This seminar runs on Fridays from 09.30 – 11:00 in Seminar Room D, Manor Road Building except weeks 2 and 6 when we will meet on Thursdays 13.00 – 14.30 in Seminar F.

Reading Notes:


Other useful English texts include:


4. For further information on the definitive sentencing guidelines, see the website of the Sentencing Council of England and Wales: [http://sentencingcouncil.judiciary.gov.uk/](http://sentencingcouncil.judiciary.gov.uk/)

Interesting essays on sentencing in other jurisdictions can be found in the following:


and for a range of issues including parole:

Seminar 1

Purposes and Philosophies of Sentencing

Overview

This seminar will consist of a discussion of the principal sentencing perspectives (Retributive and Utilitarian). We will address the most important questions in the area including the following: Why Punish? What is accomplished by imposing punishments on convicted offenders? Many jurisdictions have attempted to clarify for sentencers the purposes of sentencing. After exploring the theoretical perspectives we shall turn to the statutory sentencing objectives identified in the Criminal Justice Act 2003. The seminar will place developments in an international context as we explore arrangements in other common law jurisdictions.

Required Readings

From Principled Sentencing, the following readings:

Introduction to Chapter 1 (pp. 1-8)

Cullen and Gilbert (Selection 1.4)

Intro to Chapter 2 (pp. 39-46)

Bentham (2.2)

Intro to Chapter 4 (pp. 102-107)

von Hirsch (4.2)

Frase (4.4)

Plus:

Section 142 of the Criminal Justice Act 2003


Seminar Discussion Questions

What is the argument for declaring a primary rationale for sentencing?

What are the principal theoretical differences between retributive and utilitarian theories of punishment?

Is it conceivable that a sentencing system could be based exclusively on one of the two principal sentencing philosophies? For example, would it be possible to have a retributive sentencing framework which paid no heed to utilitarian considerations?

What is the central moral objection to the pursuit of general deterrence as a sentencing objective?

Is there any role for crime prevention (i.e., crime control aims) within a retributive rationale?

Some people claim that retributive sentencing should be replaced by something more positive; rather than simply punishing an offender, the sentence should achieve some other benefits (and not just preventing re-offending). What do you make of this objection to retributivism?

Is it necessary to have hard treatment within a censure-based account of sentencing? (Censure without Sanction)

What is meant by the terms “ordinal” and “cardinal” proportionality?

What does R.A Duff mean by the term “secular penance”?

Consider the sentencing objectives placed on a statutory footing by the Criminal Justice Act 2003. What role does such a list of purposes play? What impact is this provision likely to have upon sentencing practices?

Could the statutory provision regarding the purposes of sentencing in the CJA 2003 have been improved, and if so in what way? For example, would it be useful to provide judges with a hierarchy of sentencing purposes to be considered at sentencing? If so, how would one proceed to determine such a hierarchy?
Seminar 2

The Use of Custody: Issues and Challenges

Overview

All western jurisdictions, but particularly the US and England and Wales, are confronted with the problem of curbing the use of custody as a sanction. One way of restricting the use of imprisonment is by means of a statutory provision stating that custody should be reserved for the most serious cases. This is known as a custody threshold: in general a court may not impose a term of custody unless the crime is so serious that no other, lesser disposal would be appropriate. In England and Wales, s. 152(2) of the Criminal Justice Act 2003 states that: “The court must not pass a custodial sentence unless it is of the opinion that the offence... was so serious that neither a fine alone nor a community sentence can be justified for the offence”. As the readings note, many scholars have criticized this approach for being ineffective. In this seminar we shall examine some of the issues surrounding the use of custody, and evaluate some of the specific proposals recently advanced to reduce the number of offenders sent to prison.

Required Readings


Seminar Discussion Questions

All jurisdictions incorporate some kind of statutory provision to ensure that only the most serious cases are sent to prison. How useful is the current statutory threshold for the imposition of a term of custody in England and Wales?

What evidence would be needed to conclude that the current provision is ineffective, or requires amendment?

