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Refining the measurement of consistency in sentencing: A methodological review

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Abstract

The importance of improving consistency in sentencing has been underscored by institutional reforms in a number of jurisdictions. However, the effectiveness of these policy changes has not been clearly measured. To a certain extent this is due to the methodological confusion reflected by the multiplicity of methods that have been used in the study of consistency in sentencing. Here we review and categorise all of the quantitative methods that have been used to measure consistency in the literature. Our classification differentiates methods based on characteristics such as their robustness, the type of data they require, or whether they are amenable to comparisons in time or across jurisdictions. In this way the paper has a twofold contribution: it simplifies the implementation of future empirical analyses on consistency and facilitates their critical interpretation.

Keywords: Sentencing; Consistency; Disparity; Measurement; Quantitative

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1. Introduction

The assurance that like cases will be treated alike regardless of where, when, or who is sentencing them is a fundamental principle of justice. Furthermore, in addition to being a goal in its own right, consistency in sentencing is also associated with other desirable effects. For example, it fosters public confidence in sentencing, helps to establish a common understanding of the consequences of crime, and promotes the legitimacy of the criminal justice system. However, the means by which consistency in sentencing can be achieved are neither clear-cut nor uncontroversial.

Over the years, critics of the sentencing process in western jurisdictions have contended that unrestrained discretion in the hands of sentencers leads to inconsistency in sentencing.[2] This has led many jurisdictions to introduce greater structure for sentencers, usually in the form of sentencing guidelines. The exact nature of guidelines varies widely; in simple terms we could position them along a continuous scale reflecting the extent to which judicial discretion is restricted (Reitz, 2013). For example, across the US many states and the federal system employ relatively rigid guidelines, often in the form of a sentencing grid (see Frase, 2005a), where types of offences are associated with specific sentence outcomes. In contrast Scandinavian countries have typically issued 'guidance by words' (see Wandall, 2006), while in England and Wales the Sentencing Council has devised a system of guidelines which lies between these two paradigms (see Dhami, 2013; Roberts, 2013a).

Despite the considerable attention attracted by these reforms, the effectiveness of different approaches to structuring discretion remains an open question. American scholars have led the research efforts, although significant work did not begin until the late 90s, and struggled to reach definitive conclusions. This view was first expressed by Tonry (1996) and Austin et al. (1996), as recounted by Hofer et al. (1999): "*Evaluations of state systems have been few, and independent evaluations almost non-existent*"; and "*The past 20 years have produced many accusations but few studies documenting the misuse of discretion by judges*" (Hofer et al., 1999, p. 262).

Along the new century we have seen a substantial increase in the number of contributions, many of them investigating the consequences of the 'Booker/Fanfan' reform of the federal guidelines. However, in spite of these new contributions – addressing a specific case study – no definitive answers have been found (Engen, 2011; Sebba, 2013)[3]:"*It is difficult to comment on the impact of sentencing guidelines on sentencing disparity because there simply is little empirically rigorous research examining the effects of actual policy changes*" (Engen, 2011, p. 1139). Furthermore, this is not a peculiarity of the US. Recent reviews looking at consistency in other jurisdictions, such as Pina-Sánchez and Linacre (2013) in England and Wales and Krasnostein and Freiberg (2013) in Australia, have noted similarly inconclusive results.

We believe that there are two fundamental reasons why so little is known about such a highly debated topic. First and foremost, there is not enough good data available (Krasnostein and Freiberg, 2013; Schanzenbach and Tiller, 2008).[4] The difficulty of convincing the judiciary

[2] Frankel's (1972) influential essay could be considered the spark that ignited the debate on sentencing reform when he claimed that unstructured discretion leads to 'lawlessness' in sentencing.

[3] "*scholars perceive the research findings to be equivocal as to the extent to which the reforms have achieved their objectives*" (Sebba, 2013, p. 257).

[4] "*The underlying antipathy to social science data in the courts has limited their utility in identifying patterns of sentencing in commonly occurring crimes*" (Krasnostein and Freiberg, 2013, p. 277).