

Ferrara

Common Law Sentencing: COURSE OUTLINE AND COURSE READINGS

Julian Roberts, Faculty of Law, University of Oxford, julian.roberts@worc.ox.ac.uk

Overview of Seminar: Sentencing lies at the heart of the criminal justice system. The decisions of judges attract considerable public interest and the sentencing process has become considerably politicized in recent years. This is true in the U.S., the U.K., as well as other common law jurisdictions. In this course we shall explore the sentencing process beginning with the most basic question: Why Punish? Many justifications have been offered for the imposition of legal punishments, and multiple sentencing objectives have recently been placed on a statutory footing in a number of common law jurisdictions. The focus is on common law, adversarial sentencing but we shall also consider the differences between common and civil law sentencing procedures. Throughout this seminar we shall explore a number of key issues, the most important of which pertains to the structuring of discretion at sentencing. We shall also attempt to place penal policy developments in an international context since the problems confronting the sentencing process also exist in other countries. Each session of the course is divided into two topics.

Format: At the beginning of each seminar the instructor will provide an introduction to the topic, and an overview of the key issues in the area. This will be followed by discussion of the specific seminar questions, and general discussion among all participants. We shall also discuss several appellate judgments; copies of the cases will be provided by the instructor.

Background/ Further Reading:

Tonry, M. (ed.) (2016) *Sentencing Policies and Practices in Western Countries: Comparative and Cross-National Perspectives*. Chicago: University of Chicago Press.

Petersilia, J. and Reitz, K. (eds.) (2012) *The Oxford Handbook of Sentencing and Corrections*. New York: Oxford University Press.

Easton, S. and Piper, C. (2016) *Sentencing and Punishment*. (4th Ed, OUP).

Roberts, J.V. (ed.) (2015) *Exploring Sentencing Practice in England and Wales*. (2015) London: Palgrave Macmillan.

Tonry, M. (ed.) (2016) *Sentencing Policies and Practices in Western Countries: Comparative and Cross-National Perspectives*. Chicago: University of Chicago Press.

Petersilia, Joan. and Reitz, K. (eds.) (2012) *The Oxford Handbook of Sentencing and Corrections*. New York: Oxford University Press.

DETAILED SEMINAR PROGRAMME

Class 1 **Introduction to common law sentencing and the philosophies of punishment: Retributivism and Utilitarianism. How are these philosophies reflected in sentencing statutes around the world?**

This seminar will include discussion of the principal issues in common law sentencing.

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)

Intro to Chapter 4 (pp. 102-107)

von Hirsch (4.2)

Frase (4.4)

Chapters 1 and 3 of Ashworth, *Sentencing and Criminal Justice* (6th ed., 2015).

Tonry, Michael. (2013) *Why Punish? How Much?* Introduction (pp. 3-24). (New York: Oxford University Press).

Roberts, J.V. and Baker, E. (2008) Sentencing Structure and Reform in Common Law Jurisdictions. In: S. Shoham, O. Beck, and M. Kett (eds.). *International Handbook of Penology and Criminal Justice*. New York: Taylor and Francis.

Key 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?

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?

Class 2

The Custody Threshold: Regulating the Use of Imprisonment

Ashworth, Andrew. (2015) *Sentencing and Criminal Justice*. 6th edition, Chapter 9.

Padfield, Nicola. (2011) Time to Bury the Custody Threshold? *Criminal Law Review*, 8: 593-612.

Roberts, J.V. and Harris, L. (2017) Reconceptualizing the Custody Threshold in England and Wales. *Criminal Law Forum*, 28 (3): 477-499.

Imposition of Community & Custodial Sentences: Definitive Guideline (Available at: <https://www.sentencingcouncil.org.uk/publications/?s&cat=definitive-guideline>)

British Academy (2013) A Presumption Against Imprisonment. Available at: <https://www.thebritishacademy.ac.uk/publications/presumption-against-imprisonment-social-order-and-social-values>

Case:

R. v. *Vaicullevicius* [2013] 2 Cr App R (S) 362.

Key Questions

All jurisdictions incorporate a 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 to the current provision 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?