If the provision does require amendment, how might it be improved, to serve as a more effective ‘filter’?

One possible alternative is to have custodial (and non-custodial) presumptions articulated in the statute. Does this represent a way forward?

Is it possible to establish a ‘bright line’ distinguishing cases bound for custody from those which should be sentenced to a community order?

Another reform alternative to reduce the number of prison admissions is to prohibit the imposition of short prison sentences. This has been proposed in many jurisdictions. How do you react to this proposal?

A more radical solution focuses on property offences. It has been argued that low-level property offences be designated ‘non-imprisonable’. No matter how many such convictions an offender accumulates, imprisonment would not be an option. Do you see any problems with this proposal?

As noted by Padfield, Lord Bingham argued that the ‘right thinking person’ test was unhelpful, but is there a role for public input into the kinds of cases which are ‘presumed’ to result in imprisonment? If so, how might the public be consulted on this issue?
Seminar 3
Structuring Judicial Discretion I: Guidance by Numbers and by Words

Overview

Structuring sentencing represents one of the most difficult challenges confronting a legislature. What are the alternatives available to a legislature wishing to constrain but not eliminate judicial discretion at sentencing? The options range from potentially restrictive numerical sentencing grids through to the “guidance by words” approach found in some western European jurisdictions. In this seminar we shall examine models from around the world, placing the experience in England and Wales in context. Some jurisdictions (such as the U.S.) place fairly rigid constraints upon sentencers while other countries have pursued a less directive approach to structuring judicial discretion.

Required Readings


Intro to Chapter 6 (pp. 229-236).

Ashworth (6.2)

Frase (6.4)


Seminar Discussion Questions

What relationship should exist between the legislature and the judiciary in terms of determining the structure of sentencing? To what extent should a sentencing court’s discretion be circumscribed by statutory provisions?

Is it appropriate for the legislature to create statutory aggravating and mitigating factors at sentencing or does this represent an inappropriate intrusion into the exercise of judicial discretion? What are the challenges to identifying in statute the principal sentencing factors?

Consider the sentencing grids used in many American states and at the federal level in the United States. What are the principal advantages and disadvantages of this approach to structuring judicial discretion?

What are the problems associated with a scheme which assigns all offences to a small number of levels of seriousness?

Consider the requirement for courts to follow sentencing guidelines. In Minnesota and other US jurisdictions this is known as the “departure test”. Is this test sufficiently binding?

How would you compare the Swedish and the Israeli sentencing laws in terms of their likely effectiveness in achieving principled sentencing?

The Israeli statute, unlike the US grid-based guidelines, requires a court to create its own ‘Proportionate Sentencing Range’. What are the consequences of this alternative approach to promoting proportionality at sentencing?
Seminar 4

Structuring Judicial Discretion Part II: England and Wales

Overview

In this seminar we shall examine the experience of sentencing guidelines in England and Wales. These guidelines have been evolving for approximately a decade now, and are issued by the Sentencing Council of England and Wales. They represent a middle ground between the grid-based guidelines found in many US jurisdictions and the “guidance by words” approach adopted in countries with a guiding sentencing statute. We shall examine one guideline in particular, the definitive guideline for the assault offences.

Required Readings


Sentencing Council, Assault and other Offences against the Person: Definitive Guideline (2011) at www.sentencingcouncil.org.uk
Seminar Discussion Questions

Unlike other common law jurisdictions, in England and Wales the vast majority of sentencing decisions is taken by lay magistrates assisted by a legal advisor. Does this have any implications for the kind of guidelines or the level of constraint of guidelines that are created?

Consider the format and structure of the English Sentencing Guidelines: Do they have greater advantages or greater disadvantages than (a) the grid systems in US jurisdictions or (b) the guidance in words embodied in the Swedish or Israeli sentencing laws?

What is the statutory requirement on courts at sentencing in England and Wales? Is this statutory requirement in this respect sufficient to ensure uniform application of these guidelines? What kind of language might be more appropriate to achieve the desired goal of ensuring compliance with the guidelines?

