

SENTENCING GUIDELINES IN ENGLAND AND WALES: MISSED OPPORTUNITIES?

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I

INTRODUCTION

In England and Wales, offenses typically have fixed maximum penalties assigned to them, usually in the form of a length of custody or fine amount, and some offenses may also have mandatory minimum sentences.¹ In addition, the available sentencing options (for example, custody, community penalty, fine, and compensation) may differ for offense type (that is, summary and indictable offenses) and for adult and youth (aged under seventeen) offenders.² Despite this, sentencers are afforded considerable discretion in the sentence they choose to pass.

When applying their discretion to sentencing decisions, it is intended that sentencers use legal factors such as the nature and seriousness of the offense and the defendant's criminal history.³ The sentencer is also obligated to take into account any aggravating and mitigating factors.⁴ For instance, in England and Wales, aggravating factors include the vulnerability of the victim, whether the victim was racially or religiously targeted, the offender's leading role in the offense, and her profit from the offense.⁵ Mitigating factors include whether the offender was provoked, the offender's minor role in the offense, and her acceptance of responsibility or show of remorse.⁶ The sentencer may also have access to sentencing recommendations provided in a pre-sentence report

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1. *The Law*, SENTENCING COUNCIL, <http://sentencingcouncil.judiciary.gov.uk/sentencing/law.htm> (last visited Jan. 16, 2013).

2. Criminal Justice Act, 2003, c. 44 (U.K.); SENTENCING GUIDELINES COUNCIL, *OVERARCHING PRINCIPLES: SENTENCING YOUTHS 3* (2009).

3. *How Sentences Are Worked Out*, SENTENCING COUNCIL, <http://sentencingcouncil.judiciary.gov.uk/sentencing/sentences-worked-out.htm> (last visited Jan. 16, 2013).

4. *Id.*

5. SENTENCING GUIDELINES COUNCIL, *OVERARCHING PRINCIPLES: SERIOUSNESS 6-7* (2004).

6. *Id.* at 7.

prepared by a probation officer or other such expert.⁷ Finally, sentencers may also be required to give a discount for a guilty plea,⁸ and consider the “totality” of a sentence if the offender is to be sentenced for more than one offense.⁹

Research on sentencing decisions in jurisdictions such as England, Wales, and the United States, however, reveals that actual sentencing behavior can diverge dramatically from that which is intended. Evidence suggests that sentences may be based on factors such as the defendant’s sex, race, and age.¹⁰ Sentences may also be influenced by wider contextual factors, such as the court, and geographic region or jurisdiction.¹¹ Finally, sentences may be affected by the characteristics of the sentencer such as his race, age, education, or training.¹² Thus, discretion in sentencing appears to lead to unwanted disparities and unfairness in sentencing.

Sentencing guidelines have been introduced in some jurisdictions to focus sentencers’ attention on legal factors and to promote rational and consistent decision-making, with transparency and accountability.¹³ Guidelines sometimes also aim to achieve effective sentencing in terms of reducing crime and increasing public safety, as well as acting as a resource-management tool by increasing the cost-effectiveness of sentences. Finally, guidelines may also aim to increase public understanding and confidence in sentencing, as well as victim satisfaction.

The aim of the present article is to critically review the development of sentencing guidelines in England and Wales. Specifically, it is argued that the

7. *Provision of Pre-sentence Reports*, CROWN PROSECUTION SERVICE, http://www.cps.gov.uk/legal/p_to_r/provision_of_pre_sentence_report_information/ (last visited Jan. 16, 2013).

8. SENTENCING GUIDELINES COUNCIL, REDUCTION IN SENTENCE FOR A GUILTY PLEA 3 (2007).

9. SENTENCING COUNCIL, OFFENCES TAKEN INTO CONSIDERATION AND TOTALITY 5 (2012).

10. See, e.g., Kathleen Daly & Rebecca L. Bordt, *Sex Effects and Sentencing: An Analysis of the Statistical Literature*, 12 JUST. Q. 141, 141 (1995); Lizanne Dowds & Carol Hedderman, *The Sentencing of Men and Women*, in UNDERSTANDING THE SENTENCING OF WOMEN 7, 21 (Carol Hedderman & Loraine Gelsthorpe eds., 1997); CLAIRE FLOOD-PAGE & ALAN MACKIE, SENTENCING PRACTICE: AN EXAMINATION OF DECISIONS IN MAGISTRATES’ COURTS AND THE CROWN COURT IN THE MID-1990s xii (1998); RODGER HOOD, RACE AND SENTENCING 88 (1992); Ojmarrh Mitchell, *A Meta-Analysis of Race and Sentencing Research: Explaining Inconsistencies*, 21 J. QUANTITATIVE CRIMINOLOGY 439, 439 (2005); MARTIN SPEED & JOHN BURROWS, SENTENCING IN CASES IN THEFT FROM SHOPS 60 (2006); Darrell Steffensmeier, John Kramer & Jeffery Ulmer, *Age Differences in Sentencing*, 12 JUST. Q. 583, 583 (1995); Darrell Steffensmeier, Jeffery Ulmer & John Kramer, *The Interaction of Race, Gender and Age in Criminal Sentencing: The Punishment Cost of Being Young, Black, and Male*, 36 CRIMINOLOGY 763, 763 (1998).

11. See, e.g., Brian D. Johnson, *Contextual Disparities in Guidelines Departures: Courtroom Social Contexts, Guidelines Compliance, and Extralegal Disparities in Criminal Sentencing*, 43 CRIMINOLOGY 761, 781 (2005); Judith Rumgay, *Custodial Decision Making in a Magistrates’ Court: Court Culture and Immediate Situational Factors*, 35 BRIT. J. CRIMINOLOGY 201, 201–02 (1995); Jeffery T. Ulmer & Brian Johnson, *Sentencing in Context: A Multilevel Analysis*, 42 CRIMINOLOGY 137, 166 (2004).

12. See, e.g., CASSIA C. SPOHN, HOW DO JUDGES DECIDE? 105 (2d ed. 2009); FLOOD-PAGE & MACKIE, *supra* note 10, at xiii; ROD MORGAN & NEIL RUSSELL, THE JUDICIARY IN THE MAGISTRATES’ COURTS 113 (2000); SPEED & BURROWS, *supra* note 10, at 59.

