalised. If seeking to make a meaningful comparison of sentencing practices, it is necessary to ensure, as far as possible, that similar conduct is being examined.

For example, above we noted that offences such as domestic burglary (as generally understood) have been used in international comparisons. However, this is not always a straightforward matter. There can be significant differences in how offences such as

[14] Frase (n 2) 51.
[15] Frase (n 2) 51.
[16] Criminal law is both broad and deep: a great deal of conduct is criminalized, and of that conduct, a large proportion is criminalized many times over"; William J Stuntz, 'The Pathological Politics of Criminal Law' (2001) 100 Michigan Law Review 505, 512.

burglary are defined between jurisdictions.[17] Yet, as the various studies show, while one should be sensitive to any dissimilarities between jurisdictions, comparisons can still deliver valuable insights. For instance, the English and Welsh offence of domestic burglary is functionally similar to the Scottish offence of theft by housebreaking involving dwellings. There may be some differences to consider, but variations do not preclude all comparisons.[18] Indeed, comparisons between these two offences are routinely drawn for other official purposes.[19]

Assessing the commensurability of different offences between jurisdictions may be more straightforward where jurisdictions are similar in key respects. For instance, in Chapter 4 of this report, we consider two offences that can be considered the same or functionally equivalent between Scotland and England and Wales. However, it should be noted that even in relatively similar jurisdictions, there is always the possibility for conduct to be criminalised differently either in law, in practice, or in official data. Thus, careful consideration and analysis of offences are advisable when seeking to make meaningful comparisons between jurisdictions.

1.3.2 Comparisons Based on Official Data

Limitations in official data present challenges for comparative work of any kind that seeks to rely on official data. With regards to sentencing specifically, the extent to which existing official data can meaningfully shed light on Scottish sentencing practices is limited.[20] At the outset, regardless of the comparator jurisdiction, this poses challenges. Moreover, excluding limitations inherent in a single source of data, there are also questions over the commensurability of data between different jurisdictions (e.g. case-counting rules for multi-conviction cases, etc). For example,

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[17] Freiberg (n 2) 241.

[18] As an example of definitional considerations, the offence of burglary in England and Wales distinguishes between theft from a dwelling and theft from a non-dwelling. Hence one may wish to focus on domestic burglary involving a dwelling. In Scotland, (counterintuitively) theft by housebreaking can be committed against both dwellings and non-dwellings. Given that the involvement of a dwelling can aggravate the offence, if making comparisons between housebreaking and domestic burglary, one may wish to look only at housebreaking offences involving dwellings (e.g. housebreaking may be broken down into different building types: dwelling, non-dwelling, and other property).

[19] For instance, see UK Government, "Relevant offences list for Scotland" (2006) < https://www.gov.uk/government/publications/relevant-offences-list-for-scotland/relevant-offences-list-for-scotland>.

[20] Rachel McPherson and Cyrus Tata, 'Causing Death by Driving Offences: Literature Review' (Scottish Sentencing Council 2018) s 1.2.3 <https://strathprints.strath.ac.uk/65983/> accessed 21 October 2021.

domestic violence and abuse data in England and Wales are not comparable with Scotland's statistics on domestic abuse due to differences in the definitions used.[21]

A more detailed analysis of official data is beyond our present scope. However, Chapter 4 draws on official data in Scotland and in England and Wales to comment on broad sentencing trends. While in some ways interesting, the data has serious gaps from the perspective of drawing inferences about Scottish sentencing compared to England and Wales. The legally relevant factors that would be expected to influence a sentence are conspicuously absent. For example, mitigating and aggravating factors are not reflected in the data, details of community sentences are not available, etc. Therefore, from official data, it is difficult to be sure a comparison is valid.

1.4 Comparative Criminal Justice

A considerable body of scholarship has focused on the complex task of making comparisons between different criminal justice systems in various jurisdictions.[22] Some works have also dealt with comparative questions in relation to Scotland.[23] However, even between neighbouring jurisdictions, differences can make comparisons challenging. Below we highlight some work on comparative sentencing.

[21] 'Domestic Abuse Recorded by the Police in Scotland, 2020-21' (Scottish Government 2021) s 5.11 <https://www.gov.scot/publications/domestic-abuse-recorded-police-scotland-2020-21/documents/>.

[22] For example, David Nelken, 'Whose Best Practices? The Significance of Context in and for Transnational Criminal Justice Indicators' (2019) 46 Journal of Law and Society S31; Renaud Colson and Stewart Field, 'Learning from Elsewhere: From Cross-Cultural Explanations to Transnational Prescriptions in Criminal Justice. An Introduction' (2019) 46 Journal of Law and Society S1; Dario Melossi, Máximo Sozzo and Richard Sparks, *Travels of the Criminal Question: Cultural Embeddedness and Diffusion* (Bloomsbury Publishing 2011); Newburn, Tim and Sparks, Richard, *Criminal Justice and Political Cultures: National and International Dimensions of Crime Control* (2004).

[23] For example, Katrina Morrison, 'The Criminal Justice System in Scotland' <http://researchrepository.napier.ac.uk/Output/832768>; Giuseppe Maglione, 'Restorative Justice, Crime Victims and Penal Welfarism. Mapping and Contextualising Restorative Justice Policy in Scotland' (2021) 30 Social & Legal Studies 745; John Muncie, 'Illusions Of Difference: Comparative Youth Justice in the Devolved United Kingdom' (2011) 51 The British Journal of Criminology 40. More generally, see David Garland, *The Culture of Control*, vol 367 (Oxford: Oxford University Press 2001).

1.4.1 Studies Comparing Sentencing Practice

A number of studies have attempted to compare sentencing practices and sentence severity in different jurisdictions.[24] The challenge is to equate the specific measure used to compare systems. When the jurisdictions share many commonalities in terms of offence definitions, sentencing options and prison release mechanisms, comparisons are more apposite. For example, a report by the Northern Ireland Assembly provides direct comparisons in sentencing patterns in Northern Ireland and England and Wales.[25] The justification for this comparison is that disposals in these two jurisdictions are closely aligned. Simple direct comparisons of this kind between Scotland and England and Wales can be, depending on the particulars, inadvisable where the disposals are not closely aligned.

1.4.2 Comparative Research on Sentencing in Scotland and England Wales

Although a number of studies have explored specific aspects of sentencing in Scotland and England and Wales,[26] there are very few global comparisons of sentencing policy and practice. One useful comparative analysis is reported by Millie, Tombs and Hough (2007).[27] These authors concluded that despite significant differences in legal systems and criminal justice structures, decision-making by the judiciary in the two jurisdictions was 'remarkably similar.'[28] The focus of this research was on what the researchers call 'borderline cases' - those near the custody threshold. In both jurisdictions, sentencers considered a wide range of factors in determining a sentence. With respect to differences between the two jurisdictions, the authors noted the long-standing tradition of the use of shorter sentences of imprisonment in Scotland, and also a stronger commitment to rehabilitation as a sentencing objective.

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[24] James Lynch has published a number of these, including Lynch (e.g., 1988; 1993).
[25] Fiona O'Connell, 'Sentencing Comparisons in Northern Ireland and England and Wales.' Research Paper 94/12. (Belfast: Northern Ireland Assembly 2012).
[26] Cyrus Tata and others, 'Assisting and Advising the Sentencing Decision Process: The Pursuit of "Quality" in Pre-Sentence Reports' (2008) 48 The British Journal of Criminology 835.
[27] Andrew Millie, Jacqueline Tombs and Mike Hough, 'Borderline Sentencing: A Comparison of Sentencers' Decision Making in England and Wales, and Scotland' (2007) 7 Criminology & Criminal Justice 243.
[28] Millie, Tombs and Hough (2007) 243.

Differences between the individual disposals in the two jurisdictions mean that comparisons can only be at a high level. For example, although there are clear parallels between the community order (CO) in England and Wales and the community payback order in Scotland, there are still notable differences between the orders. As one example, the range of possible[29] formal requirements is wider in England and Wales. Moreover, the use of these community sentences appears to differ in the two jurisdictions and such orders are more frequently imposed in Scotland (see Chapter 3 and the appendix).

1.5 Conclusion

This introductory chapter has outlined key challenges in comparing the sentencing practices of different jurisdictions, even those as close as Scotland and England and Wales. However, it would be wrong to conclude that comparison is, in principle, impossible. After all, appeal courts, sentencing commissions and councils and others make frequent reference to practices in other jurisdictions, implicitly acknowledging that some comparison is possible. The challenges facing researchers attempting to compare specific disposals across jurisdictions has led many to seek a common metric for punishment, one which would permit more robust comparisons in terms of relative punitiveness. Freiberg concluded that 'The creation of a standard unit of penal currency equivalent to the international 'Big Mac' index (which measures the cost of the same hamburger in different countries) still eludes us.'[30] In the 20 years since Freiberg made this remark, researchers have made progress towards such a measure, and in the next chapter of this report, we summarise the developments.

[29] In practice, some requirements are used more than others.
[30] Freiberg (n 2) 253.

Chapter 2:
Towards a Common Metric of Legal Punishment

This chapter identifies and explores the conceptual and methodological challenges in creating a scale of sentence severity. Over the last half-century, across multiple jurisdictions, academic and government researchers have explored the question of how to create a severity scale of legal punishments. Or, put more precisely, how to estimate the relative severity underlying across sentence types expressed in different - a priori non-comparable - and often multi-dimensional metrics. For example, while fines and prison sentences can be objectively well represented using pounds and days, community orders or suspended sentences are composed of a wide range of conditions that are harder to quantify. For example, a community penalty such as the community order or community payback order may be relatively severe or lenient, depending upon the number and nature of requirements. This chapter provides an overview of approaches that explore the subfield of what is known as 'penal metric theory.'[31]

Section 2 reviews the literature and includes studies based on: i) their influence on the academic debate (measured by the number of citations); ii) their 'real world' impact (i.e., whether they have been applied by public or civic sector research); and iii) their degree of scientific rigour. One specific assumption shared by all studies is that the subjective experience of punishment can be ignored. We discuss this assumption and its implications in detail in Section 3 of this chapter. Section 4 draws lessons that are relevant to considerations of similar comparisons of relative sentence severity across - rather than within - jurisdictions. Again, special emphasis is placed here on the methodological challenges that researchers need to overcome. But first, it is essential to clarify why researchers study the relative severity of different sentences in the first place.

2.1 The Purpose of Measuring Sentence Severity

Is sentencing becoming more severe over time? What are the effects of specific criminal justice reforms on sentencing severity? These are just two of the sorts of fundamental questions which the study of penal metrics seeks to address. Scholars

[31] Tremblay, P. On penal metrics. *Journal of Quantitative Criminology,* 4(3), 225-245 (1988).

have explored trends in sentence severity across time, trying to understand the underlying socio-political mechanisms,[32] while policymakers have also sought to explore the effects of specific criminal justice reforms on trends in sentence severity.[33]

All research on this area shares a common methodological problem: how to operationalise the concept of sentence severity. Most studies use the average sentence length or the ratio in the use of custodial sentences to other sentences as a measure of severity.[34] These measures have important limitations. Reducing the complexity of sentencing to a binary choice (custody or other) oversimplifies, whereas focusing on sentence length ignores non-custodial sentences. This in turn creates a problem of selection bias (e.g., less than 10% of cases are sentenced to custody).[35] In order to be able to assess changes in sentence severity robustly (or explore the causal mechanisms influencing such changes), academic and government researchers have elected to harmonise the main sentence types used in a jurisdiction under a common scale of severity.

2.2 Review of the Penal Metric Theory Literature

Following an in-depth review of the literature on the penal metric theory, four principal approaches to sentence severity scales can be identified: *ordinal scales*; *magnitude estimation*; *data-driven methods*; and *paired comparisons*. We review the main assumptions on which they are based and discuss their strengths and weakness.

[32] Julian V Roberts, Mike Hough and JM Hough, *Changing Attitudes to Punishment: Public Opinion, Crime and Justice* (Routledge 2002).
[33] 'Assessing the Impact and Implementation of the Sentencing Council's Assault Definitive Guideline' (Sentencing Council of England and Wales 2015) <https://www.sentencingcouncil.org.uk/publications/item/assault-offences-assessment-of-guideline/>.
[34] E.g. James P Lynch, 'A Cross-National Comparison of the Length of Custodial Sentences for Serious Crimes' (1993) 10 Justice Quarterly 639.{Citation}{Citation}
[35] O'Connell, Fiona, 'Sentencing Comparisons in Northern Ireland and England and Wales' (Northern Ireland Assembly 2013) <http://www.niassembly.gov.uk/assembly-business/committees/2011-2016/justice/research-papers/research-papers-2013/sentencing-comparisons-in-northern-ireland-and-england-and-wales/>; Lynch (n 34).

2.2.1 Ordinal Scales

The most common scales of sentence severity are based on a ranking of different categories of sentence outcomes on an ordinal scale. For example, Pina-Sánchez et al. used a five-point severity scales based on the main disposal types comprising the 'sentencing ladder' in England and Wales (discharge < fine < community order < suspended sentence order < custodial sentence).[36] Irwin-Rogers and Perry used a similar five-point scale. Ordinal scales such as these are arbitrary.[37] Where exactly should the different thresholds separating categories of severity be located? In addition, it is questionable whether sentence severity can be expressed discretely through a sequence of steps, implicitly assuming that jumps from one step to the next are equivalent.