What is your general reaction to the ‘new format’ sentencing guideline (on assault) issued by the Sentencing Council in 2011? Do you see any weaknesses with the format, or ways that it could be improved?

How does the new format guideline reflect the interests of the crime victim?

Guideline factors are found at Steps One and Two of the guideline methodology. What is the difference between the two steps?

Has the Sentencing Council placed the factors at the correct Step? That is, are there any Step Two factors you believe should be placed at Step One, or Step One factors that are more reasonably located at Step Two? How would you decide whether to assign a factor to Step One or Two?

The Sentencing Council has stressed the importance of achieving a consistent approach to sentencing rather than a consistent outcome. What do you make of this distinction?

How likely are the English guidelines to enhance consistency in sentencing?

The Sentencing Council issues one or two new guidelines every year. This is in contrast to the approach taken in the US where Sentencing Commissions devise and then issue guidelines for all offences at once. Is there a danger with issuing guidelines seriatim, over a number of years, in the way that the English Council has adopted?

How might the English guidelines be improved?
Seminar 5

The Role of Previous Convictions at Sentencing

Overview

In this seminar we shall discuss one of the most difficult problems in sentencing theory and practice: prior convictions. After the seriousness of the offence the most important factor taken into account at sentencing is the offender’s criminal history. Should previous convictions be considered at sentencing and if so, how? How much weight should be attached to an offender’s previous convictions? We consider the theoretical justifications for allowing the presence (or absence) of a criminal record to affect the severity of the sentence imposed and some of the empirical consequences of this practice.

Required Readings


Roberts, 4.6(a)

von Hirsch, 4.6(b)

Plus:


Seminar Discussion Questions

If sentences are more severe for recidivists than first offenders, should this be described as a recidivist premium or a discount for first offenders? Or does it simply amount to the same thing?

Some scholars argue that previous convictions should carry no weight at sentencing. They argue that the cumulative sentencing represents ‘double punishment’ for the same offence since the offender has already been punished for his previous offending. How do you react to this argument?

Early writings on desert-based sentencing took the position that repeat offenders were more culpable than first offenders and therefore deserved harsher punishment. On what grounds has this position been rejected?

What are some of the justifications for the claim that repeat offenders are more culpable, or that first offenders are less culpable?

Consider the Progressive Loss of Mitigation principle. How broadly should this principle apply? Should all first offenders receive a discounted sentence or only some categories of offender?

What are the principal justifications for offering a first offender sentencing discount?

Two critical dimensions of an offender’s criminal record are the recency and the relatedness of prior convictions. How are these dimensions justified by utilitarian and retributive sentencing philosophies? For example, if an offender is convicted of assault and he has prior assault convictions, does this make him more worthy of censure – more blameworthy – than an offender convicted of assault but with prior convictions for fraud?

According to s. 143(2) of the Criminal Justice Act 2003, “In considering the seriousness of an offence....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...”. What effect is this provision likely to have had on sentencing practices and the volume and composition of the prison population in England and Wales?

Where do previous convictions appear in the new format Assault sentencing guidelines issued by the Sentencing Council? Is this the appropriate place for them?
Seminar 6

Aggravation and Mitigation in Theory and Practice

Overview

In many respects the determination of sentence involves a careful consideration of all relevant mitigating and aggravating factors or circumstances. Determining the relevance of a factor is sometimes quite difficult. For example, should an offender be able to claim some mitigation on the grounds that they have served the community over a lengthy period of time? This seminar will examine some of the principal factors that mitigate sentence, and will explore their theoretical justifications and practical effects. We will discuss plea-based sentence reductions at some length.

Required readings

From *Principled Sentencing*:

Tonry, selection 8.1

Hudson, selection 8.4


Seminar Discussion Questions

How do you decide whether a particular factor or circumstance should mitigate or aggravate the sentence imposed? Does it depend upon the statutory purpose(s) of sentencing or are there factors that should be taken into account regardless of the overall purpose of sentencing?