13. See *Sentencing Guidelines*, SENTENCING COUNCIL, <http://sentencingcouncil.judiciary.gov.uk/sentencing-guidelines.htm> (last visited Jan. 16, 2013).

revision of existing guidelines and the development of new ones could be beneficially informed by (1) a psychological understanding of human judgment and decision-making, (2) the experience of guideline development and implementation in other domains, and (3) listening to sentencers' views on the guidelines.

II

SENTENCING GUIDELINES IN ENGLAND AND WALES

A. The (Old) Sentencing Guidelines Council and the (New) Sentencing Council

In England and Wales, under provisions made by the Criminal Justice Act 2003,¹⁴ since March 2004, sentencing guidelines were produced by the Sentencing Guidelines Council (SGC) after recommendations from the Sentencing Advisory Panel (SAP). However, these bodies were replaced by the Sentencing Council (SC) in April 2010 following provisions made by the Coroners and Justice Act 2009 (2009 Act).¹⁵ As with the SGC, the SC has representation from all the major interested parties, including victim services, police, prosecution, magistrates' court, and Crown Court.¹⁶ The production of guidelines similarly involves seeking advice, research, and public consultation.¹⁷ Furthermore, the application of sentencing guidelines remains largely voluntary, as the 2009 Act states that the court must "follow" any relevant guidelines "unless the court is satisfied that it would be contrary to the interests of justice to do so."¹⁸

The 2009 Act provided recommendations on how the new, or revised, guidelines should be developed, although the SC only need have "regard to the desirability" of these proposals.¹⁹ In particular, the Act suggested that guidelines should provide examples of varying degrees of seriousness of an offense, and that seriousness should be judged in terms of culpability, harm, and "other factors."²⁰ Furthermore, the Act stated that the guidelines should specify the sentencing range (called the "offence range") and the "category range" of sentences for given examples of seriousness that lie within the offense range.²¹ The Act also stated that the guidelines should specify the starting point for the offense or category ranges that is applicable to offenders who pleaded not

14. Criminal Justice Act, 2003, c. 44, §§ 167–71 (U.K.).

15. Coroners and Justice Act, 2009, c. 25, §§ 118, 135 (U.K.).

16. *See Council Members*, SENTENCING COUNCIL, <http://sentencingcouncil.judiciary.gov.uk/about/council-members.htm> (last visited Jan. 16, 2013).

17. *Our Work*, SENTENCING COUNCIL, <http://sentencingcouncil.judiciary.gov.uk/about/our-work.htm> (last visited Jan. 16, 2013).

18. Coroners and Justice Act, 2009, c. 25, § 125(1) (U.K.).

19. *Id.* at § 121(1).

20. *Id.* at § 121(3).

21. *Id.* at § 121(4).

guilty, and before aggravating and mitigating factors are considered.²² The Act suggested that guidelines ought to list the aggravating and mitigating factors that are relevant for judging seriousness, as well as listing other mitigating factors relevant for sentencing, and the weight to be given to the aggravating and mitigating factors, and previous convictions.²³ Finally, the Act required development of a guideline dealing with reduction in sentences for guilty pleas and a guideline considering the totality of sentences in cases in which an offender faces sentencing for more than one offense.²⁴

However, the Coroners and Justice Act 2009 left many important issues unaddressed. For instance, should examples of seriousness of the offense represent extreme, average, or most common cases? On what basis are culpability and harm judged? How are culpability, harm, and other factors combined to judge seriousness? What are the “other factors” sentencers should consider for judging seriousness? On what basis are the weights for aggravating and mitigating factors determined? Should the minimum and maximum sentences be displayed? How should starting points relate to current sentencing practice? How should guilty plea reductions and the totality principle be applied? In fact, double or even triple counting of aggravating and mitigating factors may potentially occur, which the legislation does not address.

Up until April 2010, a total of fifteen definitive sentencing guidelines had been published by the SGC. Some of the definitive guidelines were for offenses such as theft and burglary in a building other than a dwelling,²⁵ causing death by driving,²⁶ assaults and other offenses against the person,²⁷ robbery,²⁸ and manslaughter by reason of provocation.²⁹ Some guidelines covered overarching principles such as seriousness,³⁰ as well as principles for dealing with domestic violence,³¹ assaults on children, and cruelty to a child.³² Other guidelines covered reduction in a sentence for a guilty plea,³³ breaches (for example, of an anti-social behavior order or of a protective order),³⁴ as well as issues such as failure

22. *Id.* at § 121(5).

23. *Id.* at § 121(6).

24. *Id.* at § 120(3).

25. SENTENCING GUIDELINES COUNCIL, THEFT AND BURGLARY IN A BUILDING OTHER THAN A DWELLING (2008).

26. SENTENCING GUIDELINES COUNCIL, CAUSING DEATH BY DRIVING (2008).

27. SENTENCING GUIDELINES COUNCIL, ASSAULTS AND OTHER OFFENCES AGAINST THE PERSON (2008).

28. SENTENCING GUIDELINES COUNCIL, ROBBERY (2006).

29. SENTENCING GUIDELINES COUNCIL, MANSLAUGHTER BY REASON OF PROVOCATION (2005).

30. SENTENCING GUIDELINES COUNCIL, OVERARCHING PRINCIPLES: SERIOUSNESS (2004).

31. SENTENCING GUIDELINES COUNCIL, OVERARCHING PRINCIPLES: DOMESTIC VIOLENCE (2006).

32. SENTENCING GUIDELINES COUNCIL, OVERARCHING PRINCIPLES: ASSAULTS ON CHILDREN AND CRUELTY TO A CHILD (2008).

33. SENTENCING GUIDELINES COUNCIL, REDUCTION IN SENTENCE FOR A GUILTY PLEA (2007).

34. SENTENCING GUIDELINES COUNCIL, BREACH OF AN ANTI-SOCIAL BEHAVIOR ORDER (2008); SENTENCING GUIDELINES COUNCIL, BREACH OF A PROTECTIVE ORDER (2006).

to surrender to bail.³⁵ Finally, some guidelines dealt with the Magistrates' Courts Sentencing Guidelines,³⁶ the Sexual Offences Act 2003,³⁷ and new sentences in the Criminal Justice Act 2003.³⁸ Therefore, after over five years in operation, the SGC's guidelines reflected a somewhat mixed bag of guidance on a limited number of offenses.³⁹ Against this backdrop, the SC took the opportunity for change and embarked upon a review of existing sentencing guidelines.