Other researchers have used more refined versions of these scales by either ranking more specific sentence types with further granularity,[38] or by taking the average of separate ordinal rankings derived from experts.[39] These scales of severity might appear to be continuous since sentence outcomes can now be grouped into more than just a few categories. However, they are still derived from *perceptions* of severity, where either researchers or experts do not express the relative difference in severity between sentence types, only their ranking. As a result, ordinal scales are bound to be limited in their capacity to distinguish the relative severity of different sentence types accurately.

2.2.2 Magnitude Escalation Scales

To create a continuous scale of severity to fully distinguish between sentences, some researchers have assigned numerical severity scores to different sentence outcomes. For example, in a report commissioned by the US Department of Justice, Hindelang

[36] Jose Pina-Sánchez, Ian Brunton-Smith and Guangquan Li, 'Mind the Step: A More Insightful and Robust Analysis of the Sentencing Process in England and Wales under the New Sentencing Guidelines' [2018] Criminology & Criminal Justice 174889581881189.
[37] Keir Irwin-Rogers and Thomas W Perry, 'Exploring the Impact of Sentencing Factors on Sentencing Domestic Burglary', *Exploring sentencing practice in England and Wales* (Springer 2015).
[38] Anna-Kaisa Newheiser, Takuya Sawaoka and John F Dovidio, 'Why Do We Punish Groups? High Entitativity Promotes Moral Suspicion' (2012) 48 Journal of Experimental Social Psychology 931.
[39] Andreas Kapardis and David P Farrington, 'An Experimental Study of Sentencing by Magistrates' (1981) 5 Law and Human Behavior 107.

et al.,[40] established the minimum and maximum in a scale of severity at 1 and 50 for fines and custodial sentences longer than 10 years, respectively. They proceeded to locate other sentence types within that range, according to their perceived severity. Zamble and Kalm[41] proposed a more intuitive range (from 0 to 100) and established severity values for all main sentences within that range, using responses reported from a representative sample of the Canadian adult population.

Another group of researchers used 'magnitude escalation', a more systematic approach that involves using a standard 'stimulus' or benchmark. The benchmark (for example, a 1-month custodial sentence) is assigned a specific value (say, 100). The subject is then given a new stimulus (e.g., a 6-month suspended sentence) and asked to estimate its value relative to the benchmark. This is simpler and supported by a substantial body of psychological research. Consequently, this is the most common approach used to measure sentence severity in the literature.[42] Nevertheless, it has limitations. At first sight, the subjective nature of the approach seems the main limitation of this method. However, what makes it truly problematic is its unreliability. This method assumes that participants have adequate levels of numeracy (e.g., participants should be able to infer that 'four times bigger than 100' equals 400, while 'four times smaller than 100' equals 25). There will also be wide differences across subjects. This limitation can be observed in studies which found great variability in individual assignations of severity scores.[43]

2.2.3 Thurstone Scales

Other studies employ different forms of 'paired comparisons'. As originally conceived by Thurstone,[44] 'paired comparisons' is the simplest approach to generate subjective views on sentence severity.[45] Subjects are given a series of choices to make. For each choice, they are asked to identify the option they perceive to be more severe. For

[40] Michael J Hindelang and others, *Sourcebook of Criminal Justice Statistics, 1974* (US National Criminal Justice Information and Statistics Service 1975).
[41] Edward Zamble and Kerry L Kalm, 'General and Specific Measures of Public Attitudes toward Sentencing.' (1990) 22 Canadian Journal of Behavioural Science/Revue canadienne des sciences du comportement 327.
[42] Chloé Leclerc and Pierre Tremblay, 'Looking at Penalty Scales: How Judicial Actors and the General Public Judge Penal Severity' (2016) 58 Canadian Journal of Criminology and Criminal Justice 354.
[43] Pierre Tremblay, 'On Penal Metrics' (1988) 4 Journal of Quantitative Criminology 225.
[44] Louis L Thurstone, 'A Law of Comparative Judgment.' (1927) 34 Psychological review 273.
[45] William Spelman, 'The Severity of Intermediate Sanctions' (1995) 32 Journal of Research in Crime and delinquency 107.

example, which is more severe, 6 months in prison or a 12-month community order? Thurstone's paired comparisons technique rests on the concept of 'penal exchangeability',[46] which accepts overlaps in severity between different sentence types. For example, community orders with onerous conditions attached might be perceived as more severe than short suspended sentences with fewer conditions. The frequency with which a sentence type is judged more serious than another is then used to locate each of the severity distributions for each of the sentences considered. Pina-Sánchez et al.[47] adapted this method to England and Wales using a sample of magistrates. The ensuing scale of severity has been used by the Sentencing Council for England and Wales[48] to assist in evaluations of their guidelines on sentencing outcomes.

2.2.4 Guidelines-Anchored Scales

All methods reviewed so far rely to some degree on perceptions of sanctions derived from practitioners, scholars, offenders, or the public. Some researchers have criticised this approach.[49] Instead, they have sought to establish sentence severity using cues from existing associations between sentence types established either in the sentencing practice or the criminal justice system more broadly. For example, Croyle[50] estimated the 'penal' equivalence of probation and imprisonment sentences using the average prison time experienced by offenders sentenced to probation who failed to meet the conditions in their sentence and ended up spending time in jail.

The scale of severity employed by the Sentencing Council for England and Wales until 2019 was derived from their sentencing guidelines. This scale was based on the starting point sentences for different levels of offence seriousness contained in all the

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[46] Austin Lovegrove, 'Sanctions and Severity: To the Demise of Von Hirsch and Wasik's Sanction Hierarchy' (2001) 40 The Howard Journal of Criminal Justice 126.
[47] Jose Pina-Sánchez and others, 'Have the England and Wales Guidelines Affected Sentencing Severity? An Empirical Analysis Using a Scale of Severity and Time-Series Analyses' (2019) 59 The British Journal of Criminology 979.
[48] 'Assessing the Impact and Implementation of the Sentencing Council's Theft Offences Definitive Guideline.' (Sentencing Council of England and Wales 2019) <https://www.sentencingcouncil.org.uk/wp-content/uploads/Theft-report-FINAL-web.pdf>.
[49] Lawrence Sherman, Peter William Neyroud and Eleanor Neyroud, 'The Cambridge Crime Harm Index: Measuring Total Harm from Crime Based on Sentencing Guidelines' (2016) 10 Policing: a journal of policy and practice 171.
[50] James L Croyle, 'Measuring and Explaining Disparities in Felony Sentences: Courtroom Work Group Factors and Race, Sex, and Socioeconomic Influences on Sentence Severity' (1983) 5 Political Behavior 135.

guidelines in force by 2015. The function of best fit is estimated for all pairs of levels of seriousness associated with starting points in the form of custodial sentences of various lengths. This function is then used to extrapolate 'severity scores' to other non-custodial outcomes coded in the guidelines as starting points, namely fines and community orders.[51]

These scales are based on multiple assumptions, many of them questionable (e.g., suspended custodial sentences activated following violations of requirements trigger an additional punitive element, and therefore are not equivalent to immediate custodial sentences), while others are arbitrary.[52] Lastly, there are important issues of coverage, since they can only derive severity scores from sentence types where 'types of exchange' can be identified.

2.2.5 Scales Derived from Data

A final group of studies has relied on techniques such as canonical correlation[53] or correspondence analysis[54] to derive severity scores from the associations between sentences imposed for different crimes. These methods possess the advantage that they do not rely on arbitrary or subjective decisions. They are more comprehensive, as they can estimate severity scores for any sentence types recorded in the dataset being used. Yet they also have limitations. Both methods assume that sentence severity is normally distributed. This assumption is highly questionable, as it limits the severity weight that should be attributed to long custodial sentences, which would be located at the right tail of the distribution, and under a standard normal distribution, will only depart from the average moderately (e.g., the 2.5% more severe sentence types will only be two standard deviations away from the average).

[51] For more detail, see Pina-Sánchez and others (n 47).
[52] For example, although the parameters of the function summarising the association between levels of severity and starting points are estimated through a statistical model, the specific functional form to be modelled represents a subjective decision.
[53] James C McDavid and Brian Stipal, 'Simultaneous Scaling of Offense Seriousness and Sentence Severity through Canonical Correlation Analysis' (1981) 16 Law & Soc'y Rev. 147.
[54] Brian Francis and others, 'Developing Measures of Severity and Frequency of Reconviction' <http://www.research.lancs.ac.uk/portal/en/publications/developing-measures-of-severity-and-frequency-of-reconviction(2e9f9 c6b-9f54-4ac9-9145-98b6d7262973).html>.

2.3 Modalities of Punishment and Relativity

One important consideration underlying scales of severity is that they are based on the retributivist ideal of proportionality in punishment, with the severity of the punishment imposed being proportionate to the harm of the offence. An objective account of punishment based on the deprivation of liberty gives rise to a scale wherein a ten-year imprisonment term is more severe than a one-year imprisonment term, which in turn, is more severe than a community sentence or fine. It is problematic to assume, however, an objective value of punishment when the act of sentencing refers to a decision made by a subject (the sentencer), who is meant to anticipate the likely effect that such decision will have on another subject (the offender).[55]

The true value of punishment - its *experienced* severity -- will vary across people. Imprisonment will be a more severe punishment for an offender with childcaring responsibilities (due to the added pain of being separated from children).[56] This pain of separation can also be experienced by individuals with no childcaring responsibilities but who nonetheless suffer the loss of direct contact with family or friends and this can increase the experienced severity of their punishment.[57] In contrast, it is sometimes said that some homeless people may not suffer the exact same pains of imprisonment, as their basic needs may be literally accommodated in prison. This finding emerged in van Ginneken and Hayes' study.[58] Some offenders explained how their socio-economic conditions meant that imprisonment represented a higher standard of living than the extreme deprivations they experienced in the community.

Other sanctions are also experienced differently by different offenders. The severity of a fine depends on an offender's capacity to pay.[59] Recognition of this reality justifies the use of 'day fine' systems where the amount of the fine is determined in part by the offender's capacity to pay. The consequence of the differential impact of sentences is that although a sanction may appear to be less severe than a notionally higher tariff

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[55] Lori Sexton, 'Penal Subjectivities: Developing a Theoretical Framework for Penal Consciousness' (2015) 17 Punishment & Society 114.
[56] David J Hayes, 'Penal Impact: Towards a More Intersubjective Measurement of Penal Severity' (2016) 36 Oxford Journal of Legal Studies 724.
[57] Ben Crewe, 'Depth, Weight, Tightness: Revisiting the Pains of Imprisonment' (2011) 13 Punishment & Society 509; David Hayes, 'The Impact of Supervision on the Pains of Community Penalties in England and Wales: An Exploratory Study' (2015) 7 European Journal of Probation 85.
[58] Esther FJC van Ginneken and David Hayes, '"Just" Punishment? Offenders' Views on the Meaning and Severity of Punishment' (2017) 17 Criminology & Criminal Justice 62.
[59] van Ginneken and Hayes (n 58).

disposal, in practice it may be experienced as more severe. Studies have shown as a result that lengthy probation terms are sometimes perceived to be as severe as imprisonment.[60] Another manifestation of this is that when given a choice of sanctions, some offenders prefer a prison sentence to a community order, although the latter is perceived by society as being less severe.

In addition, even though the prison environment should not automatically influence sentence severity[61] – after all a judge does not sentence an offender to a specific prison – it may have some bearing.[62] Prisons vary in their harshness.[63] Private prisons, for example, might be less restrictive than state run prisons.[64] Similarly, some prisons are perceived to be more severe[65] than others. Prison sentences will be perceived as more severe if the institution is located far from family and friends (an issue more likely in regards to female prisons).[66] The experienced (i.e. subjective) severity of a given period in prison will therefore vary, depending upon the nature of the institution.[67]

It is hard to make objective comparisons of imprisonment severity when prisoners with varied vulnerabilities will experience punishment differently. For example, offenders might be entering the prison system with complex mental health problems[68] which may result in them experiencing the pains of imprisonment more severely. This is reflected

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[60] Joan Petersilia and Elizabeth Piper Deschenes, 'Perceptions of Punishment: Inmates and Staff Rank the Severity of Prison Versus Intermediate Sanctions' (1994) 74 The Prison Journal 306; Peter B Wood and Harold G Grasmick, 'Toward the Development of Punishment Equivalencies: Male and Female Inmates Rate the Severity of Alternative Sanctions Compared to Prison' (1999) 16 Justice Quarterly 19; Esther FJC van Ginneken, 'The Pain and Purpose of Punishment: A Subjective Perspective' (2016) 22 What is Justice? Re-imagining Penal Policy Working Papers.

[61] Concerning prison conditions and COVID-19, in *HMA v Lindsay* [2020] HCJAC 26, it was noted that "To take account of the current emergency as a reason for discounting a custodial sentence would discriminate unfairly against prisoners who may have been given a short term sentence shortly before the lockdown, in favour of those upon whom such sentences are imposed now" (para 25). For a comparison one might also have reference to the position in England and Wales: see *Attorney-General's Reference, R v Manning* [2020] 4 WLR 77.

[62] van Ginneken and Hayes (n 58) 74–75.

