

The Evolution of Sentencing Guidelines: Comparing Minnesota and England and Wales¹

ABSTRACT

The history of sentencing guidelines has been an exclusively American story until recently. Since 2004, however, other countries have introduced guidelines for courts. This essay explores the contrasting approaches to guidance, as exemplified by the regimes in Minnesota and England and Wales. Unlike the Minnesota guidelines, the English regime adopts a quite different model, one which allows courts greater discretion at sentencing. The English guidelines are also offence-specific; each principal offence category has its own guideline. Courts in England are required to do more processing of the case than judges in Minnesota, following a step by step approach. Until systematic comparative research is available it is hard to determine which approach to structuring judicial discretion is preferable. To a large degree each jurisdiction has created the approach which best fits its sentencing environment. The Minnesota grids are more restrictive in nature, and generate high levels of judicial conformity and consistency. The English guidelines allow greater judicial discretion, possibly at the cost of some consistency. However, the English approach offers sentencers a wider range of guidance, including information on the use of different disposals, the sentencing of multiple crimes, the appropriate level of reduction to reflect a guilty plea and other issues. Neither the Minnesota Commission nor the English Council has been particularly self-critical over the years. The structure of the Minnesota main grid remains largely unchanged since 1980. As for England, although the structure of its guidelines has evolved considerably in structure, the Council has continued to ignore calls for its guidelines to play a more active role in controlling the use of custody as a sanction, and hence reduce the size of the prison population.

Until recently, the history of sentencing guidelines has been an exclusively American story. All that has now changed. Since 2004, several other countries have introduced guidelines for courts. This essay explores the contrasting approaches to guidance, as exemplified by the regimes in Minnesota and England and Wales. While guidelines (and sentencing grids) vary significantly across the US, this essay uses the Minnesota guidelines as an example of grid-based approaches to guidance. The English guidelines are an appropriate comparator since they have been evolving since 2004 and there is a limited, (but growing) research record on which to draw. Modified versions of the English guidelines now exist in South Korea, Uganda, Nigeria, Jamaica, and several Gulf states.

Courts in most common law countries have long enjoyed wide discretion at sentencing, guided only by light-touch appellate review. All this changed in 1970s with the introduction of presumptive sentencing guidelines. Guidelines were first implemented in a US jurisdiction and then proliferated across the country (for profiles of state guidelines, see Kauder and Ostrom, 2008; Mitchell, 2017). Guidelines drafted by a Commission have since been adopted in 18 states as well as the District of Columbia and at the federal level (Frase, 2019) Barkow and O'Neill describe the birth of the sentencing commission as 'One of the most significant modern developments in criminal law' (2006, p. x). Minnesota established a commission in 1978 and in many respects its guidelines have proved the most influential. The best-known US sentencing

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guideline comprises a two-dimensional grid and is soon to mark its 40th anniversary.² Sentencing grids share several common features. Most incorporate two primary dimensions (offense seriousness and criminal history); offenders receive a criminal history score based on the number and nature of prior convictions; contain dispositional and durational sentence recommendations; are sometimes presumptively binding upon courts; and provide little additional guidance on sentencing factors or over-arching considerations such as sentencing for multiple convictions and plea-based sentencing discounts (for discussion of the diversity of sentencing guidelines across the US, see Frase, 2005; Frase, 2019; Frase and Mitchell 2019).

To date, no other country has adopted a two-dimensional matrix structure for its guidelines.³ However, elements of the US guidelines can be discerned in the alternative schemes, many of which contain grid-like matrices. These contain ‘starting point’ sentences – which courts use as a point of departure, moving up or down to reflect relevant sentencing factors -- and sentence ranges for specific crimes, or categories of crime. The key difference between the US guidelines and those introduced elsewhere is that the latter are all offence-specific. For example, the Korean guidelines which are modelled on the English format (discussed later in this essay prescribe a standard sentencing range, applicable in most cases, as well as a mitigated and an aggravated range (Sentencing Commission of the Supreme Court of Korea, 2014). Jurisdictions considering adopting guidelines for courts now have a range of models from which to choose. This essay attempts to provide insight into the merits of the two principal methods of structuring discretion at sentencing.

Despite the common objectives of guidelines scholars rarely make comparisons across systems. A number of authors have called for more comparative research to assess policies and structures across the US (e.g., Reitz, 2013; Stemen and Rengifo, 2012; Subramanian and Shames, 2013) but few such analyses have been conducted and fewer still compare the US to guidelines in other countries. Reitz (2013) provides the only examination of the English guidelines within the context of the US experience. The limited comparisons typically relate one set of state guidelines to another, or to the federal guidelines. This essay bridges the literatures on guidelines in the US and beyond. More specifically, I compare the English regime to the Minnesota experience. My purpose is to highlight some important differences with a view to drawing some lessons from the experience with guidelines outside the United States. I pay particular attention to the structure of the two sets of guidelines. Although scholars have explored aspects of the State guidelines (e.g., Frase, 2005), few have asked questions about their fundamental structures.

Overview of Essay

Part I explores the origins of the English guidelines. Part II describes the nature of the English Council. Part III explores the structure of the English guidelines, while Part IV summarises the limited empirical research upon the English guidelines. Part V contrasts the English and the Minnesota guidelines. This section explores the way that the two sets of guidelines deal with some key issues, including: the relationship between the guidelines and prison populations; the structure of the guidelines (a small number of grids vs many offence-specific and generic

² Some states such as Alabama and Virginia use worksheets which combine offense severity and criminal history rather than a grid (see Mitchell, 2017) for a summary of cross-jurisdictional comparisons.

³ The grid structure was studied and rejected by the Western Australian government (in 1990), the Canadian Sentencing Commission (1986), the New South Wales Law Commission (1996), the Sentencing Commission Working Group in England and Wales (2008) and South Korea (2009).

guidelines); the degree of discretion allowed courts; and the role of previous convictions. Part VI draws some preliminary conclusions and suggests some priorities for comparative research.

I. Origins of the Minnesota Commission and English Council

Several publications have discussed the origins of the US guidelines and in particular the Minnesota Commission (Tonry, 1993; Frase, 2005; Parent, 1988). This literature identifies the following triggers for the guidelines: rising state prison populations; a growing awareness of racial and other disparities in prison admissions and populations; a lack of offense-based proportionality (crimes involving property accounted for a high proportion of prison admissions); and a desire to make sentencing outcomes (and hence prison populations more predictable). Many of these problems were attributed to, or were seen to be a consequence of, excessive indeterminacy in sentencing. This fuelled a growth of interest in more determinate or structured sentencing. Addressing the ‘vexing issue’ of disparate sentencing was particularly critical to the Minnesota decision to create a Commission (Parent, 1988, p. 1) and was a common objective of several early guidelines (Kilaru, 2010). The pressing nature of these problems may explain why Commissions settled on a guidelines format that would ensure consistent application and achieve rapid changes to sentencing practices. Cometh the hour, cometh the author: an important volume published in the 1970s had offered a solution to these problems.

Judge Frankel’s ‘Criminal Sentences – Law without Order’ (1972) is generally accepted as the first proposal for sentencing commissions and guidelines (Weisberg, 2012). In fact, prototypes had appeared much earlier, in Victorian England. An early sentencing monograph proposed a commission which would devise guidelines to ‘bring about an approach to uniformity’ (Cox, 1877, p. xix). A few years later a clear prototype guidelines system foreshadowing the current scheme appeared in an article entitled “Can Sentences be standardised?”. The author advocated adoption of a sentencing table and guidelines system with sentences for common crimes, based on judicial practice, and containing “starting points from which the judge would make his reckoning” (Crackenthorpe, 1900, p. 114). He also noted: “That there is at present no uniform scale of punishment – that equal justice is not meted out – is a notorious fact which requires no proof” (p. 104). Finally, another Victorian had observed that ‘the mode of fixing the lengths of sentences is from beginning to end little more than guessing’ (Spencer, 1860).

These writings resulted in a key development, namely the 1901 ‘memorandum on Normal Punishments’ prepared by Lord Alverstone for the judges of the King’s Bench Division (see Radzinowicz and Hood 1979; Wilkins, 1987). This document established sentencing levels for various permutations of six offence categories (Radzinowicz and Hood, 1986). However, these rudimentary ‘guidelines’ were not updated implemented, and there was little further public discussion of sentencing guidelines in England until the late 1980s, once the US experience became known. The evolution of the current sentencing guidelines has been documented in earlier publications (e.g., Ashworth, 2008; Ashworth and Roberts 2013b; Ashworth and Wasik, 2010; Wasik, 2014). However, a brief summary may help to contextualise the subsequent discussion.

The Court of Appeal began to issue guideline judgments in the 1980s, although as with other common law jurisdictions they were relatively rare, covering only a small percentage of offences. Courts enjoyed wide discretion at sentencing, guided only by limited appellate review.⁴

⁴ An earlier set of guidelines covering most offences had existed in the magistrates’ courts for a longer period although these were not legally binding. In contrast, magistrates’ courts must now follow the

The standard of review was high; an appellate court interfered with a lower court sentence only when it was wrong in principle or resulted from an error in law.

Pressure began to build on the government to act on two growing problems: an increase in the size of the prison population and concern about the existence of sentencing disparities. With respect to the former, in the key period of 1993-1998, the prison population grew rapidly. The population increased by more than 24,000 prisoners in this short period alone (Ministry of Justice, 2013, p. 6). Guidelines began to be seen as a plausible solution, and the US Commissions served as a possible model. An academic conference involving scholars from the US and the UK generated an important volume of essays addressing the guideline options (Wasik and Pease, 1987). Over the next few years specific proposals were advanced (see Ashworth and Roberts, 2013, p. 34) and a significant step was finally taken with the creation of the Sentencing Advisory Panel (SAP) in 1999. This body was conceived to provide advice to the Court of Appeal, which would draw upon the Panel's advice in crafting appellate judgments. The SAP had a broader membership than the Court of Appeal, including lay members.⁵ It also had a research capacity, and conducted empirical research which could then be considered by the Court of Appeal.⁶ Within five years the Panel published draft guidelines on 12 offences, and the Court of Appeal generally followed the Panel's advice when crafting their judgments (Ashworth, 2008).

Guidance arrangements for English courts appeared to have stabilised at this point in time. However, in 2000 the government launched a sentencing review which ultimately recommended additional changes (Home Office Sentencing Review, 2001). The Review expressed concern about sentencing disparities and recommended a new statutory framework which, among other elements would require guidelines based upon graded seriousness levels, 'entry point' or starting point sentences as well as guidance on a range of other sentencing issues (2001, Chapter 8). In addition, the Review proposed creation of a new authority to supplement the work of the Panel and the Court of Appeal (for more detailed discussion of the Review's recommendations, see Tonry, 2004, Chapter 5).

A second statutory body, the Sentencing Guidelines Council (SGC) was duly created in 2003. Unlike the SAP, the SGC had a judicial majority, perhaps reflecting concern that any agency with powers to issue guidelines should be primarily judicial. The SAP and the SGC were designed to complement each other, with the SAP providing draft guidelines for the SGC which issued guidelines for courts. The first such guidelines appeared in 2004.⁷ The SGC clearly had rejected the grid-based concept in favour of offense-based guidelines accompanied by guidelines applicable across all forms of offending, including one dealing with offense seriousness. The first offense-based guidelines contained multiple categories of seriousness, each with a range of sentences. For example, the guideline for assault provided four categories of harm, based upon the level of injury to the victim. Courts would identify the level of harm reflected in the case. The guideline then provided a starting point sentence and a sentence range for each level of harm,

guidelines issued by the Sentencing Council (see Ashworth 2003). The existence of these earlier guidelines will have facilitated acceptance by Magistrates of the Sentencing Council's more binding which are the subject of this essay.

⁵ Initially the Panel had eleven members, with four drawn from the judiciary.

⁶ The Panel commissioned research on many sentencing issues, including public attitudes towards: burglary and rape offences; offense seriousness and culpable driving offenses causing death (e.g., Roberts, Hough, Jacobson, and Moon, 2008).

⁷ These covered the determination of offense seriousness and the use of new sentences.

and the guideline prescribed a stepped decision-making process for courts to follow (Sentencing Guidelines Council, 2008). As will be seen, in 2010 the SGC was replaced by a new Council which began to issue its own guidelines with a new structure.

At this point there were effectively two sources of guidance for English courts: the SGC and the Court of Appeal. Growing concern over the prison population and the inability to accurately predict future prison trends led the government to launch two additional inquiries. The first of these by Lord Carter (in 2007) highlighted the rising prison population: by 2007 it was the highest on record (81,547). The report noted the alarming projections of the prison population which predicted more than 100,000 prisoners within seven years (Carter, 2007) and criticised official projections of the size of the prison estate which were very inaccurate. The review identified the loose nature of the SGC guidelines (in contrast to Minnesota) as a reason why prison projections were far less accurate in England (Carter, 2007). Lord Carter clearly saw a need for a more structured sentencing framework implemented by a single guidelines authority (2007, p. 3). At this point then, the move towards more binding guidelines was driven by a desire to better predict (and constrain) the prison population; concern over disparity receded in prominence.⁸ It is ironic that if we fast-forward to the present, there appears to be no interest on the part of governments or the Sentencing Council itself, to use the guidelines to curb the recent drift towards more, and longer prison sentences. The essay returns to this critical issue at a later point.

Recommendations from Lord Carter's review led to the creation of the Sentencing Commission Working Group (2008) with a more specific mandate to review the guidelines, as well as the statutory bodies responsible for guidance. The Working Group visited several US state commissions and subsequently recommended significant changes to the English guidelines regime. Having studied the Minnesota grid-based guidelines the Working Group concluded that the 'inflexibility' of the US grid models 'makes them unsuitable and unacceptable in England and Wales' (2008, p. 31). The Group identified the weak compliance requirement in England as the principal reason why it was hard to predict sentencing patterns and hence prison populations (p. 7). At that time courts were required only to 'have regard' to the guidelines, and the Working Group concluded⁹ that more rigorous wording would ensure greater compliance with the guidelines, leading to more predictable patterns of prison admissions and projections.