B. Critique of the (Old) Sentencing Guidelines

The existing guidelines contained a foreword,⁴⁰ and the main contents for offense-related guidelines were divided into two parts: "general principles" and "offence guidelines."⁴¹ They also sometimes contained annexes, and information was mostly in text, with some tables.⁴²

The first part of these guidelines called "general principles"⁴³ aimed to define levels of seriousness for an offense considering culpability, harm, and aggravating and mitigating factors; highlight the importance of assessing dangerousness; describe the application of sentencing options such as compensation and ancillary orders; and describe use of sentencing ranges and starting points. In addition, this part of the offense-related guidelines listed the decision-making process in a number of steps as follows: (1) identification of dangerous offenders, (2) identification of the appropriate starting point, (3) consideration of relevant aggravating factors (general and specific to the offense), (4) consideration of mitigation factors (including personal mitigation), (5) reduction for a guilty plea, (6) consideration of ancillary orders, (7) application of the totality principle, and (8) provision of reasons for sentencing outside the range.⁴⁴

The second part of the offense-related guidelines, called "offence guidelines," stated the maximum penalty attached to the offense.⁴⁵ Different types of the offense were then very briefly described in terms of the nature of activity involved, and each of these types had an associated sentencing range and starting point.⁴⁶ The starting points were pertinent to a first-time offender

35. SENTENCING GUIDELINES COUNCIL, FAILURE TO SURRENDER TO BAIL (2007).

36. SENTENCING GUIDELINES COUNCIL, MAGISTRATES' COURTS SENTENCING GUIDELINES (2008).

37. SENTENCING GUIDELINES COUNCIL, SEXUAL OFFENCES ACT 2003 (2007).

38. SENTENCING GUIDELINES COUNCIL, NEW SENTENCES: CRIMINAL JUSTICE ACT 2003 (2004).

39. However, these do cover much of those regularly sentenced by the courts.

40. *See, e.g.*, SENTENCING GUIDELINES COUNCIL, ASSAULTS AND OTHER OFFENCES AGAINST THE PERSON i (2008).

41. *See, e.g., id.* at 1.

42. *See, e.g., id.* at 24–29.

43. *See, e.g., id.* at 3–11.

44. *See id.*

45. *See, e.g., id.* at 12–23.

46. *See, e.g., id.*

convicted after trial (in other words, not pleading guilty).⁴⁷ Some common offense-specific aggravating and mitigating factors were also provided.⁴⁸

From the perspective of aiding the sentencer, the existing sentencing guidelines were problematic in several ways. By only providing a starting point for first-time offenders who had been convicted at trial, the guidelines were severely limited in their applicability. The guidelines were often too lengthy. They contained too much text that often included unnecessary or irrelevant information, resulting in redundant information. The presentation of information and issues were sometimes disorganized. Terms remained undefined or open to subjective interpretation. The guidelines did not contain the full list of factors to be used at each stage of decision-making, and how they should be weighted and integrated. The guidelines also did not suggest how community penalties or ancillary orders should be applied or how fines and compensation orders should be calculated. In fact, the guidelines did not cover the complete decision-making process. Relatedly, the guidelines were not always self-explanatory or independent of other documents users were referred to such as the general principles on seriousness and reduction in sentence for a guilty plea.

Therefore, the existing sentencing guidelines were neither ‘user friendly,’ nor capable of helping sentencers achieve the aims of the SC. A lengthy, disorganized presentation of information requiring the user to refer to other documents for amplification would clearly be difficult to learn, remember, and use. Guidelines covering only part of the decision-making process with important aspects of the process missing or open to subjective interpretation cannot lead to consistency and transparency in sentencing. This consequently cannot reduce the potential for biased decisions or increase public confidence in the criminal justice system. It also does not enable monitoring of the impact of guidelines on sentencing practice. Finally, the utility of the guidelines is also undermined by their apparently limited applicability and voluntary nature.

C. Suggestions for Improving the Existing Sentencing Guidelines⁴⁹

The offense-related sentencing guidelines should be improved in various ways. For example, they should cover the complete decision-making process involved in sentencing an offender. The guidelines should also indicate the full list of factors to be used at each stage of decision-making, and (if possible) how they should be weighted and integrated. The guidelines should categorise community penalties in a meaningful manner and provide a full list of ancillary orders that may be applied. The guidelines should also provide guidance on how fines and compensation orders are calculated. Text should be reduced,

47. *Id.* at 12.

48. *See, e.g., id.* at 12–23.

49. Issues not discussed here are whether guidelines should reflect existing practices or be prescriptive; whether guidelines should match sentencing options to sentencing goals; and whether guidelines should focus on groups of offenders or individual offenders.

especially that which is redundant or repetitive, and only information directly relevant for the decisions that need to be made should be included in the guidelines. Quotations from legislation should be minimized if not eliminated altogether (because the guideline is supposed to have interpreted and summarized this legislation anyhow). Terms should be defined clearly, with keywords highlighted, and some information can be displayed in tables and figures. Similar issues should be organized together, so information flows smoothly. The guidelines should be self-explanatory and independent of other sources of guidance.

III

OPPORTUNITIES FOR THE SENTENCING COUNCIL

Beyond the suggestions already provided, when revising existing guidelines and developing new ones, the SC can glean something useful from beyond the law books and the courtroom. In particular, decades of research in decision science on human judgment and decision-making (JDM) exists that points to ways in which JDM can be guided and improved.⁵⁰ Lessons also may be learned from efforts made to aid and guide decision-makers in the medical and clinical domains.⁵¹ Finally, the SC could glean something useful from the experiences, opinions, and preferences of sentencers using the guidelines.

A. Opportunities to be Informed by Decision Science

Decision scientists aim to understand how people should make decisions to be rational or accurate; how they actually make decisions within the limitations of the human mind, such as memory, and within the constraints of the decision task, such as limited time; and how people should change their decision behavior in order to improve their performance.⁵² These issues are studied with the background knowledge that human JDM relies on basic cognitive processes such as attention, perception, memory, and information processing.⁵³ These cognitive processes are limited in terms of capacity.⁵⁴ These processes, and thus JDM, are also affected by internal non-cognitive factors such as emotions and

50. See generally JUDGMENT AND DECISION MAKING AS A SKILL: LEARNING, DEVELOPMENT, AND EVOLUTION (Mandeep K. Dhami, Anne Schlotzmann & Michael Waldmann eds., 2011); Hillel J. Einhorn & Robin M. Hogarth, *Behavioral Decision Theory: Processes of Judgment and Choice*, 32 ANN. REV. PSYCHOL. 53, 77 (1981); Barbara A. Mellors, Alan Schwartz & Alison D. Cooke, *Judgment and Decision Making*, 49 ANN. REV. PSYCHOL. 447, 447 (1998).