Is it possible, within a retributive rationale, to take into account personal mitigating factors which are unrelated to the seriousness of the crime or the offender’s level of culpability for the offence?

Consider the case of an offender who assists the state in the prosecution of other offenders. Should this assistance be taken into account in sentencing, and if so, how much weight should it carry?

Is it appropriate or even possible for a sentencing commission to specify all relevant mitigating and aggravating factors relevant to sentencing?

Assuming that the application of sentencing factors is left to the discretion of trial courts (guided by the CACD and the Sentencing Council), is there a justification for Parliament to place a small number of important factors on a statutory footing?

If consensus can be reached on the relevance of a particular mitigating factor, how are we to decide how much weight it should carry in terms of mitigating the severity of sentence? Is this a matter that can be resolved by a sentencing commission or is it best left to the discretion of individual sentencers?

The guilty plea is widely recognized as a factor reducing sentence in common law countries and now in many European jurisdictions. Is there any problem with this? What would be the consequences of abolishing the use of a sentencing discount for a guilty plea?

Should offenders who are caught ‘red handed’ receive a reduction for pleading guilty?

Besides the timing of the guilty plea, what other factors should affect the magnitude of the reduction awarded the offender?

How does the guilty plea discount relate to the interests of the crime victim?

To what extent should a sentencing court consider the impact of the sentence on the individual offender?

What are the principal arguments in favour of, and against, the use of remorse as a mitigating factor?
Overview

Sentencing female offenders generates a separate set of issues and challenges for courts. Female offenders account for very small proportions convictions of most offence categories, yet relatively high proportions for theft and related crimes. In addition, female offenders are less likely to re-offend, and more likely to have dependents. Finally, the pathways to offending are different for male and female offenders, and the latter have very different criminogenic needs. Taken together, these considerations suggest to many scholars that a different approach to sentencing is necessary in the case of female offenders. Advocacy groups and academics have all called for greater restraint in the use of custody for female offenders. Movement towards this goal received fresh impetus with the publication of a comprehensive analysis of the problem (see Gerry and Harris reading). In this seminar we shall explore some of the issues and consider some of the latest proposals to reduce the number of female offenders committed to prison.

Required readings


Schrich, N. and Monahan, J. (2015) Evidence-based sentencing: Public Openness and Opposition to Using Gender, Age and Race as Risk Factors for Recidivism. Law and Human Behavior, in press (this reading will be distributed the week before).
Seminar Discussion Questions

Should courts adopt a different methodology or approach to sentencing in cases involving female offenders? Is it appropriate to have gender-specific sentencing policies.

How far should this depart from the sentencing of male offenders? Is a completely separate regime necessary? Separate offence-specific guidelines?

Does the fact that women as a group represent a lower category of risk to re-offend justify a differential custodial threshold?

Some US guideline schemes incorporate gender directly into the determination of whether the offender receives a noncustodial sanction. Offenders are assigned points for various attributes related to risk of re-offending (such as number and seriousness of prior convictions). Male offenders are assigned additional points with the result that they are less likely to receive a noncustodial sanction than female offenders convicted of similar offences. How do you react to this way of incorporating gender into sentencing?

Should courts apply a different set of disposals when sentencing women?

What are the principal arguments in favour of a separate methodology or of a generic ‘discount’ when sentencing female offenders?

Legislatures in Australia, Canada, and New Zealand have attempted to reduce the number of Aboriginal admissions to custody by means of statutory directions to courts. For example, s. 718(2)(e) of the Criminal Code of Canada states that: “all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders”.

An analogous provision for female offenders in England and Wales might read: “all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of female offenders”. Is this proposal appropriate? Is it likely to attract public support or opposition?
Seminar 8

Sentencing Exercise: Applying the Principles

Note: this last seminar is an optional session.

In this last, optional seminar we will discuss a sentencing judgment from the Court of Appeal (Criminal Division). The purpose of the discussion will be to apply some of the sentencing principles and objectives discussed in the preceding sessions to the specific cases. Seminar participants should read the following brief judgment from the Court of Appeal.

Required Reading: