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INTRODUCTION

Intoxication, particularly from alcohol consumption, is a frequent factor in violent offending. In England and Wales, violent offenders are perceived to be under the influence of alcohol at the time of the incident in 53 per cent of victim reports (ONS 2015) and, although recognised as an underestimate, 28 per cent of offenders report having an alcohol problem on arrival in prison (HMIP 2015). The frequent coexistence of alcohol and violence does not evidence a universal or causal link. Rather it points to a culturally contingent association between alcohol and violence with drinking being a contributory cause of violence alongside other factors, including individual characteristics and contextual factors (Graham et al. 1998, Graham and Homel 2008 and Lightowlers 2011, Lightowlers et al. 2014).

Intoxication can also be variously implicated in crime: after all, there exist alcohol-specific offences (e.g. drink-driving and drunkenness) where alcohol may be the direct cause, alcohol may serve as a trigger or facilitator of an offence (contributory factor), or it may be unrelated to an offence (co-existent; Graham et al. 2012). Given such variation in alcohol-related offending scholars, such as Padfield (2011), argue that the aggravating or mitigating effect of intoxication on an offence ought to depend on the situation and some discretion in sentencing is potentially welcomed so as to avoid a pervading and prescriptive 'malevolent assumption' regarding alcohol (Colins 1981 cited in Dingwall 2006:25).

However, alcohol's legal status and widespread availability mean alcohol intoxication (as opposed to drug intoxication) and related offending continue to prove particularly problematic for criminal justice agencies. For example, alcohol's widespread availability and normative cultural positioning can undermine efforts to rehabilitate offenders in Probation settings (Broad and Lightowlers 2015). Moreover, alcohol use remains far more prevalent than illicit drug use and so affects more cases brought before the courts.

Intoxication may lead to challenges such as establishing criminal liability and so the degree of intoxication, as well as raising questions around intent (Dingwall 2006). Indeed, only part way through the 19th century was the common law rule in England that drunkenness was not an excuse to any criminal charge modified so that for crimes of specific intent intoxication could reduce liability (Handler 2013): that is drunkenness may limit the accused's ability to form intent. Historically, intoxication has thus always proved problematic with regards to establishing criminal liability and the structuring of sentencing practice (see Dingwall 2006; Handler, 2013). Questions thus arise as to whether intoxication ought to be considered a mitigating or aggravating factor or be seen as irrelevant (Padfield 2011), especially as many offenders suggest their drinking should mitigate their sentence in their defence (Dingwall and Koffman 2008).

Despite the presence of intoxication having obvious impact on the delivery of sentencing, debate around how intoxication ought to be dealt with (with reference to theories of punishment) and *how* it should impact on sentencing are relatively lacking, as is empirical

study of how cases are dealt with in practice (Dingwall 2006; Padfield 2011). Indeed, to date there has been no nationally representative quantitative work examining how intoxication is used in sentencing practice. Furthermore, Padfield (2001:84) notes in relation to the UK:

“Given the fact that Parliament has been encouraged to pass an enormous amount of sentencing law in recent years, and that there are specific offences (being drunk and disorderly, or drunken driving being obvious examples) and specific sentences for drunk offenders (a variety of banning orders), it is perhaps surprising that there is no general law on the impact of intoxication on offence seriousness”.

Different jurisdictions deal with intoxication differently in terms of criminal liability. Some see it as irrelevant in all instances, others see it as relevant only to those offences with ‘specific’ intent as opposed to ‘basic’ intent, relevant to both offences, or to both in combination with an offence of causing harm whilst intoxicated (Dingwall 2006)ⁱ. Whilst it has not always been the case, In England and Wales, intoxication is only considered relevant to determining *mens rea* for offences with ‘specific’ intent (Dingwall 2006; Handler 2013) and intoxication cannot be considered a full defence in criminal proceedings. This position rejects the disinhibition thesisⁱⁱ and assumptions that violent and/or criminal behaviour are inevitable consequences of heavy drinking and is shaped by an assumption that one has an appreciation of one’s behaviour, even when intoxicated, and ought to be held accountable for this in the interests of public protection. Thus, the level of intoxication would have to be extremely high to bear any relevance to the accused’s liability. Moreover, the burden of proof in England and Wales is on proving the defendant was incapable of forming intent (and so the threshold is appropriately high) and means “intoxication is usually only of practical relevance at the sentencing stage” (Dingwall 2006:92). The courts are therefore merely left to determine the most appropriate sentence for the offender. However, the role intoxication plays in deciding this has received surprisingly little attention, with the few studies suggesting variation in the way it impacts sentence length and severity (Dingwall 2006).