51. See, e.g., David A. Davis & Anne Taylor-Vaisey, *Translating Guidelines into Practice*, 157 CAN. MED. ASS'N J. 408, 408 (1997); Lucila Ohno-Machado et al., *The Guideline Interchange Format: A Model for Representing Guidelines*, 5 J. AM. MED. INFORMATICS ASS'N 357, 357 (1998); Richard Thomson, Michael Lavender & Rajan Madhok, *How to Ensure that Guidelines Are Effective*, 311 BRIT. MED. J. 237, 237 (1995).

52. See, e.g., Reid Hastie, *Problems for Judgment and Decision Making*, 52 ANN. REV. PSYCHOL. 653, 658 (2001).

53. See generally Gerd Gigerenzer & Daniel G. Goldstein, *Reasoning the Fast and Frugal Way: Models of Bounded Rationality*, 103 PSYCHOL. REV. 650, 650–69 (1996).

54. See generally *id.*

perceived accountability.⁵⁵ Finally, these processes and JDM are also constrained by external decision-task-related factors such as time pressure, lack of information, or information overload, and how information is represented.⁵⁶

From a normative standpoint, it is generally agreed that rational or accurate decisions can best be made through some form of weighing and integrating of all the available and relevant information in a case.⁵⁷ However, descriptively, it has been found that people do not, and often cannot, perform such compensatory processing of information, partly because of their cognitive limitations and partly because of external decision-task constraints.⁵⁸ Indeed, there is evidence of the use of simple heuristics and “fast and frugal” processing in the legal domain.⁵⁹ Therefore, from a prescriptive standpoint, efforts to improve JDM via, for example, training, feedback, decision aids, and guidance typically can help decision-makers overcome their cognitive limitations and reduce the constraints of the decision task.⁶⁰

Importantly, these efforts to improve JDM acknowledge that the way in which information is represented, that is, textually, numerically, or visually (for example, graphs, figures, or tables), can affect how that information is understood and used to inform decisions.⁶¹ In particular, graphical information affects decision-making,⁶² and visual information can even de-bias people.⁶³

55. See generally Jennifer S. Lerner & Philip E. Tetlock, *Accounting for the Effects of Accountability*, 125 PSYCHOL. BULL. 255, 255–75 (1999); George F. Loewenstein et al., *Risks as Feelings*, 127 PSYCHOL. BULL. 267, 267–86 (1999).

56. See generally GERD GIGERENZER ET AL., SIMPLE HEURISTICS THAT MAKE US SMART (1999); Mark I. Hwang & Jerry W. Lin, *Information Dimension, Information Overload and Decision Quality*, 25 J. INFO. SCI. 213, 213–18 (1999); Carolyn M. Jagacinski, *Evaluation of Job Candidates with Missing Information: Effects of Attribute Importance and Interattribute Correlation*, 7 J. BEHAV. DECISION MAKING 25, 25–42 (1994); Rocio Garcia-Retamero & Mandeep K. Dhami, *On Avoiding Framing Effects in Experienced Decision Makers*, 66 Q. J. EXPERIMENTAL PSYCHOL. (forthcoming 2013).

57. See, e.g., GIGERENZER ET AL., *supra* note 56, at 7; THOMAS GILOVICH, DALE GRIFFIN & DANIEL KAHNEMAN, HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT 1 (2002); DANIEL KAHNEMAN, PAUL SOLVIC & AMOS TVERSKY, JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 19 (1982); Ward Edwards, *Behavioral Decision Theory*, 12 ANN. REV. PSYCHOL. 473, 474 (1961); Herbert A. Simon, *A Behavioral Model of Rational Choice*, 69 Q. J. ECON. 99, 99 (1955).

58. See, e.g., GIGERENZER ET AL., *supra* note 56, at 14; Mandeep K. Dhami & Mary Thomson, *On the Relevance of Cognitive Continuum Theory for Understanding Management Judgment and Decision Making*, 30 EUROP. MGMT. J. 316, 317 (2012).

59. See, e.g., Mandeep K. Dhami, *Psychological Models of Professional Decision-Making*, 14 PSYCHOL. SCI. 175, 177–78 (2003); Mandeep K. Dhami & Peter Ayton, *Bailing and Jailing the Fast and Frugal Way*, 14 J. BEHAV. DECISION MAKING 141, 160–61 (2001).

60. See, e.g., DHAMI, SCHLOTTMANN & WALDMANN, *supra* note 50, at 199–297.

61. Peter Sedlmeier & Denis Hilton, *Improving Judgment and Decision Making Through Communication and Representation*, in JUDGMENT AND DECISION MAKING AS A SKILL: LEARNING, DEVELOPMENT, AND EVOLUTION, *supra* note 50, at 229.

62. Gerd Gigerenzer, Ralph Hertwig, Ulrich Hoffrage & Peter Sedlmeier, *Cognitive Illusions Reconsidered*, in 1 HANDBOOK OF EXPERIMENTAL ECONOMICS RESULTS 1018 (Charles R. Plott & Vernon L. Smith eds., 2008).

63. Garcia-Retamero & Dhami, *supra* note 56; Rocio Garcia-Retamero & Mandeep K. Dhami, *Pictures Speak Louder Than Numbers: On Communicating Medical Risks to Immigrants with Non-*

Although to date, no one has studied the effects of information representation on legal decision-making per se, it is likely that legal decision-makers would also be similarly influenced by the power of visual as opposed to numerical or textual information.⁶⁴

B. Opportunities to Learn from Guidelines in Other Domains

Considerable efforts have been made to produce and implement effective, user-friendly guidelines for medical and clinical practitioners. Guideline formats include narrative text, tables, flowcharts, graphs, maps, photos, lists, critical pathways, and if-then-else statements.⁶⁵ Text-based guidelines are, however, open to variability in, for example, the order in which steps are taken and what and how information is used.⁶⁶ In addition, they may potentially be used differently by decision-makers with different backgrounds. Thus, guidelines that clearly and comprehensively order the steps taken to make a decision in a structured format are advisable, and flowcharts can achieve this.⁶⁷

It is suggested that specific (and more detailed) guidelines lead to better decisions than non-specific, less detailed ones.⁶⁸ Similarly, guidelines couched in concrete and precise language are more likely to be followed because they facilitate comprehension, recall, planning, and behavior change.⁶⁹ In fact, specification and precision of guidelines often highlights gaps in guidelines that need to be filled.⁷⁰

Decision-makers also feel more satisfied with (computerized) decision support systems that are easy to integrate into their daily routines, and find them easier to use.⁷¹ Indeed, guidelines are more likely to be adopted if they are simple, appear to have an advantage over the old approach, represent existing practices and experiences, can be easily trialled, and can be observed to be used by others.⁷² The adoption of guidelines is affected by the practice setting, such as its' customs and social norms, as well as by incentives and regulations.⁷³ Finally,

Native Language Proficiency, 14 HEALTH EXPECTATIONS 46 (Supp. 1 2011).

64. Errors and biases in decision-making may, however, arise when the visual information is less relevant.

65. See, e.g., Lucila Ohno-Machado et al., *supra* note 51, at 360 (1998).

66. See, e.g., *id.* at 368.

67. R. Barry Ruback & Jonathan Wroblewski, *The Federal Sentencing Guidelines: Psychological and Policy Reasons for Simplification*, 7 PSYCHOL. PUB. POL'Y & L. 739, 742 (2001). Ruback and Wroblewski point out that structuring tasks can reduce a decision-maker's motivation.

68. See, e.g., Paul G. Shekelle et al., *Are Nonspecific Practice Guideline Potentially Harmful? A Randomized Comparison of the Effect of Nonspecific Versus Specific Guidelines on Physician Decision Making*, 34 HEALTH SERVICES RES. 1429, 1444 (2000).

69. See, e.g., Susan Michie & Marie Johnston, *Changing Clinical Behavior by Making Guidelines Specific*, 328 BRIT. MED. J. 343, 343 (2004); Thomson, Lavender & Madhok, *supra* note 51, at 239.

70. See, e.g., Ohno-Machado et al., *supra* note 51, at 369.

71. See, e.g., Rick Goud et al., *Subjective Usability of the CARDSS Guideline-Based Decision Support System*, 136 STUD. HEALTH TECH. & INFORMATICS 193, 193 (2008).

72. See, e.g., Davis & Taylor-Vaisey, *supra* note 51, at 411.

73. See, e.g., *id.* at 412.

the adoption of guidelines may be influenced by the case itself (for example, the patient in medical and clinical domains).⁷⁴

C. Opportunities to Hear from Sentencers

As mentioned earlier, the development of sentencing guidelines is preceded by a consultation process.⁷⁵ However, when revising the existing assault guidelines, only twenty-four responses were received from Crown Court sentencers for whom the guidelines are primarily developed.⁷⁶ To identify sentencers' experiences and views of sentencing guidelines, a survey was conducted by the present author. The aims were to elicit Crown Court sentencers' (1) views of the existing sentencing guidelines; (2) views of the potential new, or revised, guidelines; and (3) their personal experiences of using sentencing guidelines, as well as their opinions on the impact of guidelines.

1. Survey Method

The survey was self-administered during a Judicial Studies Board training event held in autumn of 2010. The event was on sentencing (but not about guidelines), and it was one of several such events the judiciary is expected to attend. This event captured a subpopulation. In total, eighty-nine Crown Court sentencers participated in the survey, which reflected a fifty-one percent response rate.⁷⁷ On average, respondents had fourteen years of experience in sentencing criminal cases, with a range from six months to forty years.

Sentencers were asked to complete a three-part survey. First, they were presented with a list of seven statements about the existing (SGC) guidelines (see first column of Table 1).⁷⁸ The responses were measured on five-point scales anchored at the end- and mid-points from "disagree completely" through "neither agree nor disagree" to "agree completely." Second, sentencers were asked the extent to which they agreed or disagreed with a list of ten statements

74. See, e.g., *id.*

75. SENTENCING COUNCIL, ASSAULT GUIDELINE: RESPONSE TO CONSULTATION (2010). For instance, when revising the old assault guidelines, the professional consultation process focused on obtaining open-ended responses to nineteen questions pertaining to issues such as whether compensation and ancillary orders should be included, how harm and culpability should be determined, what additional aggravating and mitigating factors might be relevant, and whether starting points should be applicable to all offenders. The consultation also asked if they agreed with the proposed level of guidance and the extent of discretion, as well as if they thought the proposed eight-step decision-making process would increase transparency and public confidence.

76. *Id.* at 4. In addition, eighty-five responses were received from magistrates.

77. Although this response rate is smaller than that aspired to in social scientific survey research, the number of respondents is almost four times greater than that of the SC's formal consultation process which was available to all Crown Court sentencers. See SENTENCING COUNCIL, ASSAULT GUIDELINE: RESPONSE TO CONSULTATION (2010).

78. Although it is recommended to have statements that are positively and negatively framed, this was not done for the first and second part of the survey because the respondent's task becomes more cognitively demanding, thus confusing and time-consuming. Indeed, there was little evidence to suggest that respondents were biased by the framing of the statements because they showed variability in responses to the proposals for revising or improving the guidelines; in other words, they did not always agree or disagree with the statements.

about the potential new guidelines (see first column of Table 2). Finally, sentencers responded to seven questions about their personal experiences of using the sentencing guidelines and their opinions on the impact of these guidelines (see footnote to Figure 1). Responses were provided on five-point scales with anchors at each end ranging from “not at all” to “extremely.”

2. Survey Findings

Table 1 shows sentencers were typically more likely to agree rather than disagree with all of the statements provided about the *existing* sentencing guidelines suggesting that they are too long, they include terms that are sometimes left undefined and open to subjective interpretation, they include some unnecessary or irrelevant information, they are sometimes disorganized; they are sometimes repetitive or redundant, they do not clearly specify how community penalties or ancillary orders should be applied, and they are not self-explanatory because they require one to refer to other documents.

Sentencers were typically more likely to agree rather than disagree with six of the ten statements concerning the potential *new, or revised*, sentencing guidelines (see Table 2). These statements suggested that the potential new guidelines should aim to use less text and have more tables and figures, provide a full list of aggravating and mitigating factors relevant for a specific offense,

Table 1: Extent of (Dis)agreement with Views on Existing Guidelines.

| | % of Respondents | | |
|--|---------------------------------|----------------------------|------------------------------|
| | Disagree completely or somewhat | Neither agree nor disagree | Agree completely or somewhat |
| Too long. | 25 | 21 | 54 |
| Include terms that are sometimes left undefined and open to subjective interpretation. | 10 | 14 | 76 |
| Include some unnecessary or irrelevant information. | 24 | 15 | 61 |
| Content is sometimes disorganized. | 24 | 20 | 56 |
| Content is sometimes repetitive or redundant. | 17 | 18 | 65 |
| Do not clearly specify how community penalties or ancillary orders should be applied. | 6 | 28 | 67 |
| Are not self-explanatory as they require one to refer to other documents. | 28 | 30 | 42 |

categorize community penalties into some useful order, specify how fines and compensation orders ought to be calculated, provide a full list of ancillary orders, and include information on issues of totality and guilty plea reduction (and dangerousness when relevant).

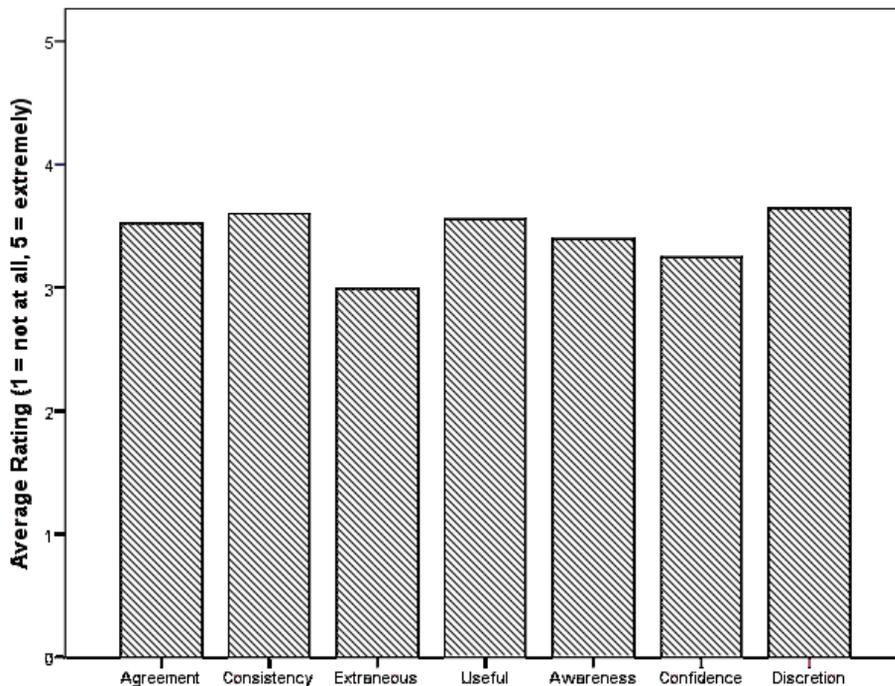
Table 2: Extent of (Dis)agreement with Views on New, or Revised, Guidelines.

| | % of Respondents | | |
|--|---------------------------------|----------------------------|------------------------------|
| | Disagree completely or somewhat | Neither agree nor disagree | Agree completely or somewhat |
| Should use less text and have more tables and figures. | 28 | 16 | 56 |
| Should provide a full list of aggravating and mitigating factors relevant for a specific offense. | 34 | 5 | 62 |
| Should specify how the various aggravating and mitigating factors should be weighted. | 53 | 12 | 36 |
| Should categorize community penalties into some useful order. | 26 | 15 | 59 |
| Should specify how fines and compensation orders ought to be calculated. | 26 | 10 | 64 |
| Should provide a full list of ancillary orders. | 10 | 14 | 76 |
| Should cover the complete sentencing process from judgment of culpability and harm, through judgment of seriousness and starting point of sentence, to final sentence. | 57 | 11 | 32 |
| Should indicate how harm and culpability ought to be judged. | 47 | 5 | 36 |
| Should specify how seriousness ought to be judged. | 40 | 5 | 41 |
| Should include information on issues of totality and guilty plea reduction (and dangerousness where relevant). | 21 | 11 | 56 |

However, Table 2 also shows sentencers typically were more likely to disagree rather than agree with statements suggesting that the potential new guidelines should aim to specify how the various aggravating and mitigating factors should be weighted; cover the complete sentencing process from judgment of culpability and harm, through judgment of seriousness and starting point of sentence, to final sentence; and indicate how harm and culpability ought to be judged. Views on how seriousness ought to be judged were divided.

Figure 1 illustrates sentencers' experiences of using sentencing guidelines and their opinions on the impact of the guidelines. Here, on average, sentencers

Figure 1: Sentencers' Experiences of Sentencing Guidelines and their Opinions on the Impact of Guidelines.⁷⁹



79. Sentencers responded to the following seven questions:

1. "How useful do you find the existing sentencing guidelines?"
2. "To what extent do you think sentencing guidelines increase the consistency of sentences given out by different sentencers on similar types of cases?"
3. "To what extent do you think sentencing guidelines increase the consistency of sentences given out by individual sentencers across similar types of cases over time?"
4. "To what extent do you think sentencing guidelines reduce the impact of extraneous factors in sentencing?"
5. "To what extent do you think sentencing guidelines increase your awareness of your sentencing practice?"
6. "To what extent do you think sentencing guidelines increase your confidence in your sentencing decisions?"
7. "To what extent do you think sentencing guidelines reduce your discretion in sentencing cases?"

thought sentencing guidelines had reduced their discretion in sentencing. Nevertheless, sentencers also thought guidelines could increase the consistency of sentences passed by different sentencers on similar types of cases (that is, agreement), as well as the consistency of sentences passed by individual sentencers across similar types of cases over time, and sentencers reported that the existing sentencing guidelines were relatively useful. Although to a lesser degree, sentencers thought guidelines had increased their awareness of their own sentencing practice and their confidence in their sentencing decisions. However, sentencers were least likely to think sentencing guidelines could reduce the impact of extraneous factors in sentencing.

Finally, sentencers' years of experience in sentencing criminal cases was significantly correlated with their responses to two of the above issues studied. Less experienced sentencers were more likely to state that the sentencing guidelines increased their confidence in their sentencing decisions ($r = -0.25$, $p = 0.030$). More experienced sentencers were more likely to state that the sentencing guidelines reduced their discretion in sentencing cases ($r = 0.23$, $p = 0.048$). Overall, sentencers' experiences of using guidelines and their opinions on the impact of guidelines were relatively positive. Sentencers' years of experience only played a small role in how they viewed the sentencing guidelines. With regard to the existing guidelines, sentencers tended to agree with statements pointing to problems regarding their structure and format (for example, length and organization), as well as their content (in other words, specification of terminology and processes). Similarly, sentencers tended to agree with statements about how the potential new guidelines could be better devised in terms of, for example, more tables and figures, full lists of aggravating and mitigating factors, and specification of fine or compensation calculations. However, sentencers typically disagreed with proposals that would enable the new guidelines to better guide their sentencing decision-making process. These proposals include specifying how factors should be weighted, and how culpability, harm, and seriousness ought to be judged. Thus, generally, sentencers wanted more information and to have that information presented in an easy-to-use way, but they did not want to be instructed on how to use that information.

IV

THE NEW SENTENCING GUIDELINES

A. Missed Opportunities?

In 2011, the SC produced the revised definitive assault guideline.⁸⁰ This replaces the one originally produced by the SGC which was not being followed, and which had been met with some criticism by sentencers.⁸¹ Although the new

80. SENTENCING COUNCIL, ASSAULT: DEFINITIVE GUIDELINE (2011).

81. SENTENCING COUNCIL, ASSAULT GUIDELINE: PROFESSIONAL CONSULTATION (2010).

assault guideline represents a significant improvement in terms of having starting points applicable to all offenders, being shorter, less wordy, and more organized, it nevertheless suffers from some of the same criticisms of its predecessor.

For instance, important terms remain undefined and open to subjective interpretation, the list of relevant aggravating and mitigating factors are non-exhaustive, and there is no guidance on how community penalties or ancillary orders should be applied or how fines and compensation orders should be calculated. In addition, the SC has not dealt with the issues that the Coroners and Justice Act 2009 left unaddressed, such as how culpability and harm should be judged, how seriousness is determined, and the weighting of aggravating and mitigating factors. The potential for double or even triple counting of aggravating and mitigating factors also remains. The problems of text-based guidelines have been ignored, and the advantages of using precise language have been overlooked. The SC has not taken into account the difficulties decision-makers may have in weighing and integrating all the available and relevant information to make reliable and informed decisions. Finally, the SC has not paid sufficient attention to the importance of representing information visually.

Thus, in its first contribution, the SC has missed several opportunities. It has missed the opportunity to learn from the science of how people make judgments and decisions, to borrow from other domains in which guidelines successfully prevail, and to satisfy Crown Court sentencers' preferences.

B. Improving the Production and Implementation of Guidelines

Fundamental differences remain in how guidelines are produced and implemented for sentencing than for other domains, which may reduce the impact of the former. Guidelines in other domains such as medical and clinical practice are based on research evidence of "what works," so they can be effective.⁸² However, this is not the case for sentencing guidelines, limiting their ability to effectively reduce crime and protect the public. Typically, a needs-assessment would be conducted before any new intervention or decision aid is designed. However, no such assessment is made before developing sentencing guidelines. Guidelines in other domains are often tested by asking users to review them for clarity, consistency, acceptability, and so forth.⁸³ However, this practice has not been adopted by the SC, and so it is no surprise that the guidelines, as found in the survey reported above, are not particularly user friendly. Finally, guidelines in other domains are also tested in practice settings to examine their feasibility.⁸⁴ Although this has not been done for sentencing guidelines, the SC has embarked upon a Crown Court survey documenting the

82. See, e.g., Lois Thomas, *Clinical Practice Guidelines*, 2 EVID. BASED NURSING 38 (1999).

83. *Id.*

84. *Id.*

factors that judges report considering when sentencing specific offenses.⁸⁵ But this survey does not ask if the advisory-only guidelines were applied, and so it remains uncertain if the aims of the SC have been achieved.

Successful implementation of guidelines requires intervention strategies that, for instance, combine continuing education methods (for example, educational materials, conferences, workshops), community-based methods (for example, academic detailing, opinion leaders), and practice-based methods (for example, case-based methods, audit and feedback, reminders) that can increase uptake of guidelines.⁸⁶ Beyond this, guidelines need to be easy to use, be perceived as having some advantage over existing practices, and be accepted by other users.⁸⁷

Various ways to enforce sentencing guideline recommendations exist, including requiring sentencers to state their reasons for departure, having appellate review, and publishing judge- or court-specific departure rates.⁸⁸ The latter mechanism relies on social influence in terms of peer pressure and conformity which is potentially very powerful. Appellate review has the advantages of helping to interpret guidelines and legislation, as well as of learning from judicial experience and individual cases to develop a body of case law. It can hold sentencers to account, and can be particularly effective in large jurisdictions aiming to change practice. In contrast to these two mechanisms, requiring judges to provide reasons for departures is likely to be ineffective. Psychological research shows people may lack insight into their cognitive processes. Even if they have such insight, however, they may lack the language to articulate such processes; and, even if they had the language, they may not wish to tell the truth.⁸⁹ For instance, Flood-Page and Mackie found that magistrates' stated reason for not awarding a compensation order for property offenses was because the stolen property had been recovered and restored to the owner; however, in interviews the main reason given was that the defendant lacked a means to pay.⁹⁰ Ultimately, the problem does not lie so much in the implementation of the guidelines, but in the design of guidelines themselves.

C. Improving the Impact of Sentencing Guidelines

It is worth noting that sentencing guidelines are not always successful in achieving the desired outcomes. For instance, research evaluating state

85. SENTENCING COUNCIL, CROWN COURT SENTENCING SURVEY (2011). One of the main goals of the SC is to monitor the impact of guidelines.

86. See, e.g., Davis & Taylor-Vaisey, *supra* note 51, at 412–13.

87. See, e.g., Goud et al., *supra* note 71, at 197; Thomson, Lavender & Madhok, *supra* note 51, at 238.

88. See, e.g., Richard S. Frase, *State Sentencing Guidelines: Diversity, Consensus, and Unresolved Policy Issues*, 105 COLUM. L. REV. 1190, 1220 (2005).