The government acted on many of the Working Group's recommendations and legislated a new guidelines regime in the Coroners and Justice Act 2009. The wording of the compliance requirement was tightened by changing from '*must have regard to any relevant guideline*' to '*must follow any relevant guideline*' (Ashworth, 2010; Roberts, 2011). With respect to the guidelines authority, in 2010 both the SAP and the SGC were replaced by the Sentencing

⁸ Research published at the time continued to document sentencing disparities. For example, one official report published at the same time as the Carter Review found that the custody rate and the average custodial sentence length both varied significantly across the 42 criminal justice areas in England and Wales (see Mason et al., 2007).

⁹ There are examples of one jurisdiction drawing upon expertise from another, the Working Group appointed a leading US sentencing expert, (Kevin Reitz) as academic advisor. Reitz provided an invaluable US perspective for the Working Group and was instrumental in several key recommendations including the tightening of the compliance requirement and creation of a more comprehensive sentencing database which would permit adequate monitoring of the use of the guidelines by courts. Similarly, the Home Office Review of 2001 and subsequent developments were influenced by the writings and input of Michael Tonry who was working in the UK during this period (see Tonry, 2002, 2004).

Council of England and Wales (SCEW). The rest of this article is concerned with the nature and outputs of the SCEW.

II Structure of The Sentencing Council of England and Wales

The English judiciary has historically opposed the imposition of more structured sentencing. A good example may be found in the 1979 report of the Advisory Council on The Penal System. This Council recommended a thorough overhaul of the maximum penalty structure in order to align the statutory maxima more closely to contemporary standards and levels of punishment. More specifically, the Council recommended amending the historically high and unrealistic maximum penalties. The government declined to implement the recommendations largely because of judicial resistance. The judges took the view that the high maxima were necessary to capture cases of exceptional seriousness. This suggests judicial concern to preserve significant degree of discretion as reflected in the range of sentence available to courts. Why then, did the English judiciary ultimately accept the creation of definitive sentencing guidelines? The explanation lies in the membership of the Sentencing Guidelines Council and subsequently the Sentencing Council, the nature of their guidelines, the relaxed statutory compliance requirement and the wide guideline sentence ranges. In a nutshell, the guidelines proved acceptable to the judiciary once it became clear that they would be devised by a primarily judicial body, would be independent of government and the legislature, and would still permit courts a significant degree of discretion.

Knapp (1987) identified three models for a sentencing commission: ‘representative’; ‘elite’ and ‘judicial’. In terms of this classification (and other characteristics), US sentencing commissions are ‘all over the map’ (Dansky, 2010, p. 159; for a concise summary of Commission composition see Mitchell, 2017). One common element is that judges are always in the minority.¹⁰ The Minnesota Sentencing Guidelines Commission is comprised of 11 individuals, including three judges. The other members include representatives of several criminal justice professions and three places are reserved for members of the general public, at least one whom must have been the victim of a felony crime. The Commission conforms to the model described by Knapp as ‘representative’, rather than ‘exclusively judicial’ or ‘elite’ (1987, pp. 117-118).

The Sentencing Council¹¹ of England and Wales does not fall neatly into one of Knapp’s three models of a sentencing commission. The judiciary constitute a majority of the Council’s 14 members although representatives of key stakeholders are also included.¹² There are no members of the general public on the SCEW, and the perspective of victims is represented not

¹⁰ Judges are heavily outnumbered on some Commissions. The least judicial is found in North Carolina where the Sentencing and Policy Advisory Commission has 30 members of whom only three are sitting judges. The very diverse membership of this Commission includes a representative of the Retail Merchants’ Association, a private citizen appointed by the governor, and six elected politicians. The Ohio Commission appears to be the largest, with 31 members, including 11 judges.

¹¹ It is unclear why the English guidelines authority (and those found in other countries such as Australia) use the term ‘Council’ rather than ‘Commission’. Although the functions, powers and activities vary, all these organizations provide advice to courts at sentencing. My personal view is that the US term was avoided in order to distance the English and Australian bodies from the grid-based guidelines which have for years been regarded negatively by judges in these other countries. Ironically, the original Victorian proposals for a guidelines authority used the term ‘Commission’ (e.g., Crackenthorne, 1900).

¹² Including representatives of the police; probation; victims’ groups; and an academic. Barkow (2012) argues that ‘Guidelines are at their best and most effective when they are based on sound empirical data and professional expertise’ (p. 1601). I agree, and the English Council conforms to this description.

by an individual crime victim (as is the case in several Australian Sentencing Councils¹³) but rather a professional working in a victim-related organization. Some commentators have called for a broader and more diverse membership including ex-offenders¹⁴, but this constituency remains unrepresented on Council (see Allen, 2016; Bottoms, 2018). Nor are any members drawn from the general public, although the Sentencing Advisory Panel (replaced by the current Council in 2011) included lay members (as do the Australian sentencing councils). Finally, the SCEW is apolitical in the sense that it has no members representing political parties or with ‘political experience and connections’ (Frase, 1993, p. 369). The US Commissions are clearly more political and populist than their counterparts in the United Kingdom. For example, it is unclear why there should be an equal number of members of the public and judges on a Commission (as is the case in Minnesota).

The English Council was created in close conjunction with the senior judiciary. The Lord Chief Justice serves as President and membership of the Council overlaps with the Court of Appeal. The judiciary also appear to have influenced the nature of the enabling statute which created the Council. This legislation specifies the kinds of guidelines the Council should be developing and specifies the duties of a court, including the compliance requirement. This significant degree of judicial engagement was critical to ensuring acceptance by sentencers.¹⁵ Judicial dominance of the Council has been questioned by some scholars,¹⁶ but the English guidelines would not have emerged if Parliament had created a Council modelled on the Minnesota Commission; English judges would have rejected guidelines issued by a body without a judicial majority.

A judicial majority ensures greater independence. The Minnesota governor makes appointments to the MSGC and while an elected politician with responsibility for the court system (the Secretary of State) appoints members to the English Council, decisions are taken in conjunction with the Lord Chief Justice. To date, neither the government nor Parliament has intruded into the Council’s activities, and the Council’s judicial majority may explain this uncharacteristic reticence on the part of legislators. In contrast, the Minnesota Commission has been under almost constant political pressure since its creation, resulting in an escalation in sentence severity over time. In 1991 Frase noted ‘the pressure for increased sentence severity and legislative control’ (p. 732). In contrast, the English guidelines have not been amended in response to any external influences. The judicial dominance of the Council may carry a cost,

¹³ The Australian Sentencing Councils share a number of characteristics with the English Council and US Commissions. For example, they all publish sentencing statistics of one kind or another. The principal difference is that unlike the US and English bodies, the Australian Councils do not issue guidelines; their role is therefore primarily to inform the judiciary and the wider community about current issues and trends in sentencing (see for example the website of the Sentencing Advisory Council, Victoria).

¹⁴ Indeed, Judge Frankel proposed that his Commission would include ‘present or former prisoners’ (1972, p. 120).

¹⁵ Some Australian Councils (such as the Victorian Sentencing Council) have no judicial members, but these bodies do not issue guidelines.

¹⁶ Tonry (2004) argued against a judicial majority for the Council on the grounds that the presence of judicial members would inhibit the development of guidelines (see also Berman, 2017, pp. 103-104). Ashworth (2010) advocated for the inclusion of lay members, and more recently Allen (2016) urged the Council to include more non-judicial members.

however. One consequence of this judicial presence will be seen in the more discretionary nature of the English guidelines (discussed later in the essay).

Statutory Functions of English Council

The enabling statute for the Minnesota Commission and guidelines imposed few duties on the Commission (Frase, 1997, p. 389). In contrast the enabling statute – the Coroners and Justice Act 2009 – goes much further than similar legislation in the US or elsewhere in prescribing the nature of the guidelines or the role and responsibilities of the Council. In addition to specifying the membership of the Council, it also provides clear direction as to the structure of the guidelines the Council should issue, the duties of the Council, and also of courts with respect to compliance with the guidelines. As will be seen below, this tighter legislative mandate has consequences for the work of the Council.

Descriptive or Prescriptive Guidelines?

An important consideration for any guidelines authority concerns its role in the sentencing environment. Should a Sentencing Commission prescribe sentencing practice – or simply reflect existing trends in order to make them more consistent? Guidelines can be descriptive in nature, reproducing current judicial practice, or prescriptive, with a mandate to change current practice. The Minnesota guidelines are prescriptive (Frase, 1993). In its first report to the legislature the Commission noted that in developing its guidelines ‘we have been informed by, but not bound to, current practice’ (1980, p. 3).¹⁷ von Hirsch (1987) argued that: “The enabling statute [of any commission] should make clear that the commission’s role is a *policy-making* one” (p. 62, emphasis in original). A related issue concerns the relationship between the guidelines and prison capacity. Most US guidelines are sensitive to the prison population and have the potential to prevent serious overcrowding. The Minnesota Commission interpreted its enabling legislation ‘to mean that the guidelines should produce prison populations which do not exceed the current capacity of state correctional institutions’ (1980, p. 2). Chapter 23 of the Minnesota Laws 1978, ch. 244 et seq. directs the Commission to “take into substantial consideration current sentencing and release practices and correctional resources, including but not limited to the capacities of local and state correctional facilities.” U.S. academics appear to share the opinion firmly expressed by Frase that ‘an assumption of limited prison capacity is an essential component of guidelines development’ (1991, p. 734).

Things are rather different in England. Unlike the Minnesota statute, the English legislation ascribes no power to the English Council to issue guidelines which respond to the size of the prison population. For this reason, the Council issues guidelines based upon judicial practice and designed to promote a more consistent approach to current practice; they *reflect* rather than *refract* judicial behaviour. As the Chair of the Council noted in testimony before a Parliamentary Committee: “The first thing we look at when we are devising our guidelines is “What is the current sentencing practice of the court? By and large, that guides us as to the levels of sentencing and the sort of factors that are important in our guidelines.”¹⁸ This is the approach

¹⁷ One explanation for the English Council’s reluctance to issue guidelines which depart more significantly from current practice may be apprehension that this will undermine judicial confidence in the guidelines, leading to less compliance (for discussion of this issue in the US context, see Kilaru, 2010, p. 134).

¹⁸ Testimony of the Council’s Chair before the Justice Select Committee on July 11, 2018. <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/justice-committee/prison-population-2022/oral/86817.pdf>

taken in other countries where judicially-based guidelines have been introduced (see Dennison, 2014, p. 9). Some UK scholars have criticized this approach, arguing that the Council should address the high (relative to other western European nations) prison population in England and Wales by amending its guidelines (e.g., Allen, 2016).

This is not the whole story, however, since the Council has issued a few guidelines intended to change judicial practice. Four examples are illustrative. First, when devising its drug offences guideline, the Council concluded that the sentences being imposed on low-level drug couriers ('mules') were disproportionately high. To correct this anomaly, the Council issued a guideline to reduce levels of sentencing for drug offenders with a lesser role (see Sentencing Council, 2012c). Subsequent research by the Council and independent researchers found that the guideline had successfully resulted in shorter prison terms for this profile of drug offender (see later section on impact of the guidelines). A second example concerns the use of suspended sentences of imprisonment. For decades, courts in England and Wales used the suspended sentence order to replace community orders rather than the terms of immediate custody they were conceived to replace (see Roberts and Ashworth 2016; Bottoms 1981). The tendency was particularly pronounced in the period 2005-2014 when the volume of suspended sentences rose dramatically while the use of community penalties declined significantly (see Irwin-Rogers and Roberts, 2019, Table 1). Having noted this misapplication of the suspended sentence the Council issued a guideline to ensure that suspended sentence orders were used only in cases where custody would have been imposed (Sentencing Council, 2016a).

A third example is the guideline for health and safety offences which was designed to increase the magnitude of fines imposed, and as will be seen, achieved the intended result (see Part III). Finally, the sexual offences guideline (2013) and the terrorism offences guideline (2018) also attempt to change current practice, albeit in the opposite direction (Sentencing Council, 2018a¹⁹). For example, the sentence for the most serious cases of rape increased under the Council's guideline as did the sentence for certain terrorism offenses. These instances are corrections to departures from a proportional regime (or the misapplication of a specific sanction) rather than significant changes in policy, or an attempt to constrain the size of the prison estate.

The essential nature of the English guidelines remains conservatively descriptive, and the question is 'Why?' Even if the Council wished to change sentencing trends, there are principled and practical impediments to reducing the size of the prison estate. The principled objection is that Council has no obvious legal authority to use its guidelines to reduce the volume or duration of custodial sentences. Although the Council's drug offences guideline had this effect for one profile of offenders, this was an attempt to restore proportionality rather than to reduce the overall volume of drug offenders being sent to prison. Nothing in the enabling statute directs the Council's attention to the size of the prison population or the need to avoid prison overcrowding. The only statutory reference which might justify Council issuing guidelines that would reduce the prison population concerns the effectiveness of sanctions. S. 120 11(e) of the Coroners and Justice Act 2009 states that in discharging its functions, the Council must have regard to 'the cost of different sentences and their relative effectiveness in preventing re-

¹⁹ See testimony of the Council's Chair before the Parliamentary Select Committee on July 11, 2018, where he noted that with respect to some sexual offences, and knife crimes, 'We deliberately took the decision that that sort of offending required heavier sentencing' and acknowledged that this 'will have had some effect on lifting sentences'.
<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/justice-committee/prison-population-2022/oral/86817.pdf>

offending'. The Council could interpret this direction to conduct a review of current sanctions, and if it concluded that short prison terms were not cost effective²⁰, it might then re-issue all its guidelines having adjusted them to promote suspended sentences and community orders at the expense of short prison terms. To date, Council has declined to take such a step, but were it to do so, it could affect the volume and duration of admissions to custody.