[63] Alison Liebling and Helen Arnold, 'Prisons and Their Moral Performance: A Study of Values, Quality, and Prison Life'.

[64] Ben Crewe and others, 'The Emotional Geography of Prison Life' (2014) 18 Theoretical criminology 56.

[65] Crewe (n 57).

[66] Ivana Bacik, 'Women and the Criminal Justice System' [2002] Criminal justice in Ireland 134.

[67] Gavin Dingwall and Christopher Harding, 'Desert and the Punitiveness of Imprisonment' (Ashgate Publishing 2002).

[68] Seena Fazel and John Danesh, 'Serious Mental Disorder in 23 000 Prisoners: A Systematic Review of 62 Surveys' (2002) 359 The lancet 545.

in the high levels of self-harm and suicides in prisons.[69] It is complicated, however, to calculate how much more these individuals will suffer in comparison to each other since their experience is subjective and dependent on their personal circumstances. Finally, if punishment severity is measured purely in terms of liberty deprivation, then one could expect that ten years' imprisonment to be ten times more severe than one-year imprisonment. Yet studies have demonstrated that perceptions of severity do not increase linearly as incarceration terms get longer.[70]

2.3.1 Sentences affect People in Different Ways

To summarize, punishment severity can hence be hard to quantify objectively, since punishments vary in their subjectively experienced severity.[71] This problem, however, is overlooked by scales of severity which disregard subject variability. It can be hard to conceive how punishment severity can therefore be measured solely on the standardised metric of liberty deprivation and imprisonment. A unidimensional theory of punishment severity fails to acknowledge social inequalities and their effect on people experiencing legal punishments. It is, therefore, unable to recognise how as a result of these unequal conditions there will be differences in the perception and experience of objectively equal punishments. In order to remedy this, we should consider an approach[72] that is able to incorporate individual differences in the perception of punishment.

2.4 Measuring Severity across Jurisdictions

So far, this chapter has reviewed the main approaches that have been considered to reduce different sentences to a unidimensional scale of severity. Attempts to undertake a scale capturing differences *between* rather than within jurisdictions will be similarly affected. Specifically, with respect to cross-jurisdictional comparisons, researchers should be able to: i) control for different crime rates; while being able to

[69] Fazel and Danesh (n 68).
[70] Tremblay (n 43); Robert E Harlow, John M Darley and Paul H Robinson, 'The Severity of Intermediate Penal Sanctions: A Psychophysical Scaling Approach for Obtaining Community Perceptions' (1995) 11 Journal of Quantitative Criminology 71.
[71] Adam J Kolber, 'The Subjective Experience of Punishment' (2009) 109 Colum. L. Rev. 182.
[72] Hayes (n 56).

ii) capture differences in the sentence types used in each jurisdiction; and iii) their potentially variable punitive impact on offenders.

Cross-jurisdictional comparisons of punitiveness often explore imprisonment trends.[73] As noted in Section 1, such studies are highly affected by a problem of 'selection bias' as a result of their focus on prison sentences. More importantly, when considering comparisons between jurisdictions, analyses based on prison populations will confound sentence severity with differential crime rates, which affects their validity. This last problem can be addressed using more refined *quantitative* and *qualitative* approaches. For example, Byrne et al.[74] explored comparisons in the prison population, but also in the frequency of the use of custody for roughly similar offence types. Similarly, Davies et al.[75] relied on experimental settings where judges from different jurisdictions were asked to sentence a series of simulated cases.

Such research designs can control for differences in officially-recorded crime rates, but they still assume that both the sentence types available, and the conditions to which offenders are subject, do not differ across jurisdictions. Neither of those assumptions is tenable in many instances. The sentencing options available to judges vary substantially - even across jurisdictions as similar as Scotland and England and Wales. Prison conditions also vary greatly across countries.[76]

2.4.1 Inter-Jurisdictional Scales of Severity

None of the methods employed to create a (within jurisdiction) scale of severity described in Section 2 can be used to estimate sentence severity between jurisdictions. Data-driven methods (such as those introduced in Sections 2.4 (guideline-anchored scales) and 2.5 (data-driven scales)) would miss the subtleties associated with the different sentence types and conditions experienced by offenders across jurisdictions. Methods relying on subjective judgements or perceptions of severity such as Magnitude scalation or Thurstone Scales (Sections 2.2 and 2.3) will also be problematic. None of the population subgroups considered in the literature would be informed enough to provide the insights sought by researchers. The general

[73] Roy Walmsley, 'Global Incarceration and Prison Trends' (UN 2003).
[74] James M Byrne, April Pattavina and Faye S Taxman, 'International Trends in Prison Upsizing and Downsizing: In Search of Evidence of a Global Rehabilitation Revolution' (2015) 10 Victims & Offenders 420.
[75] Malcolm Davies, Jukka-Pekka Takala and Jane Tyrer, 'Sentencing Burglars and Explaining the Differences between Jurisdictions: Implications for Convergence' (2004) 44 British Journal of Criminology 741.
[76] Information on Prison Conditions and the Treatment of Prisoners. Available at: https://www.hrw.org/legacy/advocacy/prisons/europe.htm

public, offenders, or even some criminal justice practitioners will be unfamiliar with the specific sentences imposed in different countries. The pool of experts with the required cross-jurisdictional knowledge to undertake such considerations reliably enough is too small to be used as part of an empirical study.

2.4.2 Offender Perceptions

An alternative research design that could potentially lead to comparisons of sentence severity between jurisdictions is to ask offenders in multiple jurisdictions about their perceptions of a given sentence type after having experienced it. An example of such a research design is the Eurobarometer on Experiencing Supervision[77] (EES), which aims to measure the subjective wellbeing of offenders under different forms of criminal supervision, across eight European countries, using questionnaires. The EES is limited to a specific set of sentence types. However, the same approach could be replicated for other sentence types shared across the jurisdictions under analysis, such as fines, custodial sentences, or community sanctions. Once the average perceptions of severity for the main sentence types are estimated across jurisdictions, then this data could be used to derive a scale to compare sentence severity both within and between jurisdictions.

This approach has limitations. For example, it is still be based on the assumption that subjective experiences of punitiveness can be extrapolated from the individual to the population using sample averages. It also assumes 'measurement invariance', i.e. that participants drawn from the two jurisdictions understand the questions asked similarly. However, with the right techniques, these assumptions could be relaxed,[78] while measurement invariance can be tested using latent variable estimation.[79]

2.5 Conclusion

Sentencing is complex, simultaneously seeking multiple - often contradictory - goals, for which a range of different forms of ‘punishment’ can be considered. Because of the high heterogeneity in sentence outcomes, research exploring questions such as the

[77] Ioan Durnescu and others, ‘Experiencing Offender Supervision in Europe: The Eurobarometer–Lessons from the Pilot Study’ (2018) 65 Probation Journal 7.
[78] Jose Pina-Sánchez and John Paul Gosling, ‘Tackling Selection Bias in Sentencing Data Analysis: A New Approach Based on a Scale of Severity’ [2020] Quality & Quantity 1.
[79] William Meredith, ‘Measurement Invariance, Factor Analysis and Factorial Invariance’ (1993) 58 Psychometrika 525.

impact of sentencing guidelines is challenging, and often inconclusive. Empirical studies on sentencing are normally focused on specific sentence outcomes, such as custodial sentences, with the associated loss of external validity (i.e. generalisability). When multiple outcomes are considered, it is not always possible to draw unequivocal conclusions. For example, in instances where declines in the use of one particular sentence outcome are substituted by increases in the use of other outcomes, with some being more severe while others less so. Researchers have sought to overcome this problem by grouping different sentence outcomes into a common scale of severity. This chapter reviewed the main methods adopted in the literature to estimate such severity scales. We noted that as a result of their focus on population averages, all methods disregard the subjective experience of sentences. Besides this, the analytic approaches vary widely in terms of their assumptions and limitations. There is no perfect method; all have limitations.

Research in penal metric theory has focused on the estimation of scales of severity within, not between, jurisdictions. Further, none of the methodologies for the estimation of within-jurisdictions scales of severity could be repurposed for the estimation of a scale of severity to make comparisons between jurisdictions. One research design that could undertake such comparisons would be a cross-jurisdictional survey based on the perceptions of offenders who have experienced the sentence outcomes that are equivalent across jurisdictions. These perceptions could then serve as the basis for a scale of severity between jurisdictions.

Chapter 3:
Understanding Sentencing Disposals

This chapter contributes to the understanding of sentencing in the two jurisdictions of Scotland and England and Wales. The comparative research literature is relatively sparse, usually focusing on the treatment of a special issue or offence in the two jurisdictions. To date, there has been no attempt to consider the two regimes' principal sanctions. This is an important limitation as any comparative understanding of sentencing must consider a number of key differences relating to the offence, *the sentencing disposals in law and practice*, the legal regime, and other more nebulous factors such as community reaction and criminal justice cultures (see Chapter 1).

Here we consider sentencing disposals by comparing the principal sanctions used in Scotland and England and Wales. Different jurisdictions use variations of pecuniary, community and custodial sanctions in response to crime. However, there are often differences in how these sanctions are defined and administered. For example, some jurisdictions have periods spent on licence as part of custodial sentences. Moreover, community sentences carry a range of requirements that often vary between jurisdictions.

The appendix to this report contains a series of tables that summarise key features of the principal sanctions in England and Wales and Scotland.[80] The following sections offer some commentary on these sanctions. However, it should be noted that the tables are not exhaustive.[81] Additionally, for context, it might be noted that Scotland has a wide range of alternatives to prosecution through court, known as “direct measures.”[82] While direct measures can be used in response to (mainly low-level) offending, they are beyond the scope of this review.

Tables 1A to 1D concern custodial sentences. Tables 2 and 3 document community sentences and deferred sentences, respectively. Tables 4A to 4B examine pecuniary penalties, and Table 5 the unique Scottish sanction of ‘admonition’. Finally, Tables 6A and 6B concern discharges. From these tables, it can be seen that important differences exist, particularly with regard to suspended sentences, and it would be unwise to make direct comparisons for all sanctions. However, it is possible to draw

[80] To our knowledge, no publication has summarised the principal sanctions in the two jurisdictions.
[81] Some court orders are omitted. For an overview of these see the Scottish Sentencing Council: https://www.scottishsentencingcouncil.org.uk/about-sentencing/orders/. One might also note the supervised release order (SRO).
[82] The equivalent in England and Wales would be Out of court disposals (OOCDs).

some broad inferences and raise key questions, for example, in terms of the effectiveness of different disposals.

3.1 Is there a Hierarchy of Sanctions?

The perceived punitiveness of various sanctions was discussed earlier. However, for the purposes of this discussion, it is worth reiterating a key point. Although community sanctions are, in appellate jurisprudence and guidelines, ranked below imprisonment in terms of severity, in some circumstances, community disposals can be more onerous and may be perceived as more punitive than custodial sentences:[83]

> "It is no longer necessary to equate criminal punishment with prison. At some level of intensity and length, intensive probation is equally severe as prison and may actually be the more dreaded penalty."

Therefore, while a custodial sentence may be described as "the last resort" or ultimate sanction, it is not always, and in all cases, the most severe sanction. (See section 2.3 on the subjective experiences of punishment).

3.2 Clarity in Sentencing Terminology?

Labels matter and sentences are poorly labelled. The terminology used to describe sentences conceals complexities and can be counterintuitive. Even custodial sentences that appear straightforward are multifaceted. For example, it is self-evident that custodial sentences differ in length. However, what may not be evident (especially to the public) is how a custodial sentence's length affects release, the period spent on licence, the disclosure periods applicable,[84] or the other orders and measures that may affect a custodial sentence (e.g., supervised release orders and home detention curfew; end of custody licence, etc.).

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[83] Petersilia and Deschenes (n 60) 306.
[84] 'Guidance for the Self-Disclosure of Previous Convictions & Alternatives to Prosecution in Scotland under the Rehabilitation of Offenders Act 1974' (2021) <https://www.gov.scot/publications/guidance-self-disclosure-previous-convictions-alternatives-prosecution-scotland-under-rehabilitation-offenders-act-1974/pages/1/>.

Matters get more complex with community sentences, which, as the tables in Appendix A reveal, are very flexible disposals that can carry onerous requirements. Indeed, not only can community disposals be more cost-effective and highly punitive, additionally, in terms of supporting rehabilitation, community disposals are likely the most effective Scottish sanction in the majority of cases:[85]

> "Of those released from prison in 2017/18 who had served a sentence of a year or less, 49 per cent were reconvicted within a year, compared with 30 per cent who completed a community sentence. Scottish Government analysis on costs in 2016/17 showed the average prisoner place cost £37,334, while the most used community sentence, a community payback order, cost around £1,894."

Yet, the complexity of community sentences (partly stemming from their potential diversity) can undermine public and professional confidence in them. More work communicating what community sanctions entail could be beneficial. Indeed, community sentences are liable to evolve and incorporate technologies to a greater degree (e.g., transdermal alcohol monitoring). This will mean that communicating to the public what non-custodial sentences entail will become increasingly important. Exactly how this could be communicated to the public is another area where comparative research may be helpful and we note this in our conclusions. For now, the remainder of this chapter sets out some key points on specific sentencing disposals in England and Wales and Scotland. Additionally, the tables in the appendix, though illustrative rather than comprehensive, are intended to assist in this.

3.3 Suspended Sentence Order (SSO)

The suspended sentence order (SSO) in England and Wales has been available to courts for decades, but it only became a common sanction relatively recently. Before the Criminal Justice Act (CJA) 2003, a court could only suspend a prison sentence if it found "exceptional circumstances." The CJA 2003 removed that restriction, leading to a dramatic increase in the use of the SSO. The SSO is a useful sanction for courts

[85] 'Scottish Prison Service Annual Audit 2019/20' (Audit Scotland 2021) 3 <https://www.audit-scotland.gov.uk/report/scottish-prison-service-annual-audit-201920> accessed 4 October 2021.

to consider in cases where the custody threshold has been passed but where there are reasons to justify suspending the sentence.

Suspended sentences are worthy of special attention here as these do not exist in Scotland. An overview of the SSO is provided in Table 1. While Scotland has no direct equivalent of the SSO, there is comparative research that conceptualised it broadly as a "conditional sentence."[86] Conditional sentences encompass a range of disposals, including suspended sentences and deferred sentences. Some have preferred the term "conditional sentence" to terms such as "suspended sentence" to highlight that this "requires something more active than simply refraining from offending, but may also include compliance with additional requirements set by the court (such as unpaid work or supervision)."[87]

Given the serious nature of the SSO, it may be argued that the closest comparator in Scotland is the community payback order (CPO).[88] In the tables below, we compare the Scottish CPO with the English and Welsh community order (CO). However, operationally, the CO resembles the SSO. Indeed, later we consider the example of causing death by careless or inconsiderate driving for which an SSO is frequently used in England and Wales. By contrast, the most common disposal (in about two-thirds of cases) in Scotland is recorded in official data as a "community sentence" - most of which are CPOs.

In England and Wales, it may be that in practice SSOs tend to have more requirements and are used more punitively than in COs.[89] Yet, an examination of the tables in the appendix reveals that an SSO is not *always* more onerous than a community sentence such as a CO. Indeed, the conditions are broadly similar and (in England and Wales) the CO has more potential requirements. Moreover, research suggests that laypersons may not see a significant difference between the CO and SSO. For example, in one study of SSOs and COs, half of the offenders interviewed "thought there was little difference between the two in practice terms."[90]

Another similarity between SSOs and COs/CPOs is noteworthy: if an offender complies with the requirements, then they will operate similarly. Likewise, if an offender fails to comply with the requirements of an SSO or a CO/CPO, then, in either case, they may spend time in prison. This said, failure to comply with the requirements

[86] Sarah Armstrong and others, 'International Evidence Review of Conditional (Suspended) Sentences' (The Scottish Centre for Crime and Justice Research 2013).
[87] Armstrong and others (n 86) 11.
[88] Drug treatment and testing orders may also be relevant but are not discussed in detail here.
[89] George Mair and Helen Mills, 'The Community Order and the Suspended Sentence Order Three Years On' [2009] Centre for Crime and Justice Studies 10.
[90] Mair and Mills (n 89) 24.

of the SSO is likely to be treated more severely by courts in England and Wales, for the very reason that the sanction is designed to replace a custodial rather than a community punishment. In this regard, the SSO may be similar to the Scottish CPO when it is imposed as a direct "alternative to imprisonment."

3.3.1 The SSO in Practice

The SSO is a useful sanction for courts to consider in cases where the custody threshold has been passed but where there are reasons to justify suspending the sentence. The offence of causing death by careless or inconsiderate driving (CDCID is discussed in greater detail in Chapter 4) is a good example of a crime for which an SSO has proved appropriate. The offence involves extremely high harm, yet as noted earlier, the offender's level of culpability is (compared to some other offences resulting in death) relatively low. The Sentencing Council's 'Imposition' guideline provides guidance regarding the use of the SSO.[91] It proposes specific factors which indicate an SSO may or may not be appropriate. For example, two factors indicating it may be appropriate to suspend a custodial sentence are: "strong personal mitigation" and "immediate custody will result in significant harmful impact upon others." Both are common in cases of CDCID. The offender's careless driving may have resulted in the death of a relative, and an immediate prison sentence may result in significant harm to the offender's children.

The SSO is fairly frequently imposed in England and Wales. In 2019, courts imposed 74,169 immediate prison sentences and 39,315 suspended sentence orders.[92] In other words, over one third (35%) of prison sentences were suspended. Thus, the SSO is a significant sanction in England and Wales.

The nature of the SSO makes it very hard to make comparisons with Scotland regarding the use of imprisonment. The SSO is deemed a sentence of imprisonment in England and Wales by virtue of the fact that a court must not impose an SSO unless the custody threshold has been passed. This structure is clearly communicated to courts by the Sentencing Council's Imposition guideline.[93] This suggests that there are two forms of custody in England and Wales: immediate imprisonment and the SSO. However, while the SSO may be de jure a sentence of imprisonment, in practice it is

[91] 'Imposition of Community and Custodial Sentences. Definitive Guideline.' (Sentencing Council of England and Wales 2017) <https://www.sentencingcouncil.org.uk/overarching-guides/crown-court/item/imposition-of-community-and-custodial-sentences/>.
[92] Source: Ministry of Justice (2020) Outcomes by Offence, data tool.
[93] 'Imposition of Community and Custodial Sentences. Definitive Guideline.' (n 91).

not always perceived as such by offenders or the general public. The existence of a form of imprisonment which does not fully correspond to a term of immediate imprisonment – and which is absent in Scotland – makes it complicated to determine which jurisdiction 'uses' imprisonment more often.

3.4 Structured Deferred Sentence (SDS)

The SDS is noted in Table 7 alongside its closest counterpart in England and Wales (the deferred sentence). In part, the SDS is intended to allow the management of offenders and the provision of support without the need to put the offender on a CPO."[94] In recent years, Scotland has conducted pilot schemes involving 'Structured Deferred Sentences' which support effective interventions and encourage offender participation.[95] Several evaluations of these pilots have generated promising results.[96] The Structured Deferred Sentencing (SDS) program in Scotland is an example of a successful application of deferred sentencing. The program targets young persons aged 16 to 21 and provides a structured deferred sentence for six months during which time the offender benefits from a support package. An evaluation published in 2019 generated positive results: approximately 90% of participants completed the deferment program.[97]

There are similarities between suspended sentences and deferred sentences: both are conditional on some future behaviour post-conviction.[98] However, typically, an SDS is for those at a lower risk of custody, and the deferral period is typically 3 months up to 6 months.[99] By contrast, an SSO is a direct substitute for a custodial sentence

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[94] 'Structured Deferred Sentences: Guidance ' (2021) para 1.3.
[95] Scottish Government *Structured Deferred Sentences in Scotland: Guidance*. (Edinburgh: The Scottish Government, 2021).
[96] Macdivitt, Katherine, *An Evaluation of the Structured Deferred Sentence Pilots* (Scottish Government 2008) <https://www.webarchive.org.uk/wayback/archive/20150219044232/http://www.gov.scot/Publications/2008/04/09134401/0>; More recently, see the evaluation of the Aberdeen Problem-Solving Approach which examined process and outcomes of offenders on the Structured Deferred Sentence (SDS), Jane Eunson and others, 'Review of the Aberdeen Problem Solving Approach'.
[97] Johanne Miller, Blane Abercrombie and Gillian McLellan, 'Evaluation of South Lanarkshire Structured Deferred Sentencing for Young People: End of Project Report September 2019'.
[98] Armstrong and others (n 86).
[99] 'Structured Deferred Sentences: Guidance' (Scottish Government 2021) 14 <https://www.gov.scot/publications/structured-deferred-sentences-scotland-guidance/> accessed 12 October 2021.

and lasts between 6 months and 2 years.[100] It is *possible* for an SDS to be longer (e.g. between 9-12 months), which falls within the lower range of the SSO.[101] However, such a long SDS would appear to be less likely than a CPO in many cases.

The SDS can encompass a range of interventions that can be perceived as onerous. Indeed, the SDS has been well received in various regards and there are arguments it could be beneficial to use further:[102]

> "The structured deferred sentence is being used in some areas but it is not a universally applied option. There may be a number of reasons why this is not the case, but it has been suggested that the lack of direct funding for such an option is a major barrier. Other issues relate to capacity, awareness and how other partners in the community justice landscape can contribute to structured deferred sentence working alongside criminal justice social work services."

While there has been some progress in this area, as of 2021, it was noted that "overall the provision of support through these interventions is inconsistent across Scotland."[103] Thus, it may be that there is potential to expand the provision of the SDS and it *may*, *in some cases*, provide a Scottish sentencing option where England and Wales would use an SSO.

3.4.1 Deferred Sentences in England and Wales

Deferred sentencing is a less commonly used sentencing option in England and Wales. Although almost 10,000 cases were deferred every year in the 1980s, today less than 1,000 cases receive a deferred sentence.[104] It is unclear why the use of deferred sentences has declined over the past decades, as it represents a useful response to a range of offenders whose life circumstances are changing for the better.[105] The deferred sentencing provision in England and Wales was modelled on the Scottish deferral procedure.[106] According to S.3(1) of the Sentencing Act 2020, a court may defer passing sentence "to enable a court, in dealing with the offender, to

[100] Eleanor Curzon and Julian V Roberts, 'The Suspended Sentence Order in England and Wales' (Sentencing Academy 2021).
[101] See 'Structured Deferred Sentences: Guidance' (n 99) s 2.6.
[102] 'Community Justice Outcome Activity Across Scotland: Annual Report 2018-2019' (2020) 35.
[103] 'Community Justice Outcome Activity Across Scotland: Annual Report 2018-2019' (n 102) 38.
[104] Julian V Roberts, 'Deferred Sentencing: A Fresh Look at an Old Concept' [2022] Criminal Law Review.
[105] For example, if the offender is beginning or completing a treatment or restorative justice programme.
[106] Roberts, 'Deferred Sentencing: A Fresh Look at an Old Concept' (n 104).

have regard to - (a) the offender's conduct after conviction (including, where appropriate, the offender's making reparation for the offence) or (b) any change in the offender's circumstances." The two grounds for deferral are broad; there will be many cases where reparation is possible, and offenders' circumstances are often changing, particularly young adults.

Although no comparative research has been conducted, it seems likely that deferred sentencing is a more useful option, and more used, in Scotland than in England and Wales. Deferred sentencing has assumed prominence as a means of supporting drug and other treatment programs. Deferral offers the offender an opportunity to demonstrate the desire (and ability) to complete a program.

As with the SSO, deferred sentencing in England and Wales has attracted media and public criticism.[107] In one well-publicized case, the court deferred sentence in order to allow the defendant to continue with counselling and to "demonstrate over a lengthier period of time that [she] had truly rid [herself] of alcohol and class A drug addiction."[108] After a four-month deferral, the court imposed a 10-month suspended sentence order for an offence with a starting point sentence of 18 months immediate custody. The sentence was heavily criticised and one lesson for Scotland would be to take steps to ensure that when an SDS is imposed in Scotland, the conditions are crystal clear to the defendant, the victim, and the community.

This is one area where guidance from the SSC may be useful for courts. Again, the implication from England and Wales appears to be that guidance for courts exercising their wide discretion to defer a sentence is necessary to ensure parity across cases, and proportionality overall. There is no specific guideline in England and Wales to assist a court in deciding whether to defer sentencing and which requirements to impose. Only very limited guidance is provided in the Council's 'explanatory materials.'[109] The Scottish regime has a wider ambit than the provision in England and Wales. For example, there is a six-month limit on the deferral period in England and Wales, whereas there is no limit in Scotland. Longer deferrals run the risk of provoking more public criticism, hence the need for guidance.

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[107] Dalrymple, Theodore, 'The Curious Case of Lavinia Woodward: A Recent Trial in England Exposes Liberal Shallowness on Crime and Punishment' [2018] *City Journal* <https://www.city-journal.org/html/lavinia-woodward-16049.html>.

[108] *R. v. Lavinia Woodward*, Sentencing Remarks, Oxford Crown Court 25th September 2017, 1.

[109] 'New Sentences: Criminal Justice Act 2003' (Sentencing Guidelines Council 2004) <https://consult.justice.gov.uk/digital-communications/imposition-consultation/supporting_documents/SGC%20New%20Sentences%20CJA%202003%20PDF%201.pdf>.

3.5 Community Order vs Community Payback Order

England and Wales have a community order while Scotland has a "community payback order." The possible requirements in both have a number of similarities. For example, unpaid work requirements are capped at 300 hours. England and Wales have more formal requirements than Scotland. However, in Scotland, other sentences such as restriction of liberty orders (RLOs) and drug treatment and testing orders (DTTOs) (both high tariff orders) can be imposed alongside a CPO, and this can close the gap - though, in practice, some requirements are more commonly imposed than others. In both jurisdictions, those serving such community sentences can be subject to electronic monitoring requirements.[110]

One point to briefly note is that in recent years fines appear to have been used more in place of community orders in England and Wales:[111]

> "When considering the proportionate use of the four main sanctions for more serious offences (fines, COs, SSOs and immediate custody), it is COs that, in particular, have declined in recent years. Whilst the proportionate use of SSOs and immediate custody remained roughly constant between 2009 and 2019, the proportionate use of COs has approximately halved with the use of fines appearing to increase at the expense of COs."

Additionally, the number of requirements attached to COs has also decreased.[112]

While the volume of COs has decreased in England and Wales, CPOs have become increasingly important in Scotland. Research comparing Scotland to England and Wales suggests that this difference is not due to the nature of cases coming before the courts in the two jurisdictions. Instead, the difference may be attributable to different policy choices.[113] While sentencing trends are beyond our present scope, this point is worth highlighting as it is relevant to the complexities of making inter-jurisdictional comparisons.

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[110] In Scotland this can be where a CPO is breached or an RLO is imposed with the CPO.
[111] Guilfoyle, Eion, 'Community Orders' (Sentencing Academy 2021) 9 <https://sentencingacademy.org.uk/wp-content/uploads/2021/03/Community-Orders-3.pdf>.
[112] Guilfoyle, Eion (n 114) s 4.
[113] Phil Bowen, 'Community Sentences Across Borders' [2017] London: The Centre for Justice Innovation.

3.6 Conclusions on Contextualising Sentencing in England and Wales

Sentencing options are deceptively complex, and sentencing is often poorly understood by the public.[114] While those involved in the justice system may well know what a particular sentence entails, the public may not. In the past, this has contributed to public confidence issues. For instance, to the readers of this report, it may well be obvious that a sentence of imprisonment does not mean the entire sentence will be served in prison. Almost all "custodial" sentences in Scotland are really "custody and community sentences" and even those not supervised post-release are on licence until their term expires. It will also be obvious to readers that periods of supervision in the community can support reintegration and promote sustained desistance from offending (recognising goals such as public protection and rehabilitation - noted in the principles and purposes of sentencing guideline).[115] However, neither of these points may be obvious to the public and terminologies such as "automatic early release" have not clarified matters.[116]

With regards to making comparisons between Scotland and England and Wales, clear branding also matters. The SSO is labelled a custodial sentence while the CPO is labelled a community sentence or alternative to custody. Whether or not the SSO is radically different in practice from the CPO in many cases, this label may make it *appear* significantly different. The positioning of disposals like the CPO as *merely* an 'alternative' may lessen perceptions of such community sentences compared to immediate imprisonment or suspended sentences. It may also neglect the benefits that community disposals offer beyond being a potential custody avoidance mechanism

To conclude, comparing sentence types is complex and while there are similarities there are also notable differences between England and Wales and Scotland. The

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[114] Nicola Marsh and others, 'Public Knowledge of and Confidence in the Criminal Justice System and Sentencing–A Report for the Sentencing Council' [2019] London: Sentencing Council <https://www.sentencingcouncil.org.uk/wp-content/uploads/Public-Knowledge-of-and-Confidence-in-the-Criminal-Justice-System-and-Sentencing.pdf>; Karen Gelb, 'Measuring Public Opinion about Sentencing' (Sentencing Advisory Council 2008) <https://www.sentencingcouncil.vic.gov.au/publications/measuring-public-opinion-about-sentencing>; Julian Roberts and Mike Hough, 'Sentencing Young Offenders: Public Opinion in England and Wales' (2005) 5 Criminal Justice 211.

[115] 'Principles and Purposes of Sentencing: Sentencing Guideline' (Scottish Sentencing Council 2018) <https://www.scottishsentencingcouncil.org.uk/media/1964/guideline-principles-and-purposes-of-sentencing.pdf>.

[116] Cyrus Tata, 'Sentencing and Release from Prison: The End of "Automatic Early Release"?' (2016) Scottish Justice Matters . http://scottishjusticematters.com/sentencing-release-prison-end-automatic-early-release/

SSO is particularly prominent for its label as a custodial sentence. This poses two challenges. The first challenge is determining if or where the SSO fits within Scottish sentencing options. The second challenge is managing the label “custodial” so as not to make community sentences appear inferior. Likewise, for different sentencing options in other jurisdictions, there will be questions concerning if there is a Scottish equivalent and what that equivalent might be.

Chapter 4: Making Comparisons: Two Offence Specific Examples

The preceding chapter identified the principal sanctions available in Scotland and England and Wales and highlighted some key differences. In this chapter, we compare sentencing guidance and sentencing trends for two specific offences (causing death by careless or inconsiderate driving, and rape). The offence of causing death by careless or inconsiderate driving is used because it is common to both jurisdictions, thus facilitating comparisons of sentencing outcomes[117] (although the sentencing options available and several other factors differ significantly). Rape is also used because the offence is comparable. The most important consideration for the purposes of comparison is that in England and Wales, a definitive guideline structures judicial discretion by prescribing specific starting points and sentence ranges for both offences. First, however, we illustrate these general points with the example of public attitudes to sentencing the first of our two offences.

4.1 Reflecting on Public Sentencing Preferences

Sentencing Councils and Commissions around the world periodically commission public opinion research in order to determine the degree of 'fit' between public sentencing preferences and judicial practice.[118] The statutory sentencing bodies in England and Wales have commissioned and published several such surveys.[119] In

[117] Here we consider the definition of the offence to be identical in both jurisdictions because of the common statutory footing. We do not explore the possibility that the offence is conceptualised or operationalised differently in Scotland or England and Wales by officials (police, prosecutors, judges, etc).

[118] Julian V Roberts, 'The Future of State Punishment. The Role of Public Opinion at Sentencing' in Michael Tonry (ed), *Retributivism Has a Past. Has It a Future?* (Retributivism has a Past Has it a Future? Oxford: Oxford University Press, Oxford, Oxford University Press 2011); Karen Gelb, 'More Myths and Misconceptions' (Sentencing Advisory Council of Melbourne 2008) <https://www.google.com/search?client=safari&rls=en&q=More+Myths+and+Misconceptions+about+Sentencing.+Melbourne%3A+Sentencing+Advisory+Council.&ie=UTF-8&oe=UTF-8>.

[119] The Sentencing Council of England and Wales has published analyses of public attitudes to plea-based sentence reductions, and sexual offences among other topics. See https://www.sentencingcouncil.org.uk/research-and-resources/publications?cat=research-report&page=2&s.

2008, the Sentencing Advisory Panel published an analysis of a survey exploring public attitudes to sentencing culpable driving offences causing death,[120] including causing death by careless or inconsiderate driving.[121] A decade later, the Scottish Sentencing Council published a survey of Scottish attitudes to sentencing, including sentencing this same offence.[122] This was followed up by a qualitative study of the perceptions and experiences of bereaved family members.[123]

This example involving public opinion further illustrates a key theme permeating this report: in the absence of research employing a single common methodology, it can be misleading to make direct comparisons between trends even in adjoining jurisdictions. This is as true for public opinion as it is for sentencing patterns. In order to compare the views of the public in the two countries, one would need to provide respondents in both jurisdictions with the same stimulus materials (i.e., crime descriptions and sentencing options) while using a comparable survey methodology (including a similar sampling strategy). Although the reports just cited examined public attitudes to the same offence, the methodologies of the two studies differed in some important respects.

The 2019 Scottish research found that approximately one respondent in ten favoured a prison sentence for this offence (in addition to disqualification for driving)[124] compared to approximately four in ten in the English survey.[125] However, the Hough et al. research used a case in which the criminal inattention to the road was wholly the offender's responsibility. The offender had pleaded not guilty but ultimately had been convicted. In contrast, Black et al. research in Scotland used a significantly less serious case, one in which the offender had been distracted by the presence of an insect in the vehicle, and had pleaded guilty to the crime. In short, the English exemplar was a more serious instance of the same crime.[126] Thus, although comparison of

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[120] Mike Hough, JV Roberts and Jessica Jacobson, 'Attitudes to the Sentencing of Offences Involving Death by Driving' (London: Sentencing Advisory Panel 2008) <https://eprints.bbk.ac.uk/id/eprint/3799/1/3799.pdf>; Julian V Roberts and others, 'Public Attitudes to the Sentencing of Offences Involving Death by Driving' (2008) 7 Criminal Law Review-London 525.

[121] More generally, see Mike Hough and Julian Roberts, *Understanding Public Attitudes to Criminal Justice* (McGraw-Hill Education (UK) 2005).

[122] Carolyn Black and others, *Public Perceptions of Sentencing: National Survey Report* (Scottish Sentencing Council 2019).

[123] Hannah Biggs and others, 'Public Perceptions of Sentencing Sexual Offences in Scotland: Qualitative Research Exploring Sexual Offences' (Scottish Sentencing Council 2021) <https://www.scottishsentencingcouncil.org.uk/media/2122/public-perceptions-of-sentencing-qualatative-research-of-sexual-offences-final-july-2021.pdf>. However, it should be stressed this study used a different methodology which makes comparisons complicated.

[124] Black and others (n 125).

[125] Hough, Roberts and Jacobson (n 123); Roberts and others (n 123).

[126] Other differences exist, including the year the survey was conducted and the specific sampling methodology.

sentencing preferences suggests that attitudes towards sentencing this offence are less punitive in Scotland, much of the difference in public sentencing preferences can be attributed to these methodological differences.

The consequences for any guideline of differences in community reaction is a matter for the SSC to determine. For present purposes, we simply note that without a comparative study employing a common methodology, methodological differences between individual single-jurisdiction studies caution against any automatic read-across between Scottish and English and Welsh public sentencing preferences, or relative punitiveness of the public in the two nations. This problem would be remedied by commissioning research dedicated to comparing public attitudes to sentencing in the two jurisdictions.

4.2 Causing death By Careless or Inconsiderate Driving: Road Traffic Act 1988 (section 2B)

This relatively new[127] offence carries a maximum penalty of 5 years imprisonment and a minimum licence disqualification of 12 months. Cases attract considerable media attention and public concern due to the loss of human life. It is also a challenging offence for courts to sentence. While the level of harm is very high, the offender's culpability is usually relatively low.[128] The offender may, for example, be responsible for a 'momentary inattention' to the road, albeit with fatal consequences. We begin our exploration of sentencing for this offence by noting the sentence recommendations contained in the definitive guideline issued by the Sentencing Council of England and Wales.[129] Relative to other jurisdictions such as the Netherlands, sentencing this offence in England and Wales is more severe, emphasizing the harm rather than the culpability of the offender.[130]

[127] The Road Safety Act 2006 created two new offences, CDCID being one.
[128] Padfield notes that 'most of these offenders have a clean record, impeccable character and show real remorse'. Nicola Padfield, 'Time to Bury the Custody "Threshold"' (2011) 8 Criminal Law Review 593.
[129] The guideline was originally issued by the Sentencing Guidelines Council (in 2008). For this reason, it does not correspond to the same structure as other guidelines issued by the current statutory authority, the Sentencing Council.
[130] Sally Cunningham, 'Has Law Reform Policy Been Driven in the Right Direction? How the New Causing Death by Driving Offences Are Operating in Practice'; Marius Duker, 'The Relation Between Culpability and Harm in Sentencing Traffic Offences in the Netherlands and England & Wales' in Dijk,

Comparisons between Scotland and England and Wales for this offence are complicated by the presence of offence specific guidance and the SSO in only the latter jurisdiction. In comparing custody rates, most - but by no means all - cases attracting an SSO should be considered as having crossed the custody threshold.[131] However, in this context, one cannot, based on the use of SSOs over community sentences, say whether or not sanctions for this offence are more or less severe in England and Wales.

4.2.1 England and Wales: Offence Specific Guideline

The Council's definitive guideline provides the following ranges for three categories of seriousness based on the degree to which the driving departed from an acceptable standard of driving.

Examples of nature of activity	Starting point	Range
Careless or inconsiderate driving arising from momentary inattention with no aggravating factors	Medium level community order	Low level community order – high level community order
Other cases of careless or inconsiderate driving	36 weeks' custody	High level community order – 2 years' custody
Careless or inconsiderate driving falling not far short of dangerous driving	15 months' custody	36 weeks – 3 years' custody

As can be seen, the guideline's ranges suggest a custodial sentence for the most serious cases and a community order for the least serious range. Cases that do not qualify for one of these two categories attract a category sentence range that runs from a high-level community order up to two years' imprisonment. It is worth noting, however, that these sentence ranges derive from the SGC guidance, and were created when the maximum penalty for the offence was two years imprisonment. The maximum penalty is now five years imprisonment. When the Council revises this

Alwin van and Wolswijk, Hein (eds), *Criminal Liability for Serious Traffic Offences* (Eleven International Publishing 2015) <https://research.rug.nl/en/publications/criminal-liability-for-serious-traffic-offences-essays-on-causing>.

[131] An unknown percentage of cases attracting an SSO would likely have been drawn from the community caseload, a phenomenon long documented in England and Wales (Keir Irwin-Rogers and Julian V Roberts, 'Swimming Against the Tide: The Suspended Sentence Order in England and Wales, 2000-2017' (2019) 82 Law & Contemp. Probs. 137). The Sentencing Council recognised this tendency and its 2017 guideline on the use of the principal sanctions was designed to correct the problem.

guideline to adopt the approach it has taken in more recent guidelines, it will likely increase both the starting point sentences and sentence ranges, reasoning that in raising the maximum penalty Parliament desired to increase sentences for this offence, even if only those in the most serious category.

4.2.2 Current English and Welsh Sentencing Trends: The SSO[132]

The first case sentenced under for causing death by careless or inconsiderate driving was *R. v Larke (Ann)* and it exemplifies the complexities of sentencing this offence.[133] A 74-year-old with an otherwise clean record performed a driving manoeuvre that resulted in the deaths of two persons. As the guideline notes, where more than one person is killed, that will aggravate the seriousness of the offence because of the increase in harm. Moreover, in terms of starting points, the conduct was found to be in the most severe category and "falling not far short of dangerous driving." The guideline suggests a starting point of 15 months and up to three years custody. However, due to mitigating factors (including the lack of a prior record, remorse, and the age of the offender), a sentence of 39 weeks' imprisonment suspended for 12 months was imposed.

In terms of broad sentencing trends, official figures reveal that in 2015 of 173 convictions for this offence 27% received an immediate custodial sentence. The average custodial sentence length fell between 2011 (15.3 months) to 2014 (10.4 months), but increased again in 2015 (14.4 months)."[134] The most recent statistics (for 2019)[135] reveal that of 149 cases sentenced in England and Wales, approximately one quarter (24%) of convictions resulted in immediate imprisonment. While the official figures provide some general insight, they say little about the cases coming before the courts. As the very first case highlights, there is much to consider with respect to this offence for sentencing purposes. This detail and nuance are lost in the official data and, therefore, comparisons based on this are imperfect (see 1.3.2).

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[132] These are low volume offences which means that they are susceptible to fluctuations driven by small numbers of cases.
[133] [2009] EWCA Crim 870.
[134] 'Driving Offences and Penalties Relating to Causing Death or Serious Injury' (Ministry of Justice 2016) 11 <https://consult.justice.gov.uk/digital-communications/driving-offences-causing-death-or-serious-injury/supporting_documents/drivingoffencesconsultationdocument.pdf>.
[135] Data are available for 2020, but due to the pandemic volumes are down, so we have used 2019 data.

4.2.1 Current Scottish Sentencing Trends: The CPO[136]

As noted earlier, Scotland does not have a suspended sentence option. Instead, most offences of causing death by careless or inconsiderate driving are dealt with in Scotland by way of a "community sentence" according to published figures. As can be seen, over the decade, approximately one case in ten resulted in a custodial sentence.

People convicted by main penalty, 2010-11 to 2019-20											
Main crime	Main penalty	2010-11	2011-12	2012-13	2013-14	2014-15	2015-16	2016-17	2017-18	2018-19	2019-20
Causing death by dangerous driving	Custody	12	8	10	13	7	13	9	11	9	9
	Community sentence	-	-	-	-	-	2	1	1	3	-
	Financial penalty	1	-	-	-	-	-	-	-	-	-
	Other	-	-	-	-	-	-	-	-	-	-
Death by careless driving when under the influence of drink/ drugs	Custody	1	2	5	-	-	1	-	-	1	-
	Community sentence	-	-	-	-	-	-	-	-	-	-
	Financial penalty	-	-	-	-	-	-	-	-	-	-
	Other	-	-	-	-	-	-	-	-	-	-
Causing death by careless driving	Custody	2	5	3	1	4	4	3	2	1	-
	Community sentence	10	11	14	9	24	16	15	20	12	13
	Financial penalty	5	5	2	-	1	4	4	3	6	-
	Other	1	-	-	1	-	1	-	1	-	-
Total convicted		32	31	34	24	36	41	32	38	32	22

[136] These are low volume offences (even compared to England and Wales), which means that they are susceptible to fluctuations driven by small numbers of cases.

Having requested a breakdown of community sentences from the Criminal Proceedings Database, it can be seen that most are CPOs.

People convicted by main penalty, 2010-11 to 2019-20											
Main crime	Main penalty	2010-11	2011-12	2012-13	2013-14	2014-15	2015-16	2016-17	2017-18	2018-19	2019-20
Causing death by dangerous driving	Imprisonment	8	6	9	13	7	12	5	8	9	9
	Young Offender Institution	4	2	1	-	-	1	4	3	-	-
	Community Payback Order	-	-	-	-	-	1	1	1	3	-
	Restriction of Liberty Order	-	-	-	-	-	1	-	-	-	-
	Fine	1	-	-	-	-	-	-	-	-	-
Death by careless driving when under the influence of drink/ drugs	Imprisonment	1	2	5	-	-	1	-	-	1	-
Causing death by careless driving	Imprisonment	1	5	3	1	4	3	3	1	1	-
	Young Offender Institution	1	-	-	-	-	1	-	1	-	-
	Community Service Order	9	10	8	-	-	-	-	-	-	-
	Community Payback Order	-	-	5	8	22	13	14	17	11	8
	Restriction of Liberty Order	-	-	1	1	1	3	1	3	1	5
	Probation	-	1	-	-	1	-	-	-	-	-
	Probation & CSO	1	-	-	-	-	-	-	-	-	-
	Fine	5	5	2	-	1	4	4	3	6	-
	Admonished	1	-	-	1	-	-	-	1	-	-
	No order made	-	-	-	-	-	1	-	-	-	-
Total convicted		32	31	34	24	36	41	32	38	32	22
1. Where main crime											

The CPO is labelled as an “alternative to imprisonment” and, as the tables in the appendix highlight, it is a highly flexible sanction - able to serve retributive and consequentialist aims in many cases. However, the figures above provide little insight into the nature of the CPOs issues in Scotland. For example, the Criminal Proceedings Database does not contain information about the requirements attached to these CPOs. Limitations such as this hinder the ability to draw meaningful comparative inferences about the two jurisdictions.

4.3 Offences of Rape

Offences of rape are another area where comparisons may be made. For example, comparisons of rape offences have been made between various jurisdictions and "one of the main reasons for this decision is the fact that rape is a universal crime."[137] Of course, definitions of rape can vary around the world, and this can raise questions for legal and comparative work in some contexts.[138]

In the example of causing death by careless or inconsiderate driving, the same statutory provision applied to both jurisdictions. That is not the case here. Offences of rape exist in different statutory provisions in Scotland and England and Wales. In Scotland, the relevant statutory provision is section 1 of the Sexual Offences (Scotland) Act (2009) (hereinafter the 2009 Act). In England and Wales, the relevant provision is section 1 of the Sexual Offences Act 2003 (hereinafter the 2003 Act). The notification requirements for both jurisdictions are set out in the Sexual Offence Act 2003.

While there are different statutory provisions, they are in many ways functionally similar. In part, this similarity is because, in making its recommendations for Scotland (many of which were adopted in the 2009 Act), the Law Reform Commission considered the 2003 Act and the Home Office reports underpinning it. These were found to be of "considerable value".[139] Accordingly, it is unsurprising that the 2009 Act and the 2003 Act have a number of striking similarities. As well as structural similarities between the statutory provisions, offences such as rape (section 1 in both statutes) are defined in similar terms. Certainty, the 2009 Act brings the definition of rape much closer to that of the 2003 Act than the previous common law definition. Such similarities may be one reason there has already been a doctrinal analysis of sentencing for rape that compares Scotland to England and Wales.[140]

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[137] SS Terblanche, 'Rape Sentencing with the Aid of Sentencing Guidelines' (2006) 39 The Comparative and International Law Journal of Southern Africa 1, 2.

[138] For example, where actus reus is defined differently. For instance, see Jaye Ellis, 'General Principles and Comparative Law' (2011) 22 European Journal of International Law 949, 968.

[139] 'Report on Rape and Other Sexual Offence' (Scottish Law Commission 2007) para 1.8 <https://www.scotlawcom.gov.uk/files/4712/7989/6877/rep209.pdf>.

[140] G Brown, *Sentencing Rape: A Comparative Analysis* (Bloomsbury Academic 2020) <https://books.google.co.uk/books?id=QwDFtQEACAAJ>.

4.3.1 England and Wales: Offence Specific Guideline

The Council's definitive guideline provides three categories of harm and two categories of culpability.

Harm	
Category 1	The extreme nature of one or more category 2 factors or the extreme impact caused by a combination of category 2 factors **may** elevate to category 1
Category 2	• Severe psychological or physical harm • Pregnancy or STI as a consequence of offence • Additional degradation/humiliation • Abduction • Prolonged detention/sustained incident • Violence or threats of violence (beyond that which is inherent in the offence) • Forced/uninvited entry into victim's home • Victim is particularly vulnerable due to personal circumstances* * for children under 13 please refer to the guideline on page 27
Category 3	Factor(s) in categories 1 and 2 not present

Culpability
A
Significant degree of planning
Offender acts together with others to commit the offence
Use of alcohol/drugs on victim to facilitate the offence
Abuse of trust
Previous violence against victim
Offence committed in course of burglary
Recording of the offence
Commercial exploitation and/or motivation
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) or transgender identity (or presumed transgender identity)
Offence motivated by, or demonstrating, hostility to the victim based on his or her disability (or presumed disability)
B
Factor(s) in category A not present

In contrast to the previous example, there is more scope for varying harm to a (single) victim: physical and psychological.[141] The guideline provides a list of well-considered factors for the court to consider in terms of harm, culpability, and mitigation and aggravation. Additionally, it also provides a range of starting points to structure judicial discretion. This type of guidance is not currently present in Scotland, though case law has considered several of the points addressed in the English and Welsh guidelines. Moreover, as will be discussed below, the Scottish courts have explicitly had regard to the guidelines in England and Wales for this offence.

[141] In death by driving offences the harm is, of course, always death.

4.3.2 Sentencing Trends in England and Wales and Scotland: Immediate Imprisonment

Rape is an indictable offence with a maximum sentence of life imprisonment in both jurisdictions.[142] Unsurprisingly, custodial sentences account for almost all sentences for this offence. The latest sentencing statistics reveal that in 2019, 99% of males aged 21 or over received a sentence of immediate imprisonment in England and Wales. Scotland is similar and almost all of those convicted receive a sentence of imprisonment. Therefore, the type of punishment is less of a confounding factor when drawing comparisons for this offence. Accordingly, the key comparative questions will usually revolve around the length of a custodial sentence, the factors to be taken into account when sentencing, etc. In drawing comparisons, regard may also be had to public attitudes in both jurisdictions. Recent research commissioned by the SSC examined public perceptions of sexual offences, including in specific case scenarios.[143] However, the purposes and methodology of this research and that in England and Wales differ - making comparisons between these single-jurisdiction studies very difficult. If one wants to know how Scottish and English/Welsh public attitudes to rape compare, a dedicated comparative study using a similar methodology in both jurisdictions is needed.

However, again, if seeking to draw comparisons based on official administrative data, challenges arise. Many of the factors relevant to sentencing for this offence are not present in the official data. Therefore, based solely on this data, only very limited inferences may be drawn concerning how Scottish sentences compare to those in England and Wales for this offence.

4.4 The Value of Comparative Research: Public Confidence

One factor in sentencing for these, and arguably all offences, is public confidence. Within Scotland, limited public knowledge and understandings of sentencing can undermine confidence. For example, the public may not always be fully aware of the differences between the crimes a person may be convicted of. Moreover, the public

[142] A whole life order may theoretically be imposed for this offence in England and Wales but to date it has been reserved for cases involving murder.
[143] Biggs and others (n 126).

may also be unaware of how even the same offence can differ greatly in terms of seriousness: such as the harm caused, the culpability of the offender, etc. This can contribute to public confusion when (misleadingly) similar conduct is apparently sentenced differently. Likewise, imprisonment may be the best-known punishment and there may be a general sense of what this entails. Yet, even here there may not be a full appreciation among the public of how such sentences are implemented.[144] There is likely less understanding of community sentences amongst most people and this issue is not helped by how such sentences are depicted in official data.

From an international perspective, the Scottish judiciary is not alone in attempting to communicate more effectively with the public and comparative research may be useful with respect to public understanding of sentencing. Recent research by the Sentencing Academy[145] documented significant misperceptions of sentencing severity. Respondents in England and Wales were asked to estimate the custody rate for a profile of conviction for an offence (males over 21). Responses were classified into categories. A large under-estimate of the custody rate for this offence was defined as percentages of 60% or less. A second group was defined as modestly under-estimating the custody rate (between 60% and 85%). Finally, average estimates between 85% and 100% were classified as 'roughly accurate'. Results showed that approximately half the sample (48%) fell into the first category, providing estimates well below the actual custody rate.[146]

This research contextualises public attitudes to sentencing. Although a majority of the public in both jurisdictions regard sentencing as too lenient, this view is based on inaccurate knowledge of actual sentencing patterns. Comparative research offers some avenues for ameliorating this shared difficulty: it helps to clarify the precise cause of the issues, expand domestic views of what does and does not work in this context, etc.

[144] Tata (n 119).
[145] Jonathan Bild and Julian V. Roberts (2021) *How accurate are Public Estimates of Sentencing Practice?* London: Sentencing Academy.
[146] Similar trends emerged when respondents were asked to estimate the custody rate for burglary. See Roberts, Bild and Hough (2022).

4.5 The Relevance of Comparisons Between England and Wales Guidelines for Scottish Sentencing

As noted, Scotland does not yet have offence specific guidelines like England and Wales. Instead, guidance on sentencing is available from case law.[147] While the importance of precedent is clear, guidelines from a body such as the Sentencing Council have the benefit of time and scope that court guidelines rarely do. The Sentencing Council can commission research, monitor the operation of guidelines, consult, etc. As such, the Sentencing Council guidelines are well researched, considered by multiple stakeholders, and embody years of experience in terms of how to structure judicial discretion.[148]

Moreover, Sentencing Council guidelines are more accessible than case law. While it may be that Scottish case law (and that of England and Wales) has articulated many of the points covered by the guidelines, extracting these points requires work. By contrast, the Sentencing Council guidelines offer a simple and accessible way to communicate key points about sentencing. For example, in 4.3.2 above, we note that in comparing sentences for rape between the two jurisdictions difficulties emerge because key factors are not reflected in official data. The natural question a reader, or the public, may ask from this is what these factors are. In Scotland, an indicative answer involves a comparatively long search, analysis, and exposition of case law. In England and Wales, an *indicative* answer only needs to have regard to the relevant guidelines.

Given the strengths of the English and Welsh guidelines, the Scottish courts have recognised their potential utility. For example:[149]

> "It is helpful, particularly in offences under UK legislation, to look at the guidelines applied by the English courts and to consider, to the extent that they are relevant, the specific factors on which those guidelines are based."

[147] Scottish courts may provide formal or informal guideline judgments.
[148] This is not to suggest they are perfect or that there is no need to reflect upon them critically. See Julian V Roberts, 'The Evolution of Sentencing Guidelines in Minnesota and England and Wales' (2019) 48 Crime and Justice 187.
[149] *HM Advocate v Roulston* J.C. 2006 J.C. 1, para 17.

Later cases have further confirmed the specific utility of the English and Welsh guidelines concerning our example offence of causing death by careless or inconsiderate driving:[150]

> "As has been recognised in a number of appeals before this court, it is appropriate in cases involving charges of causing death by dangerous driving or careless driving for sentencers in Scotland to have regard to the Definitive Guideline entitled 'Causing of Death by Driving.'"

Likewise, the Scottish Courts have also noted that it is apposite to draw upon the English and Welsh Guidelines on sexual offences guidance in relation to rape offences in Scotland.[151]

Consequently, the courts recognise the value of comparisons between the two jurisdictions in certain contexts. However, while value is recognised, the use of English and Welsh guidance in Scotland is complex.[152] While regard may be had to the guidelines, it has been noted "that does not mean that the guidelines are to be interpreted and applied in a mechanistic way"[153] and that regard should also be had to Scottish precedent.[154]

In *HMA v B,*[155] concerning the offence of rape, the court conceptualised the relevance of the English and Welsh guidelines as a cross-check "to see if any major disparity appears." Yet, in doing so, it seems a key factor against "too rigidly" applying the English and Welsh guidelines was that "in England and Wales there are statutorily defined sentencing purposes (Criminal Justice Act 2003, s.142) which are not directly applicable in Scotland."[156] However, it can be signposted here that as of November 26th 2018, Scotland has its own guideline on the principles and purposes of sentencing. This Scottish guideline sets out principles that are rather similar to those set out in England and Wales (the Criminal Justice Act 2003, s.142 has been replaced by the Sentencing Act 2020 s.57(2)).

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[150] *HMA v Noche* [2011] HCJAC 108, para 29. Available at: < https://www.scottishsentencingcouncil.org.uk/about-sentencing/hm-advocate-v-noche-opinion/>
[151] *HMA v* B 2015 S.L.T. 841, para 13.
[152] Brown, Graeme, 'The English Sentencing Guidelines on Causing Death by Dangerous Driving: The Crown Sentence Appeals in Gatti and Jones' (2021) 170 Criminal Law Bulletin 1.
[153] *Neill v HMA* [2014] HCJAC 67, para 11.
[154] HM Advocate v McKeever [2016] HCJAC 43
[155] *HMA v* B 2015 S.L.T. 841, para 13
[156] *HMA v* B 2015 S.L.T. 841, para 13

Scotland: Aims of Sentencing	England and Wales: Aims of Sentencing
Protection of the public	Protection of the public
Punishment	Punishment
Rehabilitation of offenders	The reform and rehabilitation of offenders
Giving the offender the opportunity to make amends	The making of reparation by offenders to persons affected by their offences
Expressing disapproval of offending behaviour	The reduction of crime (including its reduction by deterrence)

In sum, the Sentencing Council guidelines are relevant to informing the development of Scottish guidelines. Not only can the English and Welsh experience inform about possible ways to structure judicial discretion, but they may carry lessons for communicating sentencing to the public. Of course, this is not to say the model used in England and Wales is perfect or universally praised. However, whether or not one adopts, modifies or rejects this approach, it still provides a host of lessons to draw upon, if only to avoid mistakes.

4.1 Implications from the Experience of England and Wales?

The sentencing guidance available to courts in England and Wales carries some useful experience on which Scotland can reflect, albeit with important qualifications. Most notably, it is not always possible to directly read across from England and Wales sentencing levels and ranges to guide any ranges for consideration in Scotland. For example, as discussed, while the offence definitions for causing death by careless or inconsiderate driving are comparable, there are important differences in terms of the available sanctions. More generally, as highlighted in Section 4.5, how best to use and compare the English and Welsh guidance for Scotland is an open question. It may be

that the model of England and Wales (or elsewhere) offers useful insights into how to structure judicial discretion while suitably protecting individualised sentencing, ensuring consistency, and improving public confidence. Certainly, Scottish courts have been willing to have regard to English and Welsh guidance, although this comes with caveats, and it is unclear precisely how far this regard ought to extend. Indeed, the principal utility of the English guidelines may lie in the aggravating and mitigating factors which are likely to be common to the analogous offence in Scotland.

Chapter 5: Conclusions

Scotland has a separate legal system with a distinct history. It will therefore always, in some ways, be different from any other country and reform will present some unique challenges and questions in the Scottish context. However, while these distinctively Scottish traits cannot be ignored, Scotland's position is not entirely different from other jurisdictions.

Across various countries, key questions to be addressed include what sentence is proportionate for a given offence and offender combination, what factors aggravate and mitigate an offence, what should the aims of sentencing be, where should the custodial threshold be set, what sentence types are effective (in terms of resources, deterrence, rehabilitation, etc), and how can sentences promote public confidence. In this regard, the experiences of other jurisdictions can be informative. Indeed, such comparisons are to a degree necessary in order for jurisdictions to learn from each other and it would be unfortunate if this did not occur. Bearing the above in mind, this review has set out some of the theoretical and practical challenges that are encountered when attempting to draw valuable comparisons between different legal jurisdictions and offences.

From this, a complex picture emerges. On the one hand, comparative work (with appropriate care and sensitivity) can offer new insights into key issues. On the other hand, in the absence of research employing a single common methodology, comparisons are often difficult. Therefore, it can be inappropriate to simply draw *direct* comparisons between, for instance, England and Wales and Scotland. However, there are opportunities to make proper direct comparisons if there is research funded to do so. Though, for now, caution is needed when comparing different sources of data and ad hoc studies with different methodologies.

5.1 Insights from England and Wales

To briefly exemplify some possibilities and limitations for comparative work we have focused here on Scotland and England and Wales. These are two jurisdictions where strong similarities exist and, in some instances, criminal offences are comparable or even shared. Within the UK, England and Wales have the most established guideline system. This system has a long history and significant experience which the SSC may well find helpful. Indeed, to the extent that "sentencers in England and Wales and in

Scotland adopt remarkably similar approaches to decision making"[157], experience from England and Wales can offer valuable insights which may be relevant to Scotland.

As we have noted, the sentencing guidelines issued by the English and Welsh Council may offer assistance regarding the kinds of sanctions appropriate to specific offences and the aggravating and mitigating factors relevant to sentencing a particular offence. Comparisons between jurisdictions can also be useful to determine the relative severity of sanctions appropriate to offences of differing seriousness.

In terms of the limitations of comparative work, even in such closely neighbouring jurisdictions, there remain *grey areas* where simple direct comparisons can be problematic. As the discussion of causing death by careless or inconsiderate driving demonstrated, different sentencing options in the two jurisdictions make comparing sentencing practices on a like for like basis difficult. Moreover, even if the sanctions are the same, our ability to compare practice is hindered by the limitations of official data and methodological challenges noted in Chapter 2. Notably, conduct such as that in our two example offences (while always extremely serious) still covers a range of degrees of offender culpability and harm. This variation is not reflected in sources such as official administrative data on sentence outcomes. Therefore, even with similar offences and sanctions, it is difficult to be sure one is comparing apples to apples.

5.2 Further Research

Both the challenges and potential of comparative insights comparative research is useful. Such research brings to light best practices and may also offer novel insights. As Dubber notes:[158]

> "Comparative criminal law has the potential to make an important contribution to criminal law, a subject that is both more parochial and more in need of critical analysis than any other form of state action through law. That potential remains as yet unrealized."

Comparative approaches can enable lessons learned in other jurisdictions to benefit Scotland. In the context of guidelines, there are advantages associated with different

[157] Millie, Tombs and Hough (n 27) 260.
[158] Markus D Dubber, 'Comparative Criminal Law' pt IV.

approaches to structuring discretion at sentencing and Scotland could critically draw on this: tailoring it as appropriate.[159]

If facilitating comparative research, opportunities would exist to examine pressing questions more thoroughly, without sole reliance on pre-existing research. For example, this paper has made note of the suspended sentence order in England and Wales. As far as we are aware, little research (and no recent research since the creation of the SSC) has sought to contextualise this in terms of Scottish sentencing options. Would Scottish judges benefit from an option equivalent to the SSO? What, if any existing Scottish sentence, would be equivalent? Is the SSO more effective or less effective than a Scottish community sentence? Relatedly, key comparative questions might emerge in relation to community sentences. We have outlined some of the formal differences here between the CPO and CO, but more could be done to profile the real-world differences in how each sanction is used. Such research might examine the effectiveness of various uses of community sentences, not just in England and Wales but elsewhere.[160] Finally, as we have highlighted, there are questions around public attitudes in each jurisdiction that could be better understood through comparative work.

5.3 Summing Up Comparative Research: The Potential and Pitfalls

As we have stressed in this report, direct, one-to-one comparisons between jurisdictions are fraught with difficulty, whether the measure is sentencing trends, the use of custody as a sanction or public attitudes towards sentencing. This difficulty is particularly acute because of the absence of research employing a single common methodology. However, international comparisons *are* possible (especially where there is a similar shared research methodology), and under the right circumstances, extremely useful. This is particularly the case in developing guidelines. Jurisdictions at an early stage of guideline development may well benefit from the experiences of existing sentencing councils and commissions, if only to avoid mistakes.

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[159] Roberts, 'The Evolution of Sentencing Guidelines in Minnesota and England and Wales' (n 151) pt VI.

[160] For example, Northern Ireland's enhanced combination order (ECO) has shown promise in evaluations.

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Appendix: Principal Sanctions in Scotland and England and Wales

Table 1A Determinate Sentences of Imprisonment

	England and Wales	**Scotland**
When may it be imposed?	Only if the court is of the opinion that the offence, or a combination of the offence and one or more offences associated with it, is so serious that neither a fine alone nor a sentence can be justified. A custodial sentence may be imposed where the court believes it is necessary to protect the public.	Imprisonment can be imposed for a range of offences depending on the circumstances of the offence and the offender. There are statutory presumptions against the imposition of custodial sentences of 12 months or less, against sentencing someone to custody where they have not previously been imprisoned, and against the imposition of a custodial sentence where the offender is under 21.
If Offender aged under 21	If the offender is aged between 18 and 20, the sentence will be served in a young offenders institution.	For non-child offenders aged between 16 and 21 (or older in exceptional circumstances), the sentence will be served in a young offenders institution.
If Offender aged 21 or over	Serve the custodial part of the sentence in prison.	Serve the custodial part of the sentence in prison.
Length of sentence ***See release provisions**	The length of the sentence depends on the seriousness of the offence and the maximum penalty for the crime allowed by law.	The maximum length of imprisonment depends on the court the case is heard in:

	Custodial sentences are reserved for the most serious offences and are imposed when the offence committed is "so serious that neither a fine alone nor a community sentence can be justified for the offence (s.230(2) of the Sentencing Code). Parliament has also introduced minimum sentences for some serious offences that must be imposed unless there are exceptional circumstances.	- Justice of the Peace Court = 60 days - Sheriff Court (summary) = Up to 1 year - Sheriff Court (solemn) = Up to 5 years - High Court = Up to life Where the offender has been held in pre-trial remand, the judge must consider whether the sentence should be "backdated" to account for this. This changes the notional date of incarceration rather than the sentence length.
Usage	Used in approximately 7% of convictions (33% of convictions for indictable offences where it is the most common sanction).	Used in approximately 15% of convictions.
Release Provisions	The majority of prisoners are released after serving half their sentence. Those serving a sentence of over seven years for relevant violent sexual offences will be released at the two-thirds point. When a determinate sentence of imprisonment is imposed for 12 months or more, an offender is subject to license conditions after the custodial element has been served.	Prisoners serving a sentence of fewer than 4 years (known as short-term prisoners) are released automatically and unconditionally after serving half their sentence in custody. Prisoners serving a sentence of four years or more (known as long-term prisoners) can be considered for release by the Parole Board halfway through their sentence but may not be released until the final 6 months of their sentence.