89. See, e.g., Dhimi & Ayton, *supra* note 59, at 161; Richard E. Nisbett & Timothy D. Wilson, *Telling More Than We Can Know: Verbal Reports on Mental Processes*, 84 PSYCHOL. REV. 231, 231 (1977).

90. FLOOD-PAGE & MACKIE, *supra* note 10, at 60–62.

sentencing guidelines in the United States suggests that although successful in reducing extralegal disparity in sentencing in some jurisdictions, the guidelines have sharply increased such disparity in other jurisdictions.⁹¹ A fifteen-year review of the U.S. federal sentencing guidelines concluded that there were both positive and negative outcomes associated with their use.⁹² The guidelines increased the transparency and predictability of sentencing and reduced inter-judge and regional disparities.⁹³ However, the guidelines also reduced the use of simple probation while dramatically increasing the use and length of incarceration.⁹⁴ The guidelines failed to reduce inter-judge disparities for some offenses, and regional differences in some offenses actually increased.⁹⁵ Finally, the guidelines failed to eradicate some ethnicity, race, and gender disparities in sentencing.⁹⁶

There are many reasons for why these sentencing guidelines may fail to achieve the desired impact. According to the U.S. Sentencing Commission, “Part of the reason not all the goals of sentencing reform have been fully achieved is that not all of the components of guidelines implementation put in place at the dawn of the guidelines era have been fully implemented or have worked as intended.”⁹⁷ Commentators also argue that the Federal guidelines failed because they lacked a clear purpose⁹⁸ and were too complex.⁹⁹

In England and Wales, Raine and Dunstan found that fairly specific and relatively simple guidelines on the calculation of fines nevertheless resulted in wide-ranging outcomes and considerable disparities for different categories of offenses.¹⁰⁰ The explanation for these findings was primarily that sentencers (in this case lay magistrates), were unfamiliar with the basic principles of the guidelines, uncertain about the structuring of the decision process, afforded discretion by the imprecise language, and felt deviation from the guidelines was justified on the grounds of proportionality.¹⁰¹

Officially, sentencing is geared toward simultaneously achieving several goals: the punishment of offenders (retribution), reduction of crime (deterrence

91. See, e.g., Cassia Spohn, *The Effects of the Offender's Race, Ethnicity, and Sex on Federal Sentencing Outcomes in the Guidelines Era*, 76 LAW & CONTEMP. PROBS., no. 1, 2013 at 75.

92. See, e.g., U.S. SENTENCING COMM'N, FIFTEEN YEARS OF GUIDELINES SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING ITS GOALS OF SENTENCING REFORM, reprinted in 311 FED SENT'G REP. 269, 269–76 (2004).

93. *Id.* at 273.

94. *Id.* at 270.

95. *Id.* at 273.

96. *Id.* at 274–76.

97. *Id.* at 276.

98. See, e.g., Evangeline A. Zimmerman, *The Federal Sentencing Guidelines: A Misplaced Trust in Mechanical Justice*, 43 MICH. J. L. REFORM 841, 857 (2010).

99. See, e.g., Ruback & Wroblewski, *supra* note 67, at 742.

100. See, e.g., John W. Raine & Eileen Dunstan, *How Well Do Sentencing Guidelines Work? Equity, Proportionality and Consistency in the Determination of Fine Levels in the Magistrates' Courts of England and Wales*, 48 HOW. J. CRIM. JUST. 13, 29 (2009).

101. *Id.* at 29–32.

and incapacitation), reform and rehabilitation of offenders, protection of the public, and reparation. However, the guidelines do not reconcile these often conflicting goals. One way to narrow down which goals of sentencing should be achieved by the guidelines, instruct how information should be weighted and integrated for judgments of offense seriousness, specify how aggravating and mitigating factors should be considered, and indicate the acceptable sentencing options and ranges, is to examine public opinion on the issue.¹⁰²

In fact, it is unclear to what extent the SC can have a real impact on sentencing practice in England and Wales, because despite the emphasis placed on the Coroners and Justice Act 2009 in terms of improving the existing sentencing guidelines, the Act fell short of making the guidelines mandatory. A lack of sufficient awareness and compliance with the guidelines occurs in other domains where use of guidelines are considered best practice,¹⁰³ and so these difficulties are likely to be greater in the sentencing domain where the introduction of guidelines is still contentious. There is some evidence that the personal and demographic characteristics of decision-makers may affect their adoption of guidelines in the medical and clinical domains,¹⁰⁴ and it is likely that such individual differences may also occur in the sentencing domain, especially in terms of type of sentencer (for example, lay magistrates versus district judges and Crown Court sentencers) and years of experience on the sentencing bench.

V

CONCLUSION

When revising the existing sentencing guidelines and developing new ones, the SC has so far missed opportunities that lie in the science of how people make judgments and decisions, the development and implementation of guidelines in other domains such as medicine, and the views of sentencers who are expected to apply guidelines. All of these sources suggest that sentencing guidelines could benefit from improvements such as reduced text, increased visual representation of information, and greater structure, specification and coverage.

Beyond the format and structure of guidelines, consideration of their implementation and impact is important, and in the information technology age, production of computerised guidelines is also becoming popular in other domains. The clarity, specificity and structure required to develop such guidelines may help improve the current sentencing guidelines. When adopting the suggestions for improving sentencing guidelines provided above, it is clear that many gaps in the existing guidelines will be identified and so these will also need to be filled. Attention must also be paid to ensuring that variables (for example, aggravating and mitigating factors) are reliably and validly

102. See, e.g., Julian V. Roberts et al., *Public Attitudes to Sentencing Purposes and Sentencing Factors: An Empirical Analysis*, 11 CRIM. L. REV. 771, 771 (2009).

103. See, e.g., Davis & Taylor-Vaisey, *supra* note 51, at 410.

104. *Id.* at 411.

measured.¹⁰⁵ It is easier to assess if clearly specified guidelines are being followed.¹⁰⁶

Ultimately, improving the structure and format of guidelines can promote consistency and agreement in sentencing. An improved structure can ensure the use of relevant factors, lessen the impact of extraneous factors, prevent double or triple counting, and encourage adherence to the guidelines. It can reduce reliance on post hoc reasons to justify departures and improve monitoring of the guidelines' impact. In due course, such changes could increase the effectiveness of sentences and foster confidence in court decisions.

105. See, e.g., Ruback & Wroblewski, *supra* note 67, at 764–67.

106. See Michie & Johnston, *supra* note 69, at 343.