The practical problems arise from the use of separate guidelines issued sequentially over a lengthy period. The Minnesota Commission can change the size of the prison population expeditiously by reducing the grid sentence ranges (assuming there is no legislative resistance to such changes). For example, it could reduce recommended sentence lengths by 10% across the entire grid. This would result in a reduction in the sentence lengths, (and ultimately a smaller prison population) without disturbing ordinal proportionality – all offences would be affected to the same proportionate degree. Other US Commissions such as the federal Commission could also achieve expeditious reductions in the prison population. However, if the English Council wished to promote a greater use of noncustodial sentences for, say, assault offenders, this would require launching a professional and public consultation and then ultimately issuing an amended guideline. The typical duration for creation, consultation and release of a guideline is approximately 12 months. Moreover, once sentences for assault changed it would also be necessary to review all other guidelines for offenses against the person to ensure that proportionality across offences was not undermined. This re-calibration would then trigger additional rounds of consultation for each guideline, as required by the statute. This limitation is one of the drawbacks of an offence-specific approach to issuing guidelines.

Finally, it is not obvious that sentencing guidelines *should* shoulder the responsibility of constraining or reducing the prison population. There is at least an argument that they should be blind to prison capacity. If there has been a surge in serious crimes, resulting in an overcrowded prison estate, why should offenders sentenced in the aftermath receive milder punishments as a result of the State's failure to provide adequate prison capacity? Frase (1991) argued that a Commission should respond to rising crime rates by recommending increases in prison capacity 'or greater use of ...intermediate sanctions' (p. 736). As a practical matter the legislature should be alerted to an impending problem of prison overcrowding, but the principle of adjusting sentence lengths or the dispositional line to respond to rising or falling crime rates is questionable. Moreover, should sentences rise back to pre-crisis levels of severity once the prison population falls back to earlier levels?

Consistency of Outcome versus Consistency of Approach

As noted, Frankel's seminal volume inspired the creation of the Minnesota Sentencing Guidelines Commission (see Parent, 1988; Frase, 2005; Berman 2017). Disparity was the problem, and guidelines the solution. In light of this, it is unsurprising that the Minnesota guidelines assumed the form of a simple grid which ensures predictable and consistent outcomes. More recently, however, scholars have called into question this emphasis on reducing disparities, linking such a goal to the high use of imprisonment. Adelman (2013) argues that 'too much focusing on reducing inter-judge sentencing disparity is a major mistake' (p. 304). Barkow (2012) wrote that 'the [guidelines] movement's reaction against the prior regime often placed too much emphasis on uniformity and not enough on individualization' (p. 1620) while Stith (2000)

²⁰ The UK Ministry of Justice has conducted extensive multivariate research to explore the relationship between different sanctions and recidivism rates. More specifically, the research compared recidivism rates for short custodial sentences, suspended sentence orders, and found that the one-year reoffending rate was highest for those sentenced to short-term custody (see Mews et al., 2015).

and others have drawn similar conclusions about the federal guidelines. The grid-based approach has also been criticised by European scholars such as Wandall (2004) who argues that the Minnesota guidelines ‘bind sentencing structures closely to a concern for sentencing outcomes’ (p. 26) and concluded that the Danish approach of discretionary sentencing without guidelines was ‘preferable’ (p. 42).

The English Council has on numerous occasions stressed that its guidelines were not designed to promote greater consistency per se, but a more consistent approach to sentencing. The first Chair of the Council noted that the primary aim of the Council was to ‘promote a clear, fair and consistent *approach* to sentencing’ (Leveson, 2013, p. 3, emphasis added). The distinction between promoting consistency and promoting a consistent approach is unclear but it appears to distance the Council from what it regards as an American approach to guidelines, namely consistent outcomes. The English Council²¹ has steered well clear of making any claims about reducing disparity, achieving greater consistency, or even a more consistent approach to sentencing (although as noted later, there is evidence that sentencing is more consistent). This constitutes another important difference between the English Council and the US Commissions, all of which as Tonry noted ‘claim that its guidelines have reduced sentencing disparities compared with sentencing patterns before guidelines took effect’ (1993, p. 152).

Development of Guidelines: Concurrent or Consecutive?

Unlike the Minnesota Commission, the English Council chose to develop and issue its guidelines *seriatim*; there was no ‘Big Bang’ moment in the English guidelines experience when all offences became subject to a guideline. The incremental approach confers benefits but also creates challenges. Guidelines are more expeditiously implemented if all offences are assigned to a single grid, or if all offence-specific guidelines are created at the same time. Constructing a separate guideline with different sentence recommendations, starting point sentences, and mitigating and aggravating factors takes much longer. The Council might have taken several years to develop all its offence specific guidelines in preparation for a mass release. Instead, it chose to identify key offences and to issue guidelines one by one. Council began with high volume offences or crimes for which guidance appeared particularly necessary. The early guidelines included assault, burglary and drug offences.²² The first guideline (assault offences) appeared in 2011 (see Sentencing Council 2011; Roberts and Rafferty, 2011). Most of the others have been offence-based guidelines but the Council has issued general guidelines applying to all cases. By 2020, a decade after its creation, the Council will have issued approximately 40 stand-alone guidelines covering all principal offence categories as well as several which apply across cases. In short, the English guidelines have taken much longer than those in Minnesota to cover all crimes.²³

²¹ The more recently created Scottish Sentencing Council adopts the more direct approach found in the U.S.. S 2a of the enabling statute states the Council ‘must, in carrying out its functions, seek to — (a) promote consistency in sentencing practice’. (Criminal Justice and Licensing (Scotland) Act 2010).

²² Other jurisdictions have taken the same incremental approach. The South African Law Commission proposed that guidelines would be developed one-by-one, over a five-year period, although its recommendations were not implemented (see Law Reform Commission of South Africa, 2001). The Ugandan guidelines, modelled on the English system also adopted the gradual approach to guideline development (Kamuzze, 2014).

²³ Other Councils have taken even longer. The Scottish Sentencing Council was created in 2015 and is also issuing its guidelines sequentially. As of January 2019, the Council has yet to issue its first guideline.

The second challenge arising from the offence-by-offence approach to guideline development is that greater effort is required by the Council to maintain ordinal proportionality across offences. When developing the manslaughter guideline for example, Council had to ensure that the sentence ranges and starting points were aligned with the guidance for the most serious assaults, and other personal injury crimes.²⁴ It is easier to preserve ordinal proportionality when all offenses are assigned to a single grid. On the other hand, the advantage of the consecutive rather than concurrent approach is that the Council can learn by trial and error, improving its guidelines over time, and this it has done. The first guideline (for assault offences) attracted some resistance from courts and critiques by practitioners;²⁵ accordingly, the Council revised its format in later guidelines (see example to follow).

III. Structure of the English Guidelines

The principal structural difference between the two regimes is that Minnesota employs one of three grids²⁶ to accommodate all offenses, whereas the English guidelines provide separate (and individualised) guidelines for different categories of offending.²⁷ The original Minnesota grid applied to all offenses; the MSGC has subsequently created separate grids for sex offenses and drug offenses (see Minnesota Sentencing Guidelines Commission, 2018), but all three grids share a common structure (see Appendix A for an extract from the main Minnesota grid).²⁸

The Minnesota grid was effectively a transposition of the parole guidelines grid devised by Wilkins and his colleagues (see Wilkins, 1987; Tonry, 1993²⁹; Frase, 2005). The chief architect

²⁴ This task was further complicated by constant legislative interventions in sentencing, as well as judicial interpretation of revised statutory sentences. For example, in 2003 Parliament introduced a comprehensive new regime of mandatory minimum periods of imprisonment for different categories of murder, all of which are subject to imprisonment for life. These new sentences then had the effect, whether intended or not, of uplifting sentences for other homicide offenses such as manslaughter, as well as the most serious assaults.

²⁵ The guideline contains categories of higher and lesser harm and culpability, but no ‘intermediate’ or ‘medium’ category. Some practitioners complained that this complicated the task of assigning cases to categories.

²⁶ The first published example of an offence-specific guideline can be found in the report of the Canadian Sentencing Commission (1987, Appendix A). The Canadian proposals were well-received by US scholars such as Norval Morris and Andrew von Hirsch. However, once the Canadian Parliament declined to implement the recommendations, the Commission’s model sank without trace. There has been little further discussion of guidelines in that country except for academic commentary.

²⁷ To my knowledge, none of the many publications addressing guideline construction in the early years of guideline development discussed the possibility of offence-specific guidelines. The two key volumes in the field (Wasik and Pease (1987) and von Hirsch, Knapp and Tonry, 1987) discuss only grid-based approaches. Nor has any publication since then raised the possibility of re-thinking the grid approach.

²⁸ The Drug Offender Grid and the Sex Offender grid have fewer offense levels but the same number of criminal history categories and the same two-dimensional structure.

²⁹ Tonry (1993) notes that the early, voluntary guidelines emerged ‘expressly building on experience with parole guidelines’ (p. 140). The voluntary guidelines then evolved into presumptively binding guidelines while retaining the two-dimensional structure. Tonry (2013) describes the creation of sentencing guidelines as the ‘logical next step’ after parole guidelines, but this still does not justify the automatic read-across of the grid format.

of the parole (and then sentencing) grid wrote that: ‘By the end of the 1970s most paroling authorities had developed some form of guidelines... The transition to sentencing guidelines was a natural development’ (Wilkins, 1987, p. 14). Well, the Minnesota and other US Commissions certainly thought it natural. But are the parole and sentencing functions really that interchangeable? The dimensions of seriousness and ‘probability of recidivism (almost entirely determined by reference to prior record’ (Minnesota Sentencing Guidelines Commission, p. 13) are arguably more apposite to the decision to release than the more complex (and multidimensional) determination of sentence. Put simply, the parole decision is largely a function of the prisoner’s risk of re-offending, and criminal history is more relevant to risk than retribution (see Tonry, 2010). In contrast to parole boards, sentencing courts balance potentially competing objectives of reducing risk and recognising harm (retribution). The literature does not discuss why Minnesota adapted the parole grid for the purposes of sentencing. The familiarity of the parole grid and the relative ease with which it could be transposed to sentencing probably explains the Commission’s decision. There has been no discussion since as to whether a two-dimensional structure remains the most appropriate one to follow, and whether criminal history should still constitute one of the two dimensions. Perhaps there should have been.

A. The English Guidelines Format

The first English sentencing guideline appeared in 2004, approximately a quarter century after the inception of the Minnesota guidelines. Yet specific proposals had emerged in England in the early 1980s. The current English format may be traced to several publications by Ashworth (1983; 1987). In these works, he outlined the principal elements of a sentencing guideline, namely the grading of offenses, lists of factors which might aggravate or mitigate³⁰ as well as guidance on specific key issues such as criminal history and sentence recommendations. He also proposed that sentencing levels be determined by examining current sentencing practice in conjunction with guidance provided by the Court of Appeal. This general approach was ultimately adopted by the Sentencing Guidelines Council and then its successor, the Sentencing Council. Despite some structural variation reflecting the nature of the offence, all the offence-specific guidelines contain a number of common elements. Broadly speaking, they require courts to follow a step-by-step methodology when determining sentence. A court in Minnesota will focus on the appropriate cell in the grid covering the offense being sentenced. The sentencing exercise is more protracted and complicated in England and Wales. Applying an offense-based guideline, a sentencer must follow up to nine steps, making decisions at each step of the process. This focuses the court's attention to a greater degree on the factors affecting the nature and severity of sentence.

Example of an English Offense-based Guideline: Street Robbery

The Minnesota guidelines reflect a modified just deserts rationale, although the enabling statute articulates no single rationale (Knapp, 1987). The English guidelines generally incorporate two primary dimensions, harm and culpability, the principal components of a proportional sentence.

³⁰ For example, Ashworth noted that ‘there would be lists of aggravating and extenuating factors, which would help the sentence to decide whether to go higher or lower than the [guidelines] recommended penalty.... [and] a list of mitigating factors to be considered in conjunction with any representations on behalf of the offender.’ (1987, p. 101). This structure corresponds closely to the sentencing guidelines issued by the SCEW. Ashworth’s article highlights the importance of comparative research. Ashworth would have been well aware of developments in the US having, as editor of the *Criminal Law Review* published several articles describing the US experience.

The guidelines developed in other jurisdictions have also adopted the harm-culpability combination rather than the US crime-criminal history alternative.³¹

The street robbery guideline lays down nine separate steps for courts to follow. Figure 1 presents an extract from the robbery guideline consisting of the categories at step one and the factors which determine which category is appropriate for the case being sentenced. (All nine guideline steps for this offence can be seen in Appendix B.) In discussing the guidelines methodology, I assume that courts do work through all the steps. There seems no reason to question the professionalism of sentencers in this respect, but equally there is no way of knowing whether they do. In this sense, the English guidelines are more opaque; a court could, presumably, ignore the step by step structure, decide the appropriate sentence and then work backwards to justify the decision. The use of the methodology must therefore be taken on trust.

The first step is the most important as it determines the limits of the sentence range that the court will work within as it proceeds through the remaining steps of the guideline. At Step 1 the court assigns the case to one of three levels of harm, and the defendant to one of three levels of culpability (high, medium and lesser). Consistency at this crucial first step of the guidelines' methodology is promoted by requiring all courts to consider the same set of factors to determine which category of harm and culpability is appropriate. The list of factors at Step 1 which determine category sentence range is exclusive; courts may take other factors into account only later, at Step 2. The exclusive nature of this list is one of the most restrictive elements of the English guidelines and aims to promote a more uniform approach across courts.

³¹ These include South Korea (Park, 2010) and China (Chen, 2010; Roberts and Pei, 2016). The New Zealand guidelines also follow this approach, although they have yet to be implemented (Young and King, 2013),

Figure 1: Extract from Robbery Guideline

STEP ONE

Determining the offence category

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

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

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

Culpability demonstrated by one or more of the following:

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

Harm

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

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

Once a court has determined which of three categories of harm and culpability is appropriate (guided by the factors listed in the guideline and recommendations from the advocates), it proceeds to Step 2 which contains a matrix with starting point sentences and sentence ranges for each category. For example, if the court decides the offence involves intermediate harm (category 2), committed by an individual of the lowest culpability, the guideline provides a starting point sentence of two years imprisonment and range of one to four years' imprisonment. The court begins at the starting point sentence and then moves up and down within the category range considering a non-exhaustive list of mitigating and aggravating factors (along with any other factors proposed by advocates). This exercise results in a provisional sentence. Thereafter, the court works through additional steps, including awarding credit for any assistance to the police or prosecution (Step 3) or for a guilty plea (Step 4, see Appendix B). These two considerations are external to considerations of harm or culpability and for this reason they are considered at a separate step. For example, assuming the provisional

sentence after considering all relevant sentencing factors was three years imprisonment, the court would reduce this by one third if the defendant had entered a guilty plea at first court appearance. The one-third reduction arises from the recommendations contained in a separate guideline regulating plea-based discounts (discussed later in this essay).

'Generic' Guidelines applicable to all offenses

Guidance from the Minnesota Commission is contained within the guidelines manual and the three grids. No additional stand-alone guidance is issued, and this is typical of the US guidelines.³² At best they offer some broad policy statements. In addition to its offence-specific guidelines, the English Council has issued several 'generic' guidelines which apply across cases. The most important of these (in terms of volume of cases affected) concerns plea-based sentence reductions.

Plea-based sentence reductions offer a good illustration of the benefits of guidelines which involve more than a grid and a guidelines manual. Judgments from the Court of Appeal have provided guidance regarding the appropriate levels of reduction and the factors affecting the magnitude of reductions, but a stand-alone guideline creates greater certainty and transparency. The statutory foundation for the practice in England and Wales is found in s. 144 (1) of the Criminal Justice Act 2003: *In determining what sentence to pass on an offender who has pleaded guilty to an offence in proceedings before that or another court, a court must take into account: (a) the stage in the proceedings for the offence at which the offender indicated his intention to plead guilty, and (b) the circumstances in which this indication was given.* This provision offers no guidance as to the magnitude of reductions appropriate to pleas entered at different stages of the criminal process, or the circumstances which might justify greater or lesser reductions. For guidance on these (and other) issues, courts follow the definitive guideline on sentence reductions.

The guideline states that defendants who enter a plea at first court appearance are entitled to a maximum sentence length reduction of one-third. The size of the reduction then diminishes the later the guilty plea is entered; defendants who change their plea to guilty on the day of trial should receive a reduction of only 10% (Sentencing Council, 2017). The guideline thus creates a sliding scale of discounts to reflect the timing of the plea. Timing is critical to determining the level of reduction awarded, an arrangement consistent with other common law jurisdictions (Roberts and Bradford, 2015). Finally, plea may affect the nature as well as the quantum of punishment. Offenders convicted of a crime which justifies a term of custody may receive a noncustodial sentence in return for an early guilty plea (see Sentencing Council, 2017, p. 6).

As noted, the English guidelines reflect a proportional sentencing model. Plea discounts are unrelated to harm and culpability. Accordingly, if the discounts are very striking, proportionality is undermined. If offenders convicted of the same serious crime receive very different sentences because one pleaded guilty and the other was convicted after trial, proportionality and retributive parity will be affected. For this reason, some method of constraining the power of plea to reduce sentence is necessary. In this respect, the guilty plea guideline is a useful element of the English regime in terms of reducing variability and protecting

³² The US Sentencing Commission has published several documents (referred to as 'primers') to supplement the grid and the manual. For example, one deals with aggravating and mitigating role adjustments, and others deal with the use of prior convictions. These documents are 'provided by the Commission's Legal Staff is offered to assist in understanding and applying the sentencing guidelines.'. They elaborate the guidelines and are not the equivalent of the English generic guidelines. See https://www.ussc.gov/sites/default/files/pdf/training/primers/2017_Primer_Role.pdf

offense-based proportionality. Prior to the guideline, guilty plea reductions were less predictable, and courts periodically awarded reductions significantly above one-third in order to ‘crack’ or resolve impending trials of great complexity or involving multiple defendants. Some defendants who ultimately pleaded guilty were denied any reduction on the basis that the crime was particularly heinous, a practice which still occurs in courts in Canada and other jurisdictions (see Cole and Roberts 2018). These departures from a clearly established set of recommended reductions undermine fairness. They also impair the objectives of the reductions, namely to elicit prompt pleas from defendants who elect to waive their right to trial. The existence of the definitive guideline prescribing specific reductions appropriate to the stage at which the plea was entered provides legal counsel and their clients a clear idea of what reduction to expect. The absence of a binding guideline regulating plea-based sentence discounts in Minnesota means that the likely benefit of entering a plea is unknown until the parties have secured a plea agreement.

Other Guidelines

The English Council has issued guidelines on a range of other issues. One guideline regulates the use of consecutive and concurrent sentences when a court is sentencing an offender convicted of multiple crimes. Such cases are not uncommon – the English Council estimated that approximately 40% of cases involved a defendant convicted of more than one offense. The sentencing exercise is much more complicated when the offender is convicted of multiple offenses, often varying in seriousness (see Ryberg, Roberts, and De Keijser, 2017). Accordingly, guidance is useful. The English guideline provides guidance on the ‘Totality’ principle. This requires courts to consider the totality of the offender’s crimes, and by using concurrent sentencing to ensure that the total sentence is not disproportionate (Sentencing Council, 2012a). The guideline explains the conditions under which a court would use concurrent as opposed to consecutive sentences in a way that preserves proportionality and prevents the total sentence from becoming excessive (as it would do if all sentences were simply added together).

To date, all guidelines whether grids containing levels of seriousness (Minnesota) or offence-specific guidelines (England) focus on crimes. Yet courts can also benefit from guidance with respect to the application of different punishments. The English Council has issued a guideline which covers punishments rather than crimes. The dispositions guideline covers the three principal sanctions (immediate imprisonment; suspended sentences and community orders). The guidance is relatively skeletal and has been criticised for this reason by academics (see Bottoms, 2018). In addition, as Ashworth (2018) points out, the Court of Appeal paid little attention to the guideline when issuing judgments in multiple offense appeals. Nevertheless, there is merit in the principle of *sentence*-specific guidelines. Besides these topics the Council has issued guidelines on sentencing young persons; allocation to the superior court; breach of community sanctions; and determining crime seriousness. The Council is in the process of issuing guidelines regarding the sentencing of offenders with mental health issues. A significant proportion of offenders appearing for sentence suffer from one or more mental health problems. A guideline which highlights these issues and proposes ways of considering them in the application of guidelines is surely a progressive useful reform.

As of January 2019, 32 guidelines have been issued (see Sentencing Council website).

IV. Evaluating the English Guidelines: Research Findings

Although they do not issue guidelines, the Australian Sentencing Councils have been subject to official evaluations, usually five years after their creation (e.g., New South Wales Department of Justice, 2008). Surprisingly, the UK government has yet to conduct a comparable evaluation of the English Council³³ although two independent evaluations have been published (Allen, 2016; Bottoms, 2018). In addition, the Council's guidelines have attracted critical commentary from academics and practitioners (e.g., Padfield, 2013; Dhami, 2013; the Secret Barrister, 2017; Cooper, 2013; Lovegrove, 2010). Padfield (2013) for example questioned whether the guidelines have generated fairer and more consistent outcomes, and a recurrent critique is that notwithstanding the 2009 amendments to the compliance requirement, the guidelines still permit too much judicial discretion at sentencing (e.g., Ashworth 2010; Young and King 2013). No attempt will be made to summarise this literature, although the academic critiques focus on the failure of the Council to address the comparatively high use of incarceration as a sanction, while some practitioners argue that the guidelines have undermined the individualised nature of sentencing (and possibly also the role of personal mitigation). The empirical literature on the guidelines is growing, but remains sparse relative to the US. A number of key questions have yet to be answered. Nevertheless, some preliminary conclusions may be drawn, particularly with respect to the use of the guidelines by the courts.

A. Offence-specific Guidelines

Over the past 40 years the US guidelines and in particular the Minnesota guidelines have attracted much research and commentary. In light of their shorter lifespan, far less has been published on the English guidelines.³⁴ As with the Minnesota and other US Commissions, the English Council publishes an annual report and also monitors the impact of its guidelines. Since the total guideline range is so wide (running up to the statutory maximum in some cases), the percentage of sentences imposed within this range, and therefore compliant with the law, is relatively meaningless. In addition, prior to issuing a guideline the Council always predicts the effect of the guideline on prison places (see, for example, Sentencing Council, 2018c). Again, the analysis is not very informative. Since the guidelines are designed to reflect judicial practice, the predicted effect of the guideline is almost always to be resource-neutral. In order to understand the effects of the guidelines it is necessary to turn to the limited academic research. In keeping with the orientation of the guidelines, most of this research has explored the question of whether the guidelines are consistently applied, rather than whether the outcomes are more consistent after introduction of the guidelines. Academic research suggests a positive impact on consistency across courts and the application of the offence-specific guidelines.

Pina-Sanchez evaluated the impact of the assault and burglary guidelines³⁵ and concluded that 'consistency improved in all the offences studied after the new guideline came into force.' (2015, p. 87; Pina-Sánchez and Linacre (2014)). Irwin-Rogers and Perry (2015) explored the application of guideline sentencing factors in cases of domestic burglary and their analyses

³³ The Justice Select Committee in Parliament reviews each Council guideline, and periodically invites the Council's Chair to appear to discuss the Council's work, but the level of scrutiny is minimal. The Committee usually suggests minor amendments to the guidelines rather than examining the role and effectiveness of the Council (e.g., House of Commons Justice Committee, 2011).

³⁴ For essays examining the English guidelines see Ashworth and Roberts (2013a) and Roberts (2015).

³⁵ These guidelines were the first issued by the Sentencing Council (in 2011 and 2012, see Roberts and Rafferty (2011) for discussion) and have attracted the most research.

‘provided a strong indication that the courts were sentencing in a manner that was consistent with the domestic burglary guideline and in particular the principle that that the factors in step one of the guideline should have more of an influence on sentence severity than the factors in step two’ (p. 210). As noted earlier, the drug offences guideline was designed to change current sentencing practices and research suggests it has succeeded. Fleetwood, Radcliffe and Stevens (2015) studied sentencing for low-level drug offenders and concluded that ‘the sentencing guideline appears to have achieved greater proportionality’ (p. 435). That is, the disproportionately severe sentences imposed on low-level drug offenders had come down. These studies, while restricted in scope, suggest the English guidelines have had a positive effect on promoting consistency and proportionality. More research is clearly needed, however.

Other guidelines designed to change judicial practice have also had an impact. The guideline for Health and Safety Offences was intended to increase the severity of sentencing for corporations and individuals (Sentencing Council, 2014b, p. 10). Webster (2017) reviewed sentences imposed within a year of the new guideline coming into force, and found that the median corporate fine per breach had doubled, while the fines imposed on the most serious organizations increased very significantly. Custody was used more frequently for serious breaches by individuals, although the numbers of convictions were too small to draw general conclusions.

A critical question concerns the impact of the guidelines on the prison population. Frase (2019) has noted that states operating guidelines have generally experienced slower prison growth than states without guidelines. Analyses of sentencing trends over the period 2007-2016 reveal that for certain offence categories, particularly crimes of violence and sexual aggression, the courts have been imposing more and longer prison sentences (Ministry of Justice, 2016). Since this period included the introduction of the guidelines, the key question is whether they have contributed to this increase in sentencing severity. Research shows that the guidelines have neither constrained nor increased the size of the prison population. This is perhaps to be expected in light of the fact that they were not designed to achieve reductions in the prison estate (see above). But there are some exceptions. Prior to issuing a guideline, the Council projects the likely impact on the need for prison places, and once the guideline has been operating for several years the Council revisits its projections. To date, these analyses have suggested a generally neutral impact. However, three early guidelines have had an unanticipated effect of increasing the proportion of admissions to custody (e.g., Carline et al., 2018). At the time of writing the Council is currently considering how to address the unanticipated uplift. Taken as a whole however, there is no evidence that the guidelines have contributed to the rising prison population. Nor however, have the guidelines reduced the volume of admissions, although as noted, a number of scholars have urged the Council to pursue a reductionist strategy through its guidelines.

B. Critiques of Guidelines

Research has also addressed, again to a limited degree, some critiques of the guidelines. It has been suggested that the guidelines privilege consistency at the expense of individualisation – a criticism which could also be levelled at the US grids. Browne (2017) argues that ‘The current system of English sentencing guidelines... seeks consistency at the expense of individualised justice’. (p 150). Is there any evidence to support this critique? Roberts et al. (2018) employed two measures of individualisation: (i) the *number* of unique sentence lengths arising from the distribution of all custodial sentences imposed; and (ii) the *proportion* of all cases falling into the most frequently-imposed unique sentence lengths. A distribution of sentence lengths lacking individualisation would require only a small number of specific sentence lengths to capture all cases. If the guidelines have constrained individualisation, more cases will fall into a smaller number of unique sentences: The distribution of sentences will be captured by fewer sentences. Examining all sentences imposed after the introduction of the new guideline revealed that

matters improved³⁶ in terms of this measure of individualisation in sentencing: there were more, not fewer, specific sentence lengths being imposed.

A related critique of the guidelines is that they inhibit individualisation by undermining the consideration of aggravating and mitigating factors. Some advocates have argued that courts have paid less attention to speeches in mitigation, merely checking whether the guideline factors are present in the case. Researchers have tested the hypothesis that mitigation plays a diminished role under the Council's new format guidelines³⁷ by comparing the number of mitigating factors cited by courts before and after introduction of the guideline. Findings revealed no decline in the number of sentencing factors cited by courts. In fact, the new format assault guideline had the opposite effect. Under the previous assault guideline an average of 3.65 sentencing factors were recorded across all cases. This average rose to 4.67 under the new assault guideline, a statistically significant increase. The number of mitigating factors rose, although the number of aggravating factors increased to a greater extent than the number of mitigating factors, reflecting possibly the greater number of aggravating factors contained in the guidelines.³⁸

Assuming these findings replicate across other offenses, what might account for this increased degree of individualisation following introduction of the guidelines? One explanation concerns the guideline structure which requires courts to consider individually a range of sentencing factors. A court sentencing without a guideline will have only submissions from the advocates to guide their application of principles and consideration of mitigating and aggravating factors. In contrast, the English guidelines require sentencers to proceed through a series of steps and this may sensitize courts to important differences between cases, resulting in the use of a higher number of unique sentences. A second possibility is that courts take longer to sentence a case when applying a guideline with nine steps. This may provoke a deeper consideration of the case characteristics, generating greater discrimination between cases – and more unique sentence outcomes. It would be interesting to know whether requiring courts to spend more time determining the sentence leads to a more reasoned or proportionate outcome. It seems likely that sentencing is more expeditious under the grid-based approach, and the question is whether this also has a cost.

C. Research on Public Attitudes to Sentencing

There is evidence, again limited, that the guidelines may have reduced public demands for harsher sentences or public criticism of current sentencing trends. Roberts et al. (2012) report findings from an experimental study involving a representative sample of the British public. All respondents were asked to evaluate specific sentences in a series of cases. One subsample was given information about the sentencing guidelines (the 'informed' group), while the others rated the sentences without any information about the sentencing guidelines. Compared to respondents who had been given no prior information, people who had read about the

³⁶ This finding is striking because it includes data from only the first year following introduction of the new guideline. It is reasonable to expect a new guideline to take at least a year to 'bed down' before achieving its anticipated effect on trial court sentencing practices, yet these data reveal statistically significant effects on individualisation within 12 months.

³⁷ Cooper (2013) argued that 'the Council interprets personal mitigation very narrowly' (p. 160).

³⁸ This may be a weakness of guidelines which prescribe sentencing factors. There will always be more aggravating than mitigating factors, and by listing the factors the imbalance becomes clear. The result will be that as is the case with the English guidelines, aggravating factors exceed the mitigating factors by a considerable margin. What is unclear is whether this conveys a message to court about the relative weight of the two kinds of factors.

guidelines were less punitive. For example, when asked to rate a typical sentence for domestic burglary, 57% of respondents without information about the guidelines rated the sentence as too lenient. Of the group who had been given information about the guidelines only 37% perceived the sentence as being too lenient (see Roberts et al. (2012, Table 5). Moreover, people who had been informed about the guidelines expressed more confidence in the sentencing process (Table 4). The difference in attitudes is consistent with responses to more general questions, 93% of the sample expressed the view that it was ‘a good idea’ to have guidelines. Sixty percent chose ‘definitely a good idea’, 33% ‘probably a good idea’: see Roberts et al., 2012, p. 1083). To the extent that the public become aware of the Council’s guidelines, they may mitigate some criticism of the courts.

The limited research on the impact of the guidelines is encouraging but insufficient. It seems clear that the guidelines have resulted in greater transparency and are generally consistently applied by courts across the country. Many questions remain, however, and I return to research priorities at the end of this essay.

V. Comparing Approaches to Guidance in Minnesota and England

The English guidelines require more from sentencers and provide more guidance on a wider range of issues. This can be demonstrated by considering a case of robbery in which an individual with no prior convictions has pleaded guilty to the offense. Under the Minnesota guidelines, this case falls into level X and Criminal history category I. Given this profile a court must impose a sentence of imprisonment between 41 and 57 months or find ‘substantial and compelling circumstances’ to justify a downward or upward departure. Judicial decision-making therefore focuses on whether such circumstances exist and what sentence within the presumptive range is appropriate. Most of the time the sentence falls within the recommended range (see later sections of essay).

An English court would first apply the robbery guideline, proceeding through the nine steps enumerated above. Yet this guideline is not the only one that the court will have to consider. Since the guideline sentence ranges encompass both custodial and noncustodial dispositions, the court should consult the separate guideline on the use of the principal sanctions (Sentencing Council, 2016, and see above). If the defendant has pleaded guilty, the court will also apply the guideline regulating plea-based sentence reductions (Sentencing Council, 2017) which is discussed later in this essay. Finally, as noted earlier, additional guidelines address the factors affecting the determination of offense seriousness, and also the relationship among different offences if this is a case involving more than one crime.³⁹

The so-called ‘custody threshold’ is an example of the deeper judicial processing required by the English guidelines. Under the Minnesota guidelines, armed with a copy of the grid, the defendant can know well in advance of sentencing whether the case falls in the custody zone of the grid. The sentence that will likely be imposed, can readily be ascertained by consulting the relevant grid. Offenders arrive at the sentencing hearing knowing their fate has largely been

³⁹ As with other Commissions and Councils, and particularly the Sentencing Councils in Australia (e.g., <https://www.sentencingcouncil.vic.gov.au/>), the English Council also publishes a range of statistical and analytic information relevant to sentencing in general and with respect to specific offenses (see <https://www.sentencingcouncil.org.uk/>). The Victoria Sentencing Council publishes ‘snapshots’ of sentencing practices for specific offences. These have proved useful to judiciary who cite them in their judgements. It is unclear how often the English material is accessed by sentencers or whether it affects judicial decision-making.

determined by the decisions of the Minnesota Commission. The dispositional departure statistics suggest that in most cases, this a priori classification will accurately predict whether he is incarcerated. In 2016, mitigated dispositional departures occurred in approximately one third of cases (Minnesota Sentencing Guidelines Council, 2017, p. 27) and aggravated dispositional departures⁴⁰ are extremely rare. Judicial reflection is required primarily to determine whether there are substantial and compelling circumstances to justify overturning the presumptive disposition.

A comparable individual appearing for sentencing in England will have less certainty about the outcome of the hearing because there is less clarity as to whether his or her case will fall into a specific level. The sentence ranges for many offences encompass custodial as well as noncustodial options. For example, the category 3 sentence range for unlawful wounding (maximum penalty of 5 years) runs from a low-level community order to 51 weeks custody.⁴¹ A court must therefore answer the question of whether the custodial threshold has been passed. In resolving this issue, the court will be assisted by submissions from the advocates. Whether the case should be assigned to category 2 or 3 for example, may well be the subject of argument in court among the advocates. In addition, even if the case does appear likely to fall into a guidelines range which only involves custody, consideration of his plea may result in the imposition of a suspended sentence, or even a high-level community order. Compared to offenders in Minnesota, advocates representing offenders sentenced under the English guidelines have more to play for in terms of mitigating the effects of prior offending

The English guidelines are more demanding of judges yet less restrictive than their Minnesota equivalent. Does the English approach lead to a more reasoned sentencing decision? It is unclear what kind of critical test could be devised to determine whether one model is superior. Perhaps all we can conclude until more comparative research is available is that English sentencing involves a more in-depth judicial processing of all relevant variables.

A. Proportionality

Both sets of guidelines purport to reflect a retributive model of sentencing which privileges proportionality, yet they differ in their operationalisation of this concept. Proportionality engages both harm and culpability, and the severity of assigned punishments should reflect some combination of these components. Fox (1994) offered this concise definition: ‘The seriousness of a crime has two main elements – the degree of harm of the conduct and the extent of the offender’s culpability’ (1994, p. 498). More recently, the leading proportionality scholar wrote that ‘The seriousness of crime has two elements: the conduct’s degree of harmfulness and the extent of the actor’s culpability’ (von Hirsch (2017) p. 23).

Sentencing statutes echo and articulate these components. The key provision in England and Wales⁴² is found in s. 143(1) of the Criminal Justice Act 2003: *In considering the seriousness of any*

⁴⁰ As the Commission notes in its latest data release, requests for prison are included in aggravated dispositional departure rates but without these, the rate would be 1% (Minnesota Sentencing Guidelines Commission, 2017, p. 25).

⁴¹ https://www.sentencingcouncil.org.uk/wp-content/uploads/Assault_definitive_guideline_-_Crown_Court.pdf, p. 8.

⁴² Other jurisdictions take the same approach. S. 40b of the Sentencing Law of Israel notes that: ‘The guiding principle in sentencing is proportionality between the seriousness of the offence and the degree of culpability and the type and severity of punishment’ (Roberts and Gazal Ayal, 2012) while S. 718.1 of the Criminal Code of Canada articulates a similar relationship (Roberts and von Hirsch, 1998).

offence, the court must consider the offender's culpability in committing the offence and any harm which the offence caused, was intended to cause or might foreseeably have caused. This provision is re-affirmed by the directions to the Sentencing Council in the Coroners and Justice Act 2009:

When exercising functions under section 120, the Council is to have regard to the desirability of sentencing guidelines which relate to a particular offence being structured in the way described in subsections (2) to (9).

(2) The guidelines should, if reasonably practicable given the nature of the offence, describe, by reference to one or more of the factors mentioned in subsection (3), different categories of case involving the commission of the offence which illustrate in general terms the varying degrees of seriousness with which the offence may be committed.

(3) Those factors are—

(a) the offender's culpability in committing the offence;

(b) the harm caused, or intended to be caused or which might foreseeably have been caused, by the offence;

(c) such other factors as the Council considers to be particularly relevant to the seriousness of the offence in question.

In Minnesota, proportionality is conceptualised differently, and this is clearly reflected in the axes of its grids. Frase (1993) observes that as defined by the Commission: 'The goal of proportionality requires that sanction severity increase in direct proportion to increases in offense severity *and criminal history*' (p. 319, emphasis added). Frase also noted that the Minnesota Sentencing Commission assumed that seriousness and criminal history were 'the only factors relevant to proportionality' (p. 295). The use of prior crimes as a primary dimension determining severity is inconsistent with most retributive⁴³ definitions of proportionality.⁴⁴ The absence of a compelling retributive justification for considering prior convictions at sentencing raises questions about the proportional nature of the Minnesota guidelines. If prior crimes are justified by risk rather than retribution, and if they carry great weight in the sentencing grid, this explains why the Commission adopted the phrase 'modified just deserts' to describe its guidelines. Research by the Commission determined that crime seriousness and criminal history constituted the two principal predictors of sentence outcomes and the grid reflects the primacy of these dimensions (Minnesota Sentencing Guidelines Commission, 1979, p. 4).

As noted earlier, it is unclear from the scholarship on the origins of the Minnesota guidelines whether there was much discussion of alternative non-grid structures, or different dimensions if a two-dimensional format was adopted. If a Commission were to begin its work today, would it adopt a two-dimensional grid? Would it adopt the same two dimensions? It is worth recalling that Judge Frankel proposed assigning offenses to seriousness levels (he suggested five levels; 1972, p. 114) but nowhere did he propose that criminal history should constitute the second dimension of a grid. Frankel included prior record as simply one of several aggravating factors that would be contained within a sentencing code. (This essay returns later to the role of criminal history in both sets of guidelines). It is hard to escape the conclusion that the criminal history dimension of the grid was adopted for three principal reasons: (i) to promote

⁴³ It may be more accurate to state that under the Minnesota guidelines a sentence is proportional to the seriousness of the offence and the offender's risk of re-offending as reflected in his criminal history score.

⁴⁴ Almost all retributive scholars advocate limiting the role of previous convictions or eliminating them entirely from the sentencing equation (see Fletcher (1982) and for conflicting perspectives, Roberts and von Hirsch (2010)).

consistency of application by means of a simple, ‘one felony, one point’ scheme; (ii) to recognize the reality that after the crime, criminal history was the best predictor of sentence outcomes in the pre-guidelines period; and (iii) because criminal history had long been part of the parole guidelines matrix.

B. *Degree of Discretion: Statutory Compliance Requirement*

As noted, in Minnesota, courts have to find “substantial and compelling” reasons before departing from the guidelines. Courts are permitted greater discretion under the English guidelines. In England, the statutory compliance requirement is the following: S. 125 of the Coroners and Justice Act 2009 states that:

(1) Every court--

(a) must, in sentencing an offender, follow any sentencing guidelines which are relevant to the offender’s case, and

(b) must, in exercising any other function relating to the sentencing of offenders, follow any sentencing guidelines which are relevant to the exercise of that function, unless the court is satisfied that it would be contrary to the interests of justice to do so.

This wording suggests a relatively restrictive regime. However, a subsequent provision makes it clear that the constraint upon courts is to impose a sentence within the total *offence* range rather than the *category* sentence range: ‘nothing in this section imposes on the court a separate duty... to impose a sentence which is within the category range.’⁴⁵

For example, consider the offence of assault occasioning actual bodily harm. If a court decides at Step 1 that the case falls into the intermediate category of seriousness it begins to work within a *category* range running from a community order to 51 weeks’ custody. However, for the purposes of complying with the statute the court may impose any sentence within the total *offence* range which is much wider (from a fine to three years’ imprisonment (see Ashworth, 2010) for commentary).⁴⁶ Finally, as in Minnesota, English courts may depart from the guideline range if it would be contrary to the interests of justice to remain within the range. The consequence is that courts have considerable discretion *within* the guideline ranges, as well as the ability to impose a sentence outside the guidelines range, if following the guideline would be contrary to the interests of justice.

To summarise, courts may exercise their discretion in three important ways under the English guidelines. First, although Step 1 of the methodology requires a court to assign the case to a specific category of seriousness (and then sentence within that category’s sentence range), the guideline notes that courts may ‘move outside the category range’ if they believe it is justified by the presence of a significant number of aggravating or mitigating factors. Second, having settled on a provisional final sentence, a court is not bound to remain within the category range of the offence but only the much wider total guideline range. Third, a court may always depart where it would be contrary to the interests of justice to follow the guideline recommendations. The flexibility of the English guidelines is captured in the description offered by the first Chair of the Council in testimony before a Parliamentary Committee: ‘The guideline creates an approach and within that approach *judicial discretion is entirely preserved*.’ (House of Commons

⁴⁵ Coroners and Justice Act 2009, s. 125 (3)(b).

⁴⁶ This definition of compliance was a late amendment to the draft Bill. Previous versions had defined compliance more restrictively, in terms of the category range. Having selected Category 2, a court would have had to remain within Category 2’s sentence range. The final wording of the legislation relaxed compliance requirement to be the total offense range, which is of course much wider (see Roberts, 2011).

Justice Committee, December 14, 2010, p. 12, emphasis added). This surely overstates the case, but it seems reasonable to conclude that judges in England have greater freedom than their counterparts in Minnesota.

C. Compliance and Departure Rates

Departure rates are a key indicator of the health of any guidelines scheme. Monitoring judicial compliance is straightforward under the Minnesota guidelines. The Commission publishes annual statistics of the volume and percentage of dispositional and durational departures from the grid sentence recommendations and ranges. In 2017, slightly more cases were sentenced outside the guideline ranges (50.9% vs 49.1%, see Minnesota Sentencing Guidelines Commission, 2018, Table N). This total includes dispositional as well as durational departures. The Minnesota departure rates have risen steadily over the lifetime of the guidelines, a trend noted by Frase (2005). Although the trends are well documented, there is little commentary on the acceptable level of compliance. For example, is a departure rate of 30% high or low? The issue is worth more attention.

Determining compliance is more complicated in England and Wales. The ‘departure in the interests of justice’ test is of little use as an indicator of judicial compliance, since courts are permitted to impose any sentence which is within the total offence range, which is very wide. The Council publishes these statistics and they reveal the expected: ‘departure’ rates are typically very low, around 5% of all sentences imposed. In 2014, 97% of sentences for drugs, assault and burglary offences fell within the total guideline ranges (Sentencing Council 2015a, Table 1). As noted earlier, this is a consequence of the very broad sentence ranges found in the English guidelines. As is often the case, these statistics capture only part of the picture. Some of the guidelines – particularly those applicable across all cases – have not had the anticipated impact on courts. The guideline regulating sentencing in multiple offence cases is a good example. This guideline is seldom cited by courts (Bottoms, 2018). Ashworth (2018) noted that although this guideline was introduced in 2012, 12 out of 14 appellate judgments dealing with the principle of totality failed to refer to the guideline. If the Court of Appeal saw little need to consult or cite the guideline, it is unlikely to have had much impact upon sentencers of first instance.

The issue of compliance is related to appellate review. In Minnesota, the clarity of definition makes it immediately apparent whether a sentence should be reviewed by the Court of Appeals. The absence of a clear trigger for appellate review means that in England an appeal must be brought by the defendant or the Attorney General. This may suggest that trial court sentencing in England and Wales is less amenable to appellate scrutiny. It is a hard issue to resolve. The appellate jurisprudence in England reveals many examples of appellate intervention, and the Court of Appeal can evaluate the sentence against the relevant guideline. For example, it may note that the trial court placed the case in a higher category than could be justified by the factors determining the appropriate category at step one.

More meaningful compliance data are available for the generic guideline regulating plea-based sentence reductions since this guideline prescribes specific levels of reduction against which judicial practice may be compared. In 2014, fully 89% of offenders entering a guilty plea at the first stage of proceedings (and thereby entitled to the full one-third reduction) were awarded exactly this level (Sentencing Council 2015a, Figure 6). More detailed data confirm the correspondence between guideline recommendations and judicial practice. Table 1 classifies cases into one of three categories: Early, Intermediate and Late guilty pleas (On, or after day of trial) and summarises the levels of reduction awarded in each category.

The guideline recommendations were broadly being followed, with the greatest reductions awarded to offenders who entered a prompt plea ('Early' pleas). Thus 80% of offenders in this category received exactly the guideline recommendation; only 11% of offenders pleading guilty on or after trial onset (late plea cases) received this level of reduction. The reductions awarded to early plea cases cluster more tightly around the guideline's recommendation: Table 1 reveals that almost all (98%) of early plea cases fell within the guideline recommended column (one third) or the columns immediately adjacent.⁴⁷ These data suggest that defendants in England and Wales – and indeed all parties with a stake or interest in sentencing – are better placed than their counterparts in most other jurisdictions where the likely sentence reduction resulting from a guilty plea is far less predictable. This may be one of the most important benefits of the Council's guidelines.

Table 1: Empirical Sentence Reductions Awarded by Timing of Plea, England and Wales

	Greater than 1/3	1/3	21%- 32%	11%- 20%	1-10%	No reduction awarded
Early Plea	9%	80%	9%	2%	<1%	<.05%
Intermediate Plea	3%	34%	34%	22%	6%	1%
Late Plea	1%	11%	9%	24%	49%	6%

Source: Roberts and Bradford (2014)

D. *Single versus Multiple Guideline Formats*

In Minnesota, all offenses are subject to the same two-dimensional grid structure. Given the diversity of categories of offending, is this uniformity wise? The English guidelines vary to accommodate important differences in the offence. A good example of the advantages of adopting an offence-based approach to guidelines (rather than placing all offenses within the same two-dimensional grid) can be found in the English manslaughter guideline (Sentencing Council, 2018a). For most offences, the English guidelines employ two dimensions, harm and culpability. The two dimensions generally carry equal weight and create a two-dimensional matrix (see earlier sections of essay). Unlike most other offenses, and assuming a single victim, the harm of all manslaughter varies little, always entailing the loss of a human life. A manslaughter guideline which contained several different levels of harm would make little sense; what kinds of factors could justify classifying some cases as high harm and some as lesser harm? The culpability dimension is therefore paramount. For this reason, the Council departed from its traditional harm-culpability formula in two important ways.

First, there are no levels of harm, only levels of culpability. For example, the lowest level of culpability is defined in the following way: '*Death was caused in the course of an unlawful act which*

⁴⁷ There is greater dispersal of the later plea cases, particularly the latest category. This more scattered distribution of reductions reflects the complexities of cases where the guilty plea is classified as having been entered late. For example, if there has been unduly delay in disclosure of the prosecution's case, the defendant may well be awarded the maximum reduction of one-third, even if the guilty plea was entered relatively late in the process (see Sentencing Council, 2017).

was in defence of self or other(s) (where not amounting to a defence) OR where there was no intention by the offender to cause any harm and no obvious risk of anything more than minor harm OR in which the offender played a minor role .The offender's responsibility was substantially reduced by mental disorder, learning disability or lack of maturity.' Cases assigned to this category are subject to a starting point sentence of 2 years imprisonment and a sentence range of from two to four years. The limited variation in harm – for instance the degree of suffering inflicted on the victim prior to death – is captured by aggravating factors cited at step two. For example, in the unlawful act manslaughter guideline, the aggravating factors include: 'death occurred in the context of an offense which was planned and premeditated'; and 'offence committed in the presence of children' (Sentencing Council, 2018a, p. 6). As with other guidelines these factors are used by the court to move the sentence up or down within the category sentence range. The second difference is that four culpability levels were employed instead of three. This decision reflected Council's recognition that the much wider range of culpable conduct encompassed by this offence required an additional level to provide more fine-grained guidance.

Drug offenses offer a second illustration of the benefits of varying the guideline structure to better reflect the nature of the offense. Most drug offenders are part of a collective enterprise, even if only loosely defined. Importers supply distributors who hire dealers. Harm is generally captured by the toxicity or danger associated with the illegal drugs. The culpability of the offender in such cases is primarily dependent upon their role in the organization. One of the weaknesses of sentencing drug offenders has been that the harmfulness of the drug has predominated, creating disproportionate sentences for lower-level offenders such as drug mule. For this reason, the drug offenses guideline defines culpability largely in terms of role. Each offense has three levels of culpability defined as 'leading', 'significant' or 'lesser' role (Sentencing Council, 2012b). The Council conducted extensive 'road-testing' with its role-driven format, and this confirmed judicial support for this approach (Sentencing Council, 2012b). Finally, by making role an explicit driver of the offender's level of culpability, the guideline makes it much clearer to the defendant how his category – and hence level of punishment – has been determined. Once this structure has been established at Step 1, the guideline specifies a range of mitigating and aggravating factors which also bear upon the offender's level of culpability; role is therefore the primary, but not the only determinant of the offender's level of blameworthiness.

E. Mitigating and Aggravating Factors

Determining the relevance and weight of sentencing factors lies at the heart of the sentencing exercise. For this reason alone, courts would benefit from guidance on the matter. Concern over the use of extra-legal factors at sentencing led the Minnesota Commission to explicitly proscribe a list of such factors, accompanied by a list of factors which should or should not be used to justify a departure. These lists are useful for promoting a uniform approach to the decision to depart but offer no guidance for distinguishing cases remaining within the guideline ranges. The Commission could have gone much further in its guidance and the English Council does go further. Its guidelines provide more information, and structure with respect to the key aggravating and mitigating factors at sentencing. First, each guideline contains its own bespoke list of relevant factors, although there is overlap across guidelines. Some guidelines contain up to 50 factors for courts to consider.

Second, although it is not explicitly stated, the guideline structure provides some structure to mitigating and aggravating factors. Determining the relative importance of different factors is challenging and is a source of variability at sentencing. The English guideline structure

effectively creates two tiers of factors, those of primary relevance⁴⁸ (located at Step 1⁴⁹) and those of more limited relevance (assigned to Step 2). Sentencing factors relevant to the sentencing decision but unrelated to harm or culpability (state assistance; plea) are dealt with separately at Steps 3 and 4. If all courts have the same basic set of factors to consider, this should promote more uniform outcomes. In addition, the English guidelines also give guidance regarding the cases where certain factors may carry less or more weight. For example, in its rape guideline the Council notes that ‘previous good character or exemplary conduct should not normally be given significant weight’ (Sentencing Council, 2013, p. 11). The Council took the view that good conduct by the offender should carry less weight when the offense involves very significant harm.

F. *Role of Prior Convictions*

The role of previous convictions differs greatly under the two sets of guidelines. The Minnesota guidelines assign a central role to criminal history, which constitutes one of two primary dimensions. As noted, this arrangement arose from importing the structure of the parole guidelines.⁵⁰ Dale Parent, the first Executive Director of the Minnesota Commission, writes that the Commission ‘spent more hours defining the Criminal History index than it devoted to any other aspect of guideline development.’ (1988, p. 65). With the benefit of hindsight, the fruits of the Commission’s labor seem meagre.

Parent’s account of the origins of the criminal history arm of the grid makes it clear that the Commission adopted the approach to prior convictions advocated in ‘Doing Justice’, the seminal book by Andrew von Hirsch (who also served as one of the Commission’s consultants, see Parent, 1988, p. 38). That volume argued that prior convictions enhanced the offender’s blameworthiness or culpability.⁵¹ Again, Parent: ‘The Commission’s perspective meant that criminal history was to be used to increase sentence severity for offenders whose prior record indicated they were more blameworthy. *It was not used to predict which groups of offenders were more likely to commit new crimes in the future.*’ (1988, p. 66, emphasis added). The Commission’s publications also acknowledge this view. In its second progress report to the legislature, the

⁴⁸ The guidelines note that the Step One factors ‘comprise the principal factual elements of the offence’. See https://www.sentencingcouncil.org.uk/wp-content/uploads/Assault_definitive_guideline_-_Crown_Court.pdf, p.4.

⁴⁹ The Step 1- Step 2 distinction is helpful because it guides sentencers as to the relative importance of sentencing factors, but it is not without problems. One obvious difficulty is that the Council must be able to make valid assignment of factors which should be at Step 1 rather than 2. Readers reviewing the factor placements may perceive some anomalies – factors placed at Step 1 when they might more reasonably be classified at Step 2 (and vice versa).

⁵⁰ Which raises the question of why prior convictions should play a primary role within a even parole grid. Why, for example should previous convictions acquired possibly many years earlier constitute one of the grid’s two dimensions? Long-term prisoners applying for parole will have many years of custodial life containing more probative information about their risk of future offending. The literature on parole provides little justification for the primacy of criminal record in the guidelines. Blalock (1982) for example merely notes that ‘offense severity and criminal history are the two basic considerations’ (p. 93). It is unclear why this is the case, but he may equally have been writing about a sentencing grid.

⁵¹ von Hirsch subsequently abandoned this position in a later volume in which he endorsed a model unrelated to culpability (1985, Chapter 7); however, the Minnesota Commission stayed with his original formulation.

Commission noted that it had ‘decided against an index which would predict the probability of future criminality. Rather the Commission decided to construct an index measuring the extent and duration of prior criminality’ (Minnesota Sentencing Guidelines Commission, 1981, p. 1). In short, from the outset, criminal history enhancements in the Minnesota guidelines reflected retributive rather than preventive justifications. Whether that remains the case is open to question.