Class 3: Structuring sentencing discretion Part I:

- a. Problems in sentencing, including ensuring consistency and equal treatment;
- b. Structuring Sentencing in US, Scandinavia, and Italy

Required Readings

From *Principled Sentencing* (3rd ed., 2009):

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

Frankel (6.1)

Ashworth (6.2)

Frase (6.4)

Corda, A.C. (2016) Sentencing and Penal Policy in Italy. *Crime and Justice. A Review of Research*. Chicago: University of Chicago Press.

O' Malley, T. (2013) Living without Guidelines. In: *Sentencing Guidelines: Exploring the English Model*. (Oxford: Oxford University Press).

Reitz, K. (2013) *Comparing Sentencing Guidelines: Do US systems have anything worthwhile to offer England and Wales?* Chapter 12 in *Sentencing Guidelines: Exploring the English Experience*. (Oxford: OUP).

Roberts, J.V. (2019) The Evolution of Sentencing Guidelines: Comparing Minnesota and England and Wales. In: *Crime and Justice. A Review of Research*, in press.

Weigend, T. (2016) No news is good news: Criminal Sentencing in Germany. In: Tonry, M. (ed.) (2016) *Sentencing Policies and Practices in Western Countries: Comparative and Cross-National Perspectives*. Chicago: University of Chicago Press.

Spohn, C. (2002) *30 Years of Sentencing Reform*. Chapter 6, pp. 219-239 in *How do Judges Decide?* London: Sage

For information on the Minnesota guidelines, see Minnesota Sentencing Guidelines Commission: <https://mn.gov/sentencing-guidelines/>

For information on the federal guidelines, see <https://www.ussc.gov/>

Australia: the Victorian Sentencing Council: <https://www.sentencingcouncil.vic.gov.au/>

Key Questions

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?

Structuring Sentencing Part II: England and Wales and other jurisdictions

Required Readings

Roberts, J.V. and Rafferty, A. (2011) Sentencing Guidelines in England and Wales: Exploring the new Format. *Criminal Law Review*, 9: 680-689.

Chapter 14 of Ashworth, *Sentencing and Criminal Justice* (6th ed., 2015).

Roberts, J.V. and Ashworth, A. (2016) The Evolution of Sentencing Policy and Practice in England and Wales, 1996-2015. in: M. Tonry (ed.) *Sentencing Policies and Practices in Western Countries*. New York: Oxford University Press.

Ashworth, A. and Roberts, J.V. (2013) *The Origins and Nature of the Sentencing Guidelines in England and Wales*. Chapter 1 in *Sentencing Guidelines: Exploring the English Experience*. (Oxford: OUP).

Padfield, Nicola. (2013) *Exploring the Success of Sentencing Guidelines*. Chapter 3 in *Sentencing Guidelines: Exploring the English Experience*. (Oxford: OUP).

Other countries:

Roberts, J.V. and Gazal-Ayal, O. (2013). Sentencing Reform in Israel: An Analysis of the Statutory Reforms of 2012. *Israel Law Review*, 46: 455-479.

Roberts, J.V. (2003) An Analysis of the Statutory Statement of the Purposes and Principles of Sentencing in New Zealand. *Australia and New Zealand Journal of Criminology*, 36(3): 249-271.

O'Malley, Tom. (2017) Judgment and Calculation in the Selection of Sentence. *Criminal Law Forum*,

Sentencing Council, *Robbery Offences: Definitive Guideline* (2011) at www.sentencingcouncil.org.uk

Cases:

R. v. JDL. [2018] EWCA Crim 1766. Cr. App. R.(S.) 451; and commentary in *Criminal Law Review*, 2018. 12: 1018-1020.

For further information on the English sentencing guidelines, see the website of the Sentencing Council of England and Wales: <http://sentencingcouncil.judiciary.gov.uk/>

Key Questions

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?

How might we determine whether one approach to structuring discretion at sentencing is superior to all others? Can empirical research play a role, and if so, what are the measurable variables which may permit us to establish the relative success of a particular sentencing regime?

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?

How does the English 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?

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?

Class 4 PREVIOUS CONVICTIONS AND MULTIPLE CONVICTIONS

Overview

In this seminar we shall discuss two of the most difficult problems in sentencing theory and practice: prior convictions and sentencing multiple offences. 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? 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

(1) Prior Crimes

From *Principled Sentencing* (3rd ed., 2009):

Roberts, 4.6(a)

von Hirsch, 4.6(b)

Ashworth, A. (2015) *Sentencing and Criminal Justice*. 6th edition, pp. 205-226.

Hester, R., Frase, R., Roberts, J.V., and K. Mitchell (2018) Prior Record Enhancements at Sentencing: Unsettled Justifications and Unsettling Consequences. In: M. Tonry (ed.) *Crime and Justice*, 48: 209-253. Chicago: University of Chicago Press.

Lippke, R. (2016) *The Ethics of Recidivist Premiums*. The Routledge Handbook of Criminal Justice Ethics. London: Routledge.

Wasik, M. (2010) Dimensions of Criminal History. Chapter 9 in: *Previous Convictions at Sentencing: Theoretical and Applied Perspectives*. Studies in Penal Theory and Ethics. Oxford: Hart Publishing.

Tonry, M. (2010) The Questionable Relevance of Previous Convictions to Punishments for Later Crimes. Chapter 6 in: *Previous Convictions at Sentencing: Theoretical and Applied Perspectives*. Studies in Penal Theory and Ethics. Oxford: Hart Publishing.

(2) Multiple Current Crimes

Sentencing Council. Definitive Guideline on Totality.

https://www.sentencingcouncil.org.uk/wp-content/uploads/Definitive_guideline_TICs__totality_Final_web.pdf

Chapter 8 of A. Ashworth, *Sentencing and Criminal Justice* (6th ed., 2015).

Chapters 1, 8 and 14 in Ryberg et al. (eds.) (2017) *Sentencing Multiple Crimes*. Studies in Penal Theory and Philosophy. New York: Oxford University Press.

Lippke, R. (2011) Retributive Sentencing, Multiple Offending and Bulk Discounts. In: M. White (ed). *Retributivism*. New York: OUP.

Vibla, N. More than One Crime. In: *Exploring Sentencing Practice in England and Wales*. (2015). London: Palgrave Macmillan.

Chapter 8 of L. Alexander and K. Ferzan (2018) *Reflections on Crime and Culpability: Problems and Puzzles*. (This reading will be distributed in class.)

Cases

R. v. Chamberlin, [2017] EWCA Crim 39

Key Questions

Previous Convictions

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 sentencing guidelines issued by the Sentencing Council? Is this the appropriate place for them?

Class 5: Aggravation and Mitigation, including plea-based sentencing discounts

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.

Required readings

From *Principled Sentencing*: Hudson, Barbara, selection 8.4; Tonry, 8.1

Chapter 5 of A. Ashworth, *Sentencing and Criminal Justice* (6th ed., 2015).

Cooper, John. (2013) *Nothing Personal. The Impact of Personal Mitigation at Sentencing*. Chapter 10 in *Sentencing Guidelines* (Oxford: OUP).

Jacobson, Jessica and Hough, M. (2007) *Personal Mitigation*. Chapter 8 in: *Mitigation and Aggravation at Sentencing*. Cambridge: Cambridge University Press.

Maslen, H. (2013) *Remorse and Sentencing*. Chapter 8 in *Sentencing Guidelines: Exploring the English Experience*. (Oxford: OUP).

Padfield, N. (2013) Intoxication as a sentencing factor. Chapter 5 in: *Mitigation and Aggravation at Sentencing*. Cambridge: Cambridge University Press.

Roberts, J.V. (2011) Punishing, More or Less: Exploring Mitigating and Aggravating Factors at Sentencing. Chapter 1 in: *Mitigation and Aggravation at Sentencing*. Cambridge: Cambridge University Press.

Case: R. v. Sara Jane Smith [2001] EWCA Crim 1476; [2002] 1 Cr. App.R.(S.) 61.

Plea-based Discounts

Roberts, J.V. and Bradford, B. (2015) Sentence Reductions for a Guilty Plea: New Empirical Evidence from England. *Journal of Empirical Legal Studies*, 12(2): 187-210.

Reduction in Sentence for a Guilty Plea. Definitive Guideline. (2017) at: <https://www.sentencingcouncil.org.uk/publications/item/reduction-in-sentence-for-a-guilty-plea-definitive-guideline-2/>www.sentencingcouncil.org.uk.

Leverick, F. (2014) Sentence Discounting for Guilty Pleas: An Argument for Certainty over Discretion. *Criminal Law Review*, 5: 338-349.

Peay, J. and Player, E. (2018) Pleading Guilty: Why Vulnerability Matters. *Modern Law Review*, 81(6) 921-957.

Key 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 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?

How should race and gender affect the determination of which factors mitigate? For example, parenthood is often cited as a ground to mitigate sentence, and women are more likely to be sole caregivers for dependent children. How should the sentencing process take such gender-linked circumstances into account?

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?

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?

What are the principal arguments in favour of, and against, plea-based sentencing discounts? What level of sentence reduction is appropriate for defendants who plead guilty?

Class 6: Sentences of Imprisonment, Mandatory Sentencing and Sentencing for Murder

From *Principled Sentencing*:

Spohn, Reading 6.6

Mitchell, B. and Roberts, J.V. (2011) Public Attitudes Towards the Mandatory Life Sentence for Murder in England and Wales: Putting Received Wisdom to the Empirical Test. *Criminal Law Review*, 6: 456-465.

Roberts, J.V. (2002) Determining parole eligibility dates for life prisoners: lessons from Jury hearings in Canada. *Punishment and Society. The International Journal of Penology*, 4: 103-114.

Mitchell, B. (2013) Sentencing Guidelines for Murder, Chapter 4 in *Sentencing Guidelines: Exploring the English Experience*. (Oxford: OUP).

Class 7

Third Parties: Role of the Victim at Sentencing and parole

Required Readings

Roberts, J.V. (2009) Listening to the Crime Victim: Evaluating Victim Input at Sentencing and Parole. In: M. Tonry (ed.) *Crime and Justice*. Volume 38. Chicago: University of Chicago Press.

Ashworth, A. (1993) Victim Impact Statements at sentencing. *Criminal Law Review*, 498-509.

Chalmers, J. et al. (2007) Victim Impact Statements: Can work, and Do work (for those who bother to make them). *Criminal Law Review*, May 360-379.

Edwards, I. (2013) Victims and Sentencing Guidelines. Chapter 5 in *Sentencing Guidelines: Exploring the English Experience*. (Oxford: OUP).

Cases: Perkins

Key Questions

1. If victims should have procedural rights in the sense of being able to provide input into decision-making throughout the criminal process, is the claim on their behalf stronger at some stages (e.g., bail) than others (e.g., parole)?
2. Crime victims in England and Wales and most other common law jurisdictions are allowed to depose an impact statement to assist the court at sentencing (known as the Victim Personal Statement in England and Wales). Is this a useful or a harmful addition to the sentencing equation?
3. A key distinction between the criminal justice system in England and Wales (and most common law countries) and the US is that crime victims across the US are able to make submissions about more than just the impact of the crime; they make submissions regarding the appropriate decision to be taken (at bail; sentencing or parole). What are the advantages and disadvantages of giving victims additional input of this kind?

26/3