Table 1B Life Sentences

	England and Wales	Scotland
Is it compulsory?	Must be imposed on all offenders found guilty of murder. There are a number of crimes for which the maximum sentence is life imprisonment e.g. rape and robbery – this does not mean that all or most offenders convicted of these offences will get a life sentence.	Must be imposed for murder, but also can be imposed for other extremely serious offences.
Length of Sentence	Unless passing a "whole life order" (whereby an offender will spend the rest of their life in prison), when a judge passes a life sentence, they must specify the minimum term an offender must spend in prison before becoming eligible to apply for Parole.	The judge must set a punishment part of the sentence, which is the minimum time the person must spend in prison before they can be considered for release into the community by the Parole Board for Scotland. The minimum period can exceed the expected remainder of the prisoner's natural life (meaning an offender will spend the rest of their life in prison). The longest period to date is 37 years.
Licence	If released, an offender serving a life sentence will remain on licence for the rest of their life.	If released, an offender serving a life sentence will remain on licence for the rest of their life.
Recall	If they are considered a risk to the public, they can be recalled to prison. They do not need to have committed another offence to be recalled.	Can be recalled to prison if they breach the terms of their licence.

Table 1C Extended Sentences

	England and Wales	Scotland
What is an Extended Sentence?	They provide extra protection to the public and are imposed in certain types of cases where the court has found the offender is dangerous, and an extended licence period is required to protect the public from the risk of serious harm.	They provide extra protection to the public. Combines a period in prison with a further set time of supervision in the community (the extension part).
When can one be imposed?	Any offender aged 18 or over may be given an extended sentence if: - The offender is guilty of a specified violent, sexual or terrorism offence - The court assesses the offender as a significant risk to the public of committing further specified offences - A sentence of imprisonment for life is not available or, justified, and - The offender has a previous conviction for an offence listed in Schedule 14 of the Sentencing Code or the current offence justifies an appropriate custodial term of at least 4 years	Any offender aged 18 or over may be given an extended sentence if: - The offender is guilty of a sexual offence where the court intends to pass a determinate sentence of imprisonment of any length - The offender is guilty of a violent, (on indictment) abduction, or terrorism offence where the court intends to pass a custodial sentence of at least four years - The court considers that the period (if any) of licence to which the offender would normally be subject would not be adequate for the purpose of protecting the public from serious harm from the offender - A sentence of imprisonment for life or an OLR is not available or justified

How long can the extension period be?	The judge decides how long the offender should stay in prison and fixes the extended licence period up to a maximum of 8 years. The combined total of the custodial term and extension period cannot be more than the maximum sentence for the offence committed.	The extension period of the sentence can be up to 10 years. The combined total of the custodial term and extension period cannot be more than the maximum sentence for the offence committed.

Table 1D Suspended Sentences

<table>
<tr><td></td><td>England and Wales (No direct Scottish equivalent but see SDS, Admonishment, and CPO)

A suspended sentence order is to be treated as a sentence of imprisonment.</td></tr>
<tr><td>Duration</td><td>A suspended sentence can be imposed in respect of any period of imprisonment of at least 14 days but not more than 2 years.

The suspension period (operational period) may be for a period of between 6 months and 2 years.</td></tr>
<tr><td>Number of Potential Requirements</td><td>The court must be satisfied that the custody threshold has been passed.

There are 12 possible requirements under s.287 of the Sentencing Code:

<table>
<tr><td>Unpaid work</td><td>Rehabilitation activity</td><td>Programmes</td><td>Prohibited activity</td><td>Curfew</td><td>Exclusion</td></tr>
<tr><td>Residence</td><td>Foreign travel prohibition</td><td>Mental health treatment</td><td>Drug rehabilitation</td><td>Alcohol treatment</td><td>(If under 25) attendance centre</td></tr>
</table>

The number of requirements that can be imposed is not limited, but where there are two or more different requirements, the court must take into account whether the combination of requirements is compatible.

The period during which the defendant is required to comply with those requirements is known as the supervision period.

The court must ensure that any requirement imposed avoids any conflict with the offender’s religious beliefs or any other relevant order to which he may be subject.</td></tr>
</table>

How Common	Used in approximately 3% of cases (approximately 18% of all sentences imposed for indictable offences).
Review of Suspended Sentence	The Court may provide for review of a suspended sentence order at specified intervals.
What if the Suspended Sentence Order is Breached?	If the defendant does not comply with the requirements or is convicted of another offence, they are likely to serve the original custodial term in addition to the sentence they get for the new offence. More onerous requirements may be imposed on the defendant, or he may be fined for the separate breach offence up to £2,500.

Table 2 Community Orders / Community Payback Orders

	England and Wales – Community Orders	**Scotland – Community Payback Orders**
Minimum and Maximum Possible Duration	No minimum and maximum of 3 years (up to 300 hours of unpaid work)	6 months minimum and maximum of 3 years (up to 300 hours of unpaid work or other activity requirements)
Number of Potential Requirements	At least one requirement must be imposed for punishment and/or a fine imposed in addition to a community order. There are 15 potential requirements: 1. Up to 300 hours unpaid work requirement 2. Rehabilitation activity requirement 3. Programme requirement 4. Prohibited activity requirement 5. Curfew requirement 6. Exclusion requirement 7. Residence requirement 8. Foreign travel prohibition requirement 9. Mental health treatment requirement 10. Drug rehabilitation requirement	Unless the CPO is used in place of a fine, there is no limit on the number of requirements which can be imposed by the court. There are 10 potential requirements: 1. Offender supervision 2. Compensation 3. Unpaid work or other activity requirement 4. Programme requirement 5. Residence requirement 6. Mental health treatment requirement 7. Drug treatment requirement 8. An alcohol treatment requirement 9. Conduct requirement

	11. Alcohol treatment requirement 12. Alcohol abstinent and monitoring requirement 13. (If under 25) attendance centre requirement 14. Electronic compliance monitoring requirement 15. Electronic whereabouts monitoring requirement	10. (Where a breach of an order) Restricted Movement Requirement It can be imposed alongside a restriction of liberty order (RLO) or a drug treatment and testing order (DTTO).
When imposed	A CO is available if the offender is 18 or over when convicted and the offence does not warrant a custodial sentence.	Can be a standalone sanction or imposed in addition to another sentence e.g. alongside a fine,
Usage	Used in 7% of convictions.	Used in 22% of convictions.
Breach	If an offender sentenced to a community order fails to comply with the requirements of the order without reasonable excuse, the institution responsible for monitoring compliance with the order will bring the offender back to court and the court will assess the extent of the offender's compliance with the order before determining what penalty, if any, to impose for a breach.	Offenders who break the conditions of a CPO can be returned to court where the judge can vary the order or give them a different sentence for the initial offence – such as a fine, an RLO, or imprisonment. It is court practice to treat concurrent CPOs as one order for the purposes of a breach and consecutive CPOs as individual orders. However, for consecutive CPOs, in the event a single order leads to a breach, the court may be consider the appropriateness of all orders. The commission of a further offence (barring a conduct requirement) may not be a direct breach of the order. However, if an offence is committed which contravenes a

		requirement, and guilt is established, this may result in the CPO being breached through failure to comply with that requirement.

Table 3 Deferred Sentence and Structured Deferred Sentence (SDS)

	England and Wales	**Scotland**
When appropriate	The court may defer sentencing for a number of specified purposes.	Provides a structured intervention for individuals post-conviction but before sentencing. Can be used for those with underlying needs that can be addressed through social work and/or multi-agency intervention, but without the need for a court order. SDS was introduced with low tariff offending in mind to save the need to up-tariff those with underlying needs to more onerous disposals but has since been expanded.
Purpose of the sentence	To allow the court to consider: - The offender's conduct after conviction. - Any change in the offender's circumstances. - To permit a restorative programme to take place.	If the offender responds to the intervention and stays out of trouble during the deferral period, then this can result in a lesser sentence (including an admonition). Alternatively, the SDS may be used to assess or enhance the suitability of another community disposal.
Maximum deferment period	6 months	No statutory limit on the deferral period. However, as an SDS requires interventions, it will normally be at least 4 weeks, and a 3-month deferral (up to 6 months) is typical. Longer SDS periods (e.g. 9-12 months) are possible, but at this point, another higher tariff disposal (such as a CPO) may likely be considered more appropriate.

Breach	If an offender is convicted of an offence during the deferment period or fails to comply with any requirements imposed by the court during deferment, the court may issue a summons or warrant of arrest.	If an offender fails to engage or comply with any requirements imposed by the court during deferment, at review, the court can withdraw the SDS and issue another disposal.

Table 4A Fines

	England and Wales	Scotland
What determines the level of fines?	The court should determine the appropriate level of fine, which must reflect the seriousness of the offence and that the court must take into account the financial circumstances of the offender. The maximum fine allowed in both the magistrates' courts and the Crown Court is unlimited (the maximum in magistrates' court for offences committed before 12 March 2015 is £5,000)	Fines are based on how serious the crime is and the offender's financial means. The highest level of fine that can generally be given is set by law depending on which court the case is heard in. - Justice of the peace court = up to £2,500 - Sheriff court less serious cases (summary) = up to £10,000 - Sheriff court/High Court = no maximum fine.
Collecting Payment	The court should avoid double recovery, and where the means of the offender are limited, priority should be given to compensation overpayment of any other financial penalty.	The offender can be told to pay the fine all at once or in smaller amounts over time by instalments.
How common	The most common criminal sentence: 2019 – approximately 4/5ths of all sentenced offenders received a fine. (For indictable offences, a custodial sentence is the most common disposal).	The most common criminal sentence following conviction but less common than in England and Wales. Financial penalties account for fewer than half of all disposals (46% in 2019-2020)

Table 4B Compensation Order

	England and Wales	Scotland
What is a Compensation Order?	The court must consider making a compensation order in any case where personal injury, loss or damage has resulted from the offence. It can either be an ancillary order or a sentence in its own right.	This orders an offender to pay money to the victims of their crime. It can either be an ancillary order, or, a sentence in its own right for any personal injury, loss or damage caused directly or indirectly, or alarm or distress caused directly, to the victim. Cannot be imposed alongside a CPO, but a CPO may contain a compensation requirement that is functionally similar (see Table 2).
Procedure	Compensation may be ordered for such amount as the court considers appropriate having regard to any evidence and any representations made by the offender or prosecutor. The court must also take into account the offender's means. Compensation orders are paid off before fines.	The judge sets the amount to be paid. Payment of any amount under a compensation order is made to the clerk of the court who pays the correct account to the person entitled.
Breach	There is no data on whether the sums awarded are ever in fact paid. There may be issues of enforcement.	Only the court can enforce the order. Offenders who do not keep up with payments can face another disposal such as being sent to prison (or detention if the person is under the age of 21).
Maximum compensation order	There is no statutory limit on the amount of compensation that may be imposed in respect of offences for an offender aged 18 or over. However, regard is to be had to the means of an offender.	The size of the order will depend on a number of factors: - The seriousness of the charge that someone is appearing on

	A compensation order shall not exceed £5,000 where a magistrates' court imposes such an order on an offender aged under 18.	- The maximum fine which can be imposed by the sentencing court and - The offender's personal and financial circumstances. The court may impose a fine and a compensation order for the same case.
Usage	Used 4,242 times as the principal disposal in 2020-2021 (No data on use as an additional order).	Used as the main penalty in 791 cases in 2019-2020. (No data on use as an additional order).

Table 5 Admonition

	England and Wales	Scotland
What is an admonition?	There is no equivalent in England and Wales but see Conditional Discharge.	This is a warning to an offender not to commit another crime, but no punishment is given. However, the crime is recorded as a conviction on a criminal record. It may serve a loosely analogous role to a conditional discharge in some cases if used where sentencing comes several months after conviction and the offender has been of good behaviour in that period.
How Common?	N/A	About 17% of convictions result in an admonition

Table 6A Conditional Discharge

	England and Wales	Scotland
When appropriate?	When the court decides that given the character of the offender and the nature of the crime, punishment would not be appropriate. The offender is released, and the offence is registered on their criminal record. No further action is taken unless they commit a further offence within a time decided by the court (no more than 3 years). The court can still make ancillary orders, e.g. compensation or costs.	See Absolute Discharge and Admonition
How Common?	Used in 3% of convictions	N/A

Table 6B Absolute Discharge

	England and Wales	Scotland
When appropriate?	When it is 'inexpedient to inflict punishment', the court may make an order to discharge the offender absolutely. No further action is taken since either the offence was very minor, or the court considers that the experience has been enough of a deterrent. The offender will receive a criminal record. The court can still make ancillary orders e.g. compensation or costs.	When it is "inexpedient to inflict punishment" the court may make an order to discharge the offender absolutely. These tend to be reserved for cases where there are extraordinary mitigating circumstances. They can be used for most minor or serious offences. Where there is an absolute discharge, no further action is taken, and no punishment is given. Indeed, in most circumstances, the result is to make it as if there were not a conviction, and at summary level, an absolute discharge can be made without proceeding to conviction (so no conviction is recorded). For sexual offences, an absolute discharge means that the offender will not be subject to notification requirements under the Sexual Offences Act 2003. Moreover, the court cannot make a compensation order alongside an absolute discharge, and the conviction must be disregarded for the purposes of any enactment which imposes any disqualification or disability on the person. However, if the person is convicted of another crime in the future, the order of absolute discharge may be considered as a previous conviction.

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