The role of prior crimes in the US guidelines has attracted considerable attention from scholars in recent years (e.g., Hester et al., 2018; Frase and Roberts 2019; Hamilton 2015; Rosen 1997; Roberts, 1994; 1997; von Hirsch, 1994) and there is a growing consensus that the US approach suffers from several problems. The principal deficiency of the US approach (including Minnesota) is the reach of the guidelines, and the magnitudes of enhancements. Most guidelines count all prior crimes, no matter how old. The Commission provided four criteria guiding its criminal history index. One criterion was that it be ‘simple to use’ (1980, p. 7). Frase (1991) notes that: ‘as the Minnesota Commission recognised, simplicity of application is a separate and important goal’. (p. 752). It is noteworthy that the criteria did not include predictive or retributive validity. Almost no validation work was conducted until the Robina Criminal History Project began work in 2013 (see Frase et al. 2015; Hester et al., 2018).

In their desire to ensure that offenders receive consistent outcomes, the US guidelines operationalised prior conviction enhancements in a mechanistic fashion. Criminal history was unitised and converted to a score which then triggers a harsher sentence. One consequence of regular, categorical increments in severity is that the regime poorly reflects the empirical pattern of re-offending rates – perhaps reflecting the emphasis on retribution in the early days of the Commission. These issues are documented in greater detail in Frase and Roberts (2019) and Hester et al., (2018). However, one example is illustrative.

In Minnesota, a prior felony carries the same weight whether it was recorded six months previously or up to 15 years earlier. No discounting to reflect the declining retributive or predictive significance of a prior crime occurs. This practice is at odds with findings from recidivism research as well as surveys of the general public.⁵² Thus an older prior is less predictive of re-offending than a recent conviction, and the public assign less punishment to older priors, suggesting they recognize the relevance of the age of the conviction, whether from the perspective of risk or retribution (Mitchell, 2015; Hester et al., 2017). Assigning the same weight to all prior felonies ensures consistency across cases, but at what cost? By abandoning the relationship between the level of enhancement and the variables of risk and retribution which justify the premium. This is the penal equivalent of auto insurance that increases premiums in a linear fashion without regard to the nature of the driving violations or claims. The driver who rear-ended another car 14 years ago pays the same premium as the one who pranged his car last year. That can’t be right. This example illustrates the Minnesota’s Commission’s preference for consistency of application – and hence outcome – over a more complex approach which would more accurately calibrate the prior record enhancement to the individual offender’s level of blameworthiness or risk.

As for the magnitude of the enhancements, the US guideline premiums escalate far more rapidly in severity than the corresponding risk or blameworthiness of the offender. Magnitude can be measured in various ways, but one common measure is a multiplier created by dividing the presumptive sentence for the highest criminal history score by the presumptive sentence for

⁵² Public views are relevant because one of the justifications for prior record enhancements is that repeat offenders are more blameworthy, and public opinion can serve as a proxy for blameworthiness (see Roberts, 2008).

the lowest criminal history score on any given grid. Frase and Hester (2015, 2019) report that in Minnesota, averaged across all offense severity levels, the multiplier was 4.7.⁵³ Washington, Arkansas and Kansas have even higher multipliers (Table 2.2). Such high magnitudes threaten offense-based proportionality and have been criticised for many years. In 1994, von Hirsch wrote that the Minnesota guidelines ‘gave too much leverage to criminal record’ (p. 45).

Forty years after the creation of the main Minnesota grid, the counting rules regarding prior crimes remain largely the same, despite the significant advances that have been made in our understanding of the relationship between prior and future offending. The most significant change to the CH score calculation involved expanding the look-back limit for felonies from 10 to 15 years. It seems unlikely that this reform can be justified in terms of increased crime prevention or enhanced blameworthiness, and of course counting the additional felonies carries significant costs in terms of prison beds and racial disproportionality.

The English guidelines are more nuanced⁵⁴ and less punitive.⁵⁵ Prior convictions are considered at Step 2 of the guidelines methodology. This placement restricts their influence to determining the sentence within the category range rather than the selection of which category of seriousness is appropriate. Prior convictions therefore are a secondary factor under the English guidelines. No direct comparisons between Minnesota and England have been conducted, but a reasonable inference from research in the two jurisdictions that prior convictions carry less weight in England. The long ‘look-back’ period in Minnesota which results in all prior felonies within a 15-year period⁵⁶ being included in the criminal history score is not matched in England. There is no bright line rule in England and Wales regarding the relevance of older prior crimes, but unless the crime is particularly serious, previous convictions approaching a decade in age will have little (or no) aggravating effect on the sentence imposed for the current crime. The consequence is that English courts applying the guidelines assign less weight to prior crimes and disregard a number of earlier convictions as a result of their age or lack of relevance (Roberts and Pina-Sanchez, 2015).

The English approach to criminal history enhancements has a cost. Under the Minnesota guidelines an individual being sentenced knows in advance his or her own level of enhancement.

⁵³ It should be noted that although the Minnesota Commission is criticised for allowing prior convictions so much influence (as evidenced in the high multiplier), criminal history played an even more powerful role in Minnesota sentencing prior to the guidelines. Parent (1988) notes that prior convictions were the ‘primary factor in deciding whether or not to incarcerate the offender’ (p. 66).

⁵⁴ The Minnesota approach to the use of prior convictions has evolved somewhat since the first edition of the guidelines manual. Tonry (1993) described the revisions as making the use of prior convictions ‘subtler’ (p. 185). Perhaps, but they are still more mechanistically applied than in England and Wales (and other common law jurisdictions).

⁵⁵ The more nuanced approach to prior crimes in England is not entirely due to the guidelines. The relevant statutory provision (s. 143(2) of the Criminal Justice Act 2003) states that: ‘In considering the seriousness of an offence (“the current offence”) committed by an offender who has one or more previous convictions, the court must treat each previous conviction as an aggravating factor if (in the case of that conviction) the court considers that it can reasonably be so treated having regard, in particular, to— (a) the nature of the offence to which the conviction relates and its relevance to the current offence, and (b) the time that has elapsed since the conviction.’ This creates some judicial discretion to discount or disregard priors which are older or unrelated to the current crime. England is not unique in this approach; other common law jurisdictions allow courts to disregard or discount older offenses.

⁵⁶ The look-back limit is an example of one way in which the Minnesota guidelines have become more punitive and less-evidence based; the original lookback limit for felonies was 10 years.

The English guidelines are less prescriptive and do not supply an exact quantum of punishment, as is the case in Minnesota. The consequence of this two-fold. First, a court will have to think through the issues of relevance and weight: are all the offender's priors relevant?⁵⁷ Are any sufficiently old to be disregarded entirely? How much weight should the relevant priors carry? The determination of relevance and the calibration of enhancement are thus more individualised and more closely reflect the degree of enhancement appropriate to the individual offender. The second effect is less desirable: The English system will result in less consistent prior record enhancements. The differences reflect the fundamental orientation of the two approaches to guidance. Minnesota privileges simplicity of application⁵⁸ and consistency of outcomes; the English guidelines favor a more individualised and therefore complex approach. Appropriate simplicity⁵⁹ is a virtue, but on balance my preference is for the latter approach rather than the formulaic grid-based guidelines. Appendix C provides a tabular comparison of key attributes of the two formats.

VI. Drawing Conclusions

The English sentencing guidelines constitute a revolution in English sentencing. Conceived as a dynamic system, this dynamism is reflected in the different forms of guidance issued to date. Creating a new guideline (or amending an existing guideline) does not require the formal approval of the legislature, only a public consultation. This freedom has two clear advantages. First, the English Council is less subject to political pressures to 'get tough' with particular offenses or categories of offenders. Second, the Council has the authority to issue (or amend) guidelines as it sees fit, without requiring the endorsement of the legislature or the government (although subject to a public and professional consultation exercise). These considerations may explain why the English guidelines have changed within a few years, with different formats emerging for different guidelines whereas the architecture of the Minnesota main grid has remained relatively fixed over the 40 years since its creation.

Policy transfer in the area of sentencing usually arises in the context of specific high-profile initiatives such as '3-strikes' laws. Legislatures generally devise their own sentencing laws with little regard to developments in other jurisdictions, or cross-jurisdictional initiatives such as the American Law Institute's Model Penal Code Sentencing Project or the Council of Europe Sentencing Recommendations. In 1992, the Council of Europe issued a document identifying key elements of a comprehensive approach to structuring judicial discretion at sentencing (Council of Europe, 1993). The intention was that member states would adopt some or all of these recommendations. Well, that uniformity never materialised; sentencing regimes across Europe still constitute a patchwork of different systems. The US guidelines broke new ground, and for a generation there were no alternative guideline models. The wide degree of variation across the US in terms of the structure of the guidelines suggests that state Commissions developed their guidelines independent of each other, without many comparative 'best practice' analyses. None of

⁵⁷ In practice English courts disregard a significant number of prior convictions on the grounds that they are too old or insufficiently related to the current offence (see data in Roberts and Pina-Sanchez, 2014).

⁵⁸ Parent was very clear on this point: 'The pivotal consideration for the Commission was operational simplicity' (1988, p. 71).

⁵⁹ On the virtues of guideline simplicity, see Frase (1993b, p. 1207). I'm not so persuaded of the need for such simplicity. Simple schemes have disadvantages, and the US approach to criminal history enhancements would appear to be a good example of these limitations. Moreover, the additional complexity of the English approach does not appear to have created problems for sentencers in that jurisdiction.

the US systems have been modified to reflect developments in foreign jurisdictions. Approached from the other direction, the English guidelines have evolved without drawing upon the experience in the US.⁶⁰ This is a regrettable state of affairs, as there are benefits associated with different approaches to structuring discretion at sentencing. Neither the Minnesota Commission nor the English Council has been particularly self-critical over the years. In this final section I make some suggestions for improvement in both sets of guidelines.

A. Lessons for the US Commissions

Comparative analyses are of particular benefit if they suggest best practices or ways in which one system may learn for another. In his essay exploring the English and US guidelines, Reitz (2013) offered a number of suggestions to improve the English regime.⁶¹ Do the English guidelines contain any useful lessons for the US Commissions? The Commissions are unlikely to abandon formats developed decades ago, but the experience in other countries may provide some ideas for consideration. Four come to mind.

First, and consistent with much recent scholarship, Commissions operating presumptive guidelines might wish to revisit the degree of judicial discretion allowed in the guidelines. Do they permit an adequate degree of discretion? Little commentary has focused on the appropriate rate of departures; are current rates too high or low? Do sentencers perceive their ability to individualise to an appropriate degree is compromised by the ‘substantial and compelling reasons’ requirement?

Second, it is unclear whether the prominent role and current structure of criminal history enhancements can be justified. At the very least the levels of enhancement and the counting rules should be subject to greater empirical validation and scrutiny by Commissions.⁶² The academic literature makes a compelling case that offenders in States with a powerful criminal history enhancement receive severity premiums which cannot be justified on preventive or retributive grounds. The criminal history dimension of the grid has simply not been subject to sufficient scrutiny. It may be argued that the influence of prior crimes simply reflects acceptance in the US that prior crimes should generate additional punishment. Period. That may be the case, but if Commissions see their record-based enhancements as being primarily preventive, these arrangements deserve a second look. One obvious candidate for reform would be the severity increment between adjacent criminal history categories. The gap is the same across the grid. For example, level 9 offenses increase by a uniform 12 months from category to category.⁶³ It surely

⁶⁰ It is perhaps natural that sentencing scholarship mirrors this insular approach. With the exception of volumes by Tonry and colleagues (e.g., Tonry, 2016; Tonry and Frase, 2001) and bilateral comparisons between the US and other countries (e.g., Doob and Webster, 2015; Frase, 2005; Roberts, 2012) most scholars focus on a single jurisdiction. The few comparative articles (e.g., Frase, 2001; 2014) do not examine guidelines structures.

⁶¹ Reitz’s proposals would have a salutary impact on the English guidelines. For example, he suggested placing a limit upon the aggravating effect of prior convictions, and advocated greater accountability by requiring courts to justify departures when they diverged from the middle category’s starting point sentence (see 2017, pp. 196-200). Bottoms (2018) and Allen (2016) among others have also advanced a number of reform proposals to improve the guidelines.

⁶² Particularly those guidelines which operate the most powerful enhancements, thereby exacerbating racial disparities, correctional costs and undermining offense-based proportionality to the greatest degree (see Frase and Hester, 2015).

⁶³ Interestingly this was not always the case. In the first version of the grid the severity increment varied depending upon the categories (see Minnesota Sentencing Guidelines Commission, 1981, p. 27).

makes sense, on preventive or retributive grounds, to create a greater distinction between offenders with a zero score and all recidivists (see Frase and Roberts 2019).

Third, US Commissions might wish to consider whether the range of additional guidance available to sentencers in England and Wales carries benefits. Here a judicial ‘user-survey’ may identify issues for which US judges may wish to have additional guidance. The sentencing of multiple count cases is an obvious complexity in sentencing law. The English guideline on this issue is relatively skeletal, but judges may find additional information useful. Similarly, the Minnesota grids leave the courts with no guidance on complex issues such as the impact of mental health on the defendant’s level of culpability or whether they may constitute a legitimate ground for departure. Leaving these kinds of issues to the Court of Appeals to offer assistance may be an abdication of responsibility on the part of the Commission.

Fourth, the clarity of plea-based sentence reductions arising from a guideline may be attractive to Minnesota courts. Plea bargaining is more complex and more common in the US; nevertheless, if the reductions were spelled out in guidance, the process would have greater transparency and predictability.

B. Lessons for the English and other Offense-Based Guidelines

Racial disparities have been at the forefront of the guidelines movement in the U.S.. One of the principal early successes of the Minnesota guidelines was the reduction of racial disparities (Frase, 2005). Frase (2009) has documented the disproportionate effects of the prior conviction enhancements on racial minorities. Many commissions across the US (including Minnesota) now routinely conduct racial impact analyses. The English Council has yet to engage with the issue of racial disparities. This is not due to an absence of evidence that visible minorities attract different sentences. The UK Ministry of Justice publishes annual statistics comparing sentencing patterns across different ethnic groups and routinely finds differentials for certain offence categories, although the statistics are uncorrected for confounding variables which might explain racial differences.⁶⁴ The true extent of racial disparities in England is therefore unclear, although earlier, academic research by Hood (1992) found modest racial differentials, suggesting the problem is less serious in England.⁶⁵ Nevertheless, the Council needs to ensure that its guidelines have not exacerbated any pre-existing racial differences.⁶⁶ A recent report noted that within drug offences, the odds of receiving a prison sentence were 240% higher for offenders who self-identify as Black, Asian or Minority Ethnic (BAME) compared to Whites. The Review then issued a challenge to courts, stating that “*It is now incumbent on the judiciary to produce an evidence-based*

⁶⁴ The most recent (2017) found that Black and Asian offenders had a higher custody rate than Whites. In addition, since 2012, the average sentence length has been consistently longer for all non-White ethnic groups. In 2016, of all offenders sentenced to immediate custody, Black and Asian offenders received 24 and 25 months respectively compared with 18 months for White offenders (Ministry of Justice, 2017, p. 53.)

⁶⁵ The latest statistics released by the Minnesota Commission as part of its demographic impact report reveal that although Black Americans represent x% of the State population they account for x% of the prison population. The statistics in England Wales are less striking.

⁶⁶ Scholars have for years urged more consideration of this issue. As far back as 2002 scholars such as Tonry had identified the development of the guidelines as a means of addressing racial disparities (2002, p. 98). In the same volume David Faulkner also highlighted the need to take greater account of race and ethnicity (2002, Chapter 4).

explanation for the finding” (Lammy, 2017, p. 33). To date, the court system has failed to respond to this challenge, and the Sentencing Council could play an important role comparable to that of the US Commissions.

A second lesson for the English Council concerns the use of imprisonment as a sanction. Earlier I noted the impediments to the Council’s ability to regulate the size of the prison estate. Council could take some steps towards addressing the issue of a high use of incarceration in a way that is consistent with its statutory mandate. If there is no obvious authority to allow the guidelines to manage the prison capacity, the Council could do more to reflect the costs (and cost effectiveness) of different sanctions. A number of commentators have urged such a course of action (e.g., Bottoms, 2018, p. 19; British Academy, 2014, p. 106). This could be accomplished in a number of ways. For example, the Council could publish research updates on the costs of imprisonment and other sanctions, as well as the latest re-offending statistics associated with these sentences, and other sentencing trends. This may serve as a ‘nudge’ to judges regarding the use of imprisonment as a sanction. If sentencers paid attention to such information the Council may play a role in reducing the use of the most expensive and least effective sanction, even without adjusting its guidelines. A similar initiative could see Council highlighting for the judiciary the findings of research on comparative re-offending rates. There is now significant body of literature demonstrating that community orders and suspended sentence orders are associated with lower re-offending rates than imprisonment, having controlled for all relevant background variables. If an official body like the Council were to bring this to the attention of the judiciary, perhaps in conjunction with the Judicial College which offers judicial training, some judges may have second thoughts before imposing a short prison sentence.

Transparency may be a third area in which the non-US Councils and Commissions could learn from the US Commissions. Meetings of the Minnesota Commission are held in public, and time is reserved for members of the public to make a brief submission.⁶⁷ The transparency continues beyond the meeting; if individual Commission members wish to discuss Commission business outside of regular meetings, they must call a public meeting. In contrast, the Sentencing Councils in Europe, Asia, and Australia hold their meetings in private, and outsiders are not generally permitted to attend. The UK-based Councils both publish minutes of meetings but these are only skeletal in nature. It is hard to see the harm in opening meetings to a wider audience.

C. Research priorities

Guideline structures are determined by the judicial culture in which they are set; they are not technological tools which can be easily implemented in any country, the way, say that room reservation software may be adjusted for the number of rooms and then deployed by diverse hotels around the world. Yet it would be useful to know more about the relative advantages of the various approaches to guidelines. Some years ago Thibault and Walker (1975) set out to compare the adversarial and inquisitorial models of justice on a number of procedural justice indicators. They conducted laboratory-based ‘simulation’ studies in several common law and continental countries with a view to determining whether one system of criminal procedure was better tasks such as generating facts or was more popular with litigants.

⁶⁷ Parent (1988) makes it clear that in the early days of the Commission meetings were even more open to participation: ‘Members of the audience were permitted to enter the discussion at any point.’

Comparable research could use judges from both jurisdictions (or from non-guidelines countries) to sentence offenders, having been randomly assigned to use either a sentencing grid (and manual) or the more complex offense-specific and generic package of guidelines used in England. Researchers could monitor the time taken to arrive at sentence, the degree of variability in outcomes, the number of mitigating and aggravating factors, as well as many other variables. Whatever the outcome of such experimental research, the Minnesota Commission is no more likely to dismantle its grids than the English Council is to roll up all its offense-specific guidelines into a single matrix. Yet research of this kind would help us understand the ways that these different formats function and would certainly be of interest to those contemplating adoption of a guidelines scheme (see Dhimi, Belton, and Goodman-Delahunty, 2015) for discussion of research upon different models of judicial decision-making at sentencing).

Another important and overlooked area is perceived legitimacy. There is a large and growing literature on perceptions of legitimacy at sentencing and the consequences of low levels of perceived legitimacy (see for example, Hough and Bradford, 2014). We know very little about the reactions of defendants sentenced under these two different kinds of guidelines, and there are competing claims. A long-standing external critique of the sentencing grids is that they represent a mechanical and deindividualised means of determining sentence. If this is an accurate characterisation, there may well be adverse consequences on litigants' perceptions of the legitimacy of the sentencing process. Adelman (2013) argues that there is no evidence that disparity causes resentment among prisoners or undermines perceptions of legitimacy. Again, comparative research would be useful: are perceptions of legitimacy affected by the nature of the structures which determine sentencing outcomes? Do litigants and lawyers regard one approach to structuring discretion as more acceptable? Do offenders resent the use of a grid?

D. Conclusions

Ultimately, a legislature or guidelines commission needs to settle on a balance between excessively-binding guidelines which ensure formalistic consistency across cases, and guidelines which are more flexible, yet which fail to produce the same level of consistency of outcomes (see Barkow, 2012). The US guidelines emerged as a direct response to recognition that sentencing was unpredictable and inconsistent – the view best exemplified by Judge Frankel's volume. This desire to achieve more consistent outcomes has animated the grid-based guidelines ever since. In contrast, the English experience was somewhat different.

Although elements of the guidelines have changed periodically over the years, the essential architecture of the Minnesota grids remains the same.⁶⁸ The most significant development in this state was the creation of additional grids for sex offenses and drug offenses. Amendments have been minor: offenses have been moved up or down the offense ladder; grid cell ranges and the dispositional line have been adjusted periodically. To my knowledge, there has been no systematic review of the overall architecture of the grid, or consideration of additional ways in which the Commission may provide guidance for sentencers. Perhaps the time has come for further reflection. It would be unrealistic to expect a Commission to review its guideline structure often, but there is surely scope for greater self-examination than has been the case to this point in Minnesota and other US states. After 40 years of use, the Minnesota Commission is unlikely to abandon its grids. Yet there are important questions to be addressed

⁶⁸ The transformation of the federal guidelines wrought by *Booker* changed the status of those guidelines which became voluntary, but no substantial changes have been introduced to the federal grid, which retains its original structure of 43 offense levels and 256 cells. Similarly, although there have been changes to guidelines in several states over the years (see Frase, 2005, pp. 1203-1240; 2019), the basic structure of these guidelines has remained static.

with respect to a two-dimensional format. To what extent should it be described as a ‘sentencing machine’ (Tonry, 2001), albeit one less mechanised than the federal grid? Is the continued use of criminal history as a principal dimension justified? Beyond the architecture of the single grid, Commissions should review some other policy issues such as whether multiple grids or non-grid structures would improve outcomes (for other policy issues see Frase, 2005b, p. 1231).

Where has this discussion led us? The key differences between the Minnesota and English approaches to guidance are the degree of individualisation and the level of judicial discretion. Can we conclude that one approach is superior? Probably not. Ultimately, Frase (2005) rightly observed that: ‘there is no ‘ideal sentencing guidelines model; rather, each state must choose a combination of design features... appropriate to its local circumstances and political realities’ (pp. 1231-1232). Still, comparative research can help establish the strengths and weaknesses of the two competing approaches to guidelines. Having set themselves different objectives, the two sets of guidelines have achieved success in different ways. The Minnesota guidelines have been (relative) successful in constraining prison populations, establishing more offense-based proportionality in prison admissions and populations, reducing racial disparities and promoting more democratic accountability (see Frase, 2019; Tonry, 2013).

Finally, there is agreement that both schemes are preferable to the highly discretionary regimes they replaced. Frase (2019) states that ‘there is no better reform alternative’ than a guidelines model, while Berman (2017) concludes that ‘every serious modern study of U.S. sentencing has reached the conclusion that a well-designed structure provides the best ...to inform and shape individual sentencing outcomes and to promote transparency and the rule of law throughout a sentencing system’ (p. 109; see also Kilaru, 2010; Frase 2005). Most British scholars also appear to support the guidelines although some express reservations about aspects of their structure and the loose nature of the compliance requirement (Ashworth, 2010; Dhami et al., 2013). Weisberg concludes that ‘consensus holds that the best possible sentencing scheme is a moderately flexible set of guidelines issued by a commission’ (2007, p. 179). This consensus about the need for greater structure brings us full circle to Judge Frankel and, long before him, Lord Alverstone and the other jurists of Victorian England.

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Appendix A: Extract from the Minnesota Sentencing (Main) GridA

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

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

Appendix B: Steps of the Street Robbery Guideline

STEP ONE

Determining the offence category

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

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

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

Culpability demonstrated by one or more of the following:

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

Harm

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

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

STEP TWO

Starting point and category range

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

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

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

Source: Sentencing Council of England and Wales

Factors increasing seriousness
Statutory aggravating factors:
Previous convictions, having regard to a) the nature of the offence to which the conviction relates and its relevance to the current offence; and b) the time that has elapsed since the conviction
Offence committed whilst on bail
Other aggravating factors:
High value goods or sums targeted or obtained (whether economic, personal or sentimental)
Victim is targeted due to a vulnerability (or a perceived vulnerability)
Significant planning
Steps taken to prevent the victim reporting or obtaining assistance and/or from assisting or supporting the prosecution
Prolonged nature of event
Restraint, detention or additional degradation of the victim
A leading role where offending is part of a group activity
Involvement of others through coercion, intimidation or exploitation
Location of the offence (including cases where the location of the offence is the victim's residence)
Timing of the offence
Attempt to conceal identity (for example, wearing a balaclava or hood)
Commission of offence whilst under the influence of alcohol or drugs
Attempts to conceal/dispose of evidence
Established evidence of community/wider impact
Failure to comply with current court orders
Offence committed on licence
Offences taken into consideration
Failure to respond to warnings about behaviour

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

STEP THREE

Consider any factors which indicate a reduction for assistance to the prosecution

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

STEP FOUR

Reduction for guilty pleas

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

STEP FIVE

Dangerousness

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

STEP SIX

Totality principle

If sentencing an offender for more than one offence, or where the offender is already serving a sentence, consider whether the total sentence is just and proportionate to the overall offending behaviour in accordance with the *Offences Taken into Consideration and Totality* guideline.

STEP SEVEN

Compensation and ancillary orders

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

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

STEP EIGHT

Reasons

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

STEP NINE

Consideration for time spent on bail

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

Appendix C:

Key Characteristics of Sentencing Guidelines in Minnesota and England and Wales

	<i>Minnesota (1980-2018)</i>	<i>England and Wales (2004-2018)</i>
Membership of Commission or Council	Judicial Minority	Judicial Majority
Guidelines Subject to Legislative Approval	Yes	No
Degree of constraint imposed on courts	High: limited discretion permitted within the grid, and 'substantial and compelling circumstances' required to justify a departure.	Low: considerable discretion within guideline ranges and the freedom to depart when it would be contrary to the interests of justice to follow guideline.
Relationship to Prison capacity	Policy and practice linked to prison capacity	No link to prison capacity
Nature of Guidelines: Descriptive or Prescriptive	Prescriptive, and based on current sentencing practices	Primarily (but not exclusively) descriptive, based on current sentencing practices
Structure and Evolution of Guidelines	Grid based with 2 dimensions (offense seriousness and criminal history) containing dispositions and cell sentence ranges. Format largely unchanged since 1980.	Step by step approach beginning with categories of harm and culpability each with sentence ranges and a starting point sentence. Format has evolved significantly since 2012.
Format	Same two-dimensional structure (offense seriousness and criminal history) applies to all 3 grids.	Different formats to reflect variable nature of offenses although they follow a common stepped approach.
Number of Guidelines	Three grids in which all offenses are assigned to one of a small number of offense seriousness levels.	Each principal offence carries its own specific guideline; approximately 25 in existence.
Role of Previous Convictions	High impact; criminal history is a primary dimension; CH score affects both sentence type and sentence length	Low impact; no numerical guidance or quantification of prior crimes; prior convictions appear at Step Two of the guidelines methodology.
Guidance on General Sentencing Issues	Limited guidance contained in Guidelines Manual	Guidance provided on a wide range of sentencing issues through a number of 'generic' guidelines, including sentencing multiple crimes, the use of different sanctions and plea-based sentencing discounts.
Guidance on Mitigating and Aggravating Factors	Lists of proscribed factors and factors which may justify departure; little additional guidance provided	Key factors relating to harm and culpability specified in each guideline and distinction made between primary and secondary factors

Appellate Review and Departure Standard	Appellate review of ‘departures’ and standard is: ‘substantial and compelling circumstances’.	Robust appellate review, and courts required to ‘follow any relevant guidelines unless it would be contrary to the interests of justice’.
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