Recent guidelines issued in England and Wales by the Sentencing Councilⁱⁱⁱ have sought to promote transparency and public confidence in sentencing. Judges must follow sentencing guidelines, only disregarding them where their application is believed to be “contrary to the interests of justice” (Coroners and Justice Act 2009 s. 128(1)(a)). In the Magistrates’ Court Sentencing Guidelines (2008) and the earlier Sentencing Guidelines Council’s (SGC) Overarching Principles: Seriousness (2004) the Sentencing Guidelines Council suggest intoxication ought to be treated as an aggravating factor, so making an offender more culpable whilst under the influence of alcohol or drugs (para 1.22 SGC 2004). This is also prescribed in the Sentencing Council’s Definitive Guideline on Assault Offences (2011), in which intoxication is to be considered an aggravating factor: thus sustaining the SGC’s notion that intoxication should aggravate an offence on the basis of its seriousness.

Despite a consistent message that alcohol intoxication constitutes an aggravating factor, no clarification is offered as to the SGC and Sentencing Council's justification for this approach and Dingwall and Koffman (2008) remain unconvinced that it justifies increasing the seriousness of the offence. However, this clear direction suggests intoxication ought never to be seen as a mitigating factor diminishing the seriousness of an offence (although it may determine the type of sentence imposed depending on local treatment availability; Padfield 2011). Thus alongside theoretical debates as to how intoxication ought to be treated in judicial proceedings, there remain questions about how this guidance is being applied – that is, how sentencing is 'performed' in practice (Hutton 2013), as well as whether structured guidelines are indeed bringing about consistency in sentencing.

The claim that intoxication should not be mitigation for an offence does not accord with empirical research highlighting the varied way in which intoxication has been dealt with in practice. Both empirical observation and case law suggest it can serve as a mitigating factor, reducing the seriousness of an offence or at least as offender mitigation (Shapland 1981; Rungay 1998; Dingwall 2006; Padfield 2011) and even where courts note intoxication as an aggravating factor, this may serve to reduce the sentence (Padfield 2011). What is more, intoxication may serve to mitigate sentences where a Court is convinced the drinking and offending was uncharacteristic behaviour (Padfield 2011) and not citing intoxication as relevant to an offence may serve to mitigate a sentence. Finally, sentencers are more likely to see intoxication as mitigation when the offence is minor (Harrell 1981 cited in Padfield 2011). Early indications from the Crown Court Sentencing Survey suggest the sentencing factor 'under the influence of alcohol/drugs' has one of the weakest associations with sentence severity in relation to burglary offences. Irwin-Rogers and Perry (2015) obtained a negative (mitigating) but non-significant effect. Whilst there is a routinely strong statistical association when considering violent crime (including domestic violence and sexual offences) (Lightowlers, 2012; 2015)^{iv}, it is not likely that alcohol intoxication is strongly associated with acquisitive crime (such as burglary and theft).

If intoxication is not to be seen as a mitigating factor, unless the offender has not previously offended while intoxicated (as Dingwall 2006 suggests), we might expect sentence levels to rise where intoxication is present (Padfield 2011). However, sentencers may be using discretion in considering the specifics of unique cases in the interest of forwarding the utilitarian penal aims of reducing reoffending, for example, by imposing specific conditions within a sentence. They may issue a more lenient sentence where they perceive an offender to be willing to change their ways or able to access treatment (Rungay 1998, Padfield 2011), or if their offending is considered 'out of character' (a mitigating factor in the Sentencing Guidelines for assault; Sentencing Council 2011). It is thus important to explore how sentencing is 'performed' in practice, both in terms of outcomes and processes.

The Sentencing Council's (2015) own evaluation of the assault guideline suggests: i) the guideline has slightly decreased sentencing severity, and ii) this is likely to be the result of a

downward impact of the guideline on common assault, which makes up the largest group of assault offences. However, the Sentencing Council also suggests there has been an increase in severity for GBH with intent (s18) and ABH (s47). The Sentencing Council does not review the impact of the aggravating factor of being under the influence (intoxication) and so there remains a gap in understanding as to what has happened in sentencing practice since its introduction. Indeed, *“a divergence of opinions about the proper purposes of sentencing”* (Dingwall 2006:128) amongst sentencers and lay beliefs about alcohol make *“intoxication a nebulous yet useful form of mitigation”* often pleaded by lawyers (Dingwall 2006:156). Such opinions and beliefs are likely to form part of the black box of ‘instinctive synthesis’ (Hutton 2013) shaping how the guidance for assault offences is interpreted and applied in practice. If so, this may undermine consistency in sentencing.

Due to variation in subjective views on the purpose of sentencing amongst sentencers Dingwall (2006) calls for more objective criteria for assessing the culpability of offenders and attributing proportionate sentences. Roberts (2008) calls more specifically for the structuring of aggravating and mitigating factors to bring about consistency in sentencing as well as further direction for sentencers with respect to interpreting the circumstance of intoxication in particular. However, Padfield (2011) warns of the dangers of over-formulaic sentencing in relation to an offenders’ intoxication, as sentences need to be tailored to the individual offender. She suggests sentencers might be right to distinguish between those offenders ‘ready to change’ and those who are not. Padfield (2011) thus urges great caution before issuing further guidance despite the obvious attraction of a firmer framework, and emphasises the need for more empirical evidence on how sentencers work in practice.

Given the paucity of empirical quantitative research on sentencing practice in relation to assault offences involving intoxication, this study aims to examine the effect of intoxication in the sentencing of offences of assault. In particular, it addresses questions of whether:

1. intoxication has a mitigating or aggravating effect on the probability of custody and severity of sentence;
2. this effect is moderated through other characteristics of the case, such as the offence being ‘out of character’, an ‘isolated incident’ or where the offender is deemed to be taking steps to address their addiction or offending behaviour;
3. any effect of intoxication is (in)consistently applied in sentencing across Crown Court locations; and
4. the effect of intoxication is more (in)consistent than other factors?

METHODS

Data

Data are not routinely collected on sentence decision-making. The recent Crown Court Sentencing Survey (CCSS) thus offers a unique set of data on offences sentenced at the Crown Court, with detailed characteristics of the offence having been completed directly by judges after a sentence is passed. Information contained in the CCSS includes: the offence type, all relevant mitigating and aggravation factors considered, the stage at which a guilty plea was entered, the criminal history of the offender, the sentence outcome, and, crucially, an identifier of the court at which each offence was sentenced. Regrettably, before being released to external users, some of the information contained in the original CCSS was restricted for the sake of anonymity. For example, custodial sentence lengths were converted to intervals, thus transforming continuous variables into ordinal scales and reducing the level of detail available. However, the court identifiers for each of the court locations in England and Wales were only available in the first published 2011 version CCSS, which is why the analysis that follows focuses on these data. Analyses, where a court identifier is not necessary, are also replicated with later releases of the CCSS (2012-2014).

The 2011 data captures 14,854 assault offences; 9,316 processed using the old sentencing guideline and 5,538 processed using the new assault guideline. Of all the assaults in 2011, 27.89 per cent involved intoxication as an aggravating factor. Table 1 below shows these figures as well as how they relate to those in subsequent years. The prevalence of intoxication in assault offences between 2011 and 2014 is on average 25.42 per cent.

Table 1: Number of assault offences and proportion involving alcohol 2011-2014

Year	Number of assaults	Proportion involving intoxication
2011 Old	9316	28.83%
2011 New	5538	26.31%
2012*	11505	23.91%
2013	11510	24.87%
2014	12786	23.17%

* 181 cases in this year were proceed using the old sentencing guideline form and are included in this figure.

Measures

Binary indications as to which (if any) aggravating or mitigating factors were cited as relevant to a sentence are recorded. In the analyses that follow the presence of intoxication in an offence is captured where judges cited the ‘commission of offence whilst under the influence of alcohol or drugs’ as an aggravating factor.

Two outcome variables will be employed in separate analyses. Severity of sentence outcome will be measured by the probability of a custodial sentence (binary indicator). Further, for robustness' sake the analysis will be replicated using the scale of severity suggested by Irwin-Rogers and Perry (2015). This is created as an ordinal variable composed of the following five categories:

- a non-custodial sanction or suspended sentence order;
- below 12 months' imprisonment referred to as 'low severity';
- 12 months' up to 18 months' imprisonment referred to as 'medium-low severity';
- 18 months' up to 4 years' imprisonment referred to as 'medium-high severity';
and
- 4 years' imprisonment and above referred to as 'high severity'.

Analysis

The 2011 data will first be explored modelling the probability of custody for assault offences present in a logistic regression model, controlling for the crime type and all of the relevant aggravating and mitigating factors mentioned in the guideline. This enables an assessment as to whether, holding other sentencing factors equal, a custodial outcome is more probable when intoxication is present. The probability of custody where intoxication is present will be compared before and after the introduction of the new assault sentencing guideline. The probability of custody in subsequent years (2012-2014) will also be modelled using logistic regression to compare the probability of custody in 2011. Interaction effects will also be explored to assess whether: the role of intoxication is moderated by crime type; the aggravation of intoxication is being moderated by the use of the mitigation due to the behaviour 'being out of character'; the offence being an 'isolated incident'; or where the offender is deemed to be taking steps to address their addiction or offending behaviour. The above models will be replicated considering the scale of severity outcome. To do so ordinal logit models will be employed.

A random intercept will be introduced into all of the binary and ordered logit models to account for the inherent clustering of cases within Crown Court locations. Most studies that have used this dataset have failed to do so given the previously mentioned censoring of Crown Court locations. When that is the case the probability of committing Type II errors increases since the standard errors of the regression coefficients will be biased (downwards). Finally, a random slope will be specifically introduced to assess the extent to which the effect of intoxication is being consistently applied across Crown Court locations. All analysis was performed in R and using the glmer, lme4 and ordinal packages.

RESULTS

Table 2 below highlights key characteristics captured by the data in 2011 since the introduction of the new assault guideline. Namely: the number of assault offences sentenced as well as the proportion of these by the cited aggravating and mitigating factors. Intoxication was present as an aggravating factor in all types of assault offences: on average intoxication it was present in around 26.31 per cent of assault offences since the new guideline's introduction; making it the most common form of aggravation in assault offences. By way of comparison in 2011 when the old guidelines were still in place there were 9,316 assaults, with 28.83 per cent of these citing intoxication as an aggravating factor.

Table 2: Percentage assault offences in which sentence factor was cited by year, since the introduction of the new guidelines

	2011 (New guidelines)
Aggravating factors	
Abuse of power	2%
Against public sector	5.74%
Committed on bail	2.53%
Conceal evidence	0.67%
Victim forced to leave home (domestic violence)	1.19%
Evidence of community impact	0.76%
Exploiting contact arrangements	0.145%
Fail to respond warnings	1.59%
Failure to comply with current court orders	5.60%
Gratuitous degradation	2.08%
Location of the offence	24.43%
On licence	1.66%
Ongoing effect on victim	12.89%
Presence of others	16.27%
Previous violence	6.48%
Steps taken to prevent reporting / assisting	0.20%

prosecution	
Offences taken into account	0.07%
Timing of the offence	9.84%
Under the influence	26.31%
Mitigating factors	
Remorse	31.49%
Addressing addiction or offending behaviour	7.40%
Age / lack of maturity	8.63%
Good character	15.71%
Isolated incident	14.50%
Lapse of time	2.62%
Medical conditions	2.62%
Mental disorder	3.81%
No previous convictions	25.70%
Primary carer	3.41%
Single blow	16.61%
Total number of assaults	5538

* 181 cases in this year were proceed using the old sentencing guideline form and are included in this figure.

Multivariate analyses - logit models

Binary logistic regression models were run to model the probability of a custodial outcome for assault offences both before and after the new assault guideline was introduced in 2011. In models only controlling for crime type using the 2011 data the probability of custody remained reasonably similar before and after the guideline remained reasonably similar (OR=0.71 and 0.77 respectively). Once the relevant aggravating and mitigating factors in use at the time were controlled for the probability of custody after the introduction of the new guidelines (OR=1.464) was lower than before the guideline's introduction (OR=1.712).

In further logistic models relevant aggravating and mitigating factors relating to the guidelines used were controlled for as well as the crime type. This allows for an assessment of the effect of intoxication on the probability of a custodial outcome whilst controlling for all other relevant sentencing factors. Such models were also run using data from subsequent years to examine the relative size and contribution of the aggravating factor of intoxication, holding all else equal, and any change therein between 2011 and 2014. Regression coefficients and odds ratios in relation to the impact of intoxication on the probability of assault outcomes by year are summarised in Table 3 below. In each year we can see the presence of intoxication increases the odds of receiving a custodial sentence. The extent to which varies between 23% and 46% since the new guidelines were introduced which is consistently lower than in 2011 whilst the old guidelines were still operational (71%). However, these odds do not yet account for the nested structure of the data as outlined below and odds generated in models using the old guidelines are not directly comparable with results from modelling the new guidelines as the number and nature of the sentencing factors accounted for differ. Detailed results relating to all coefficients for models pre and post the new guideline for 2011 including the represented aggravating and mitigating factors relating to each can be found in Appendix I. In such logistic regression models the standard errors are overestimated as the structure of the data (i.e. the clustering of observations in court locations) is not accounted for. This is something we address in analyses that following using the 2011 data as this contains court identifiers.

Table 3: Logistic regression model coefficients, odds ratios and confidence intervals for the impact of intoxication on the probability of a custodial sentence by year

Year	Beta coefficient (S.E)	Odds ratio	Lower 95% CI	Upper 95% CI
2011 Old	0.538 (0.059)	1.712	1.526	1.775
2011 New	0.381 (0.085)	1.464	1.239	1.731
2012*	0.320 (0.060)	1.377	1.224	1.550
2013	0.205 (0.058)	1.227	1.094	1.376
2014	0.217 (0.057)	1.242	1.112	1.387

* 181 cases in this year were proceed using the old sentencing guideline form and are thus excluded from this analysis.

Moderating factors - bivariate analyses and moderation effects

Crime type and intoxication

Crime type is a significant predictor of custody and severity in data from 2011 using the old guidelines and for the 2011 using the new guidelines, as one would expect given that sentence outcomes are related to the severity of the offence (see Appendix I). However, an interaction between intoxication and crime type was found not significant both before and after the new guideline's introduction. These insignificant interaction terms suggest that, regardless of the offence type, the aggravation of intoxication is being uniformly applied across the various crime types; even amongst crimes of specific and general intent.

Good character

Sentencers may issue more lenient sentences where they believe a defendant's offending is 'out of character'. In 2011, whilst still using the old guidelines, incidents in which the offender was thought to be intoxicated but where mitigation of the offending behaviour being out of character was also cited accounted for 24.09 per cent (n=647) such incidents. On introduction of the new guideline in 2011 this reduced to 15.17 per cent (n=221) of incidents in which the offender was thought to be intoxicated who received mitigation for 'good character/exemplary conduct'. A similar proportion to that was observed in 2014 (14.05%, n=416). The above logit models were rerun to include interaction terms between the aggravating effect of intoxication and mitigating effect of the offending behaviour being out of character to assess the presence of any significant moderation effect. This was found to be not significant in 2011 both pre and post the introduction of the new assault guidelines, as well as in subsequent years (2012, 2013, 2014).

Isolated incident

On introduction of the new assault guidelines in 2011 mitigation of an offence having been an isolated incident was permitted. This could thus conceivably be used alongside the aggravating factor of an offence having been committed when intoxicated. Results from 2011 indicate that 15.79 per cent (n=230) of incidents in which the offender was thought to be intoxicated also cited the fact that it was an isolated incident as mitigation. Interaction terms between the aggravating effect of intoxication and mitigating effect of the offence being an isolated incident were also examined to assess the presence of moderation in sentencing practice since the introduction of the new assault guidelines. A significant positive interaction was identified after the implementation of the new guidelines in 2011 (b=0.72 (S.E. 0.25), $p < 0.01$), 2013 (b=.035 (S.E. 0.16), $p < 0.05$) and 2014 (b=0.54 (S.E. 0.16), $p < 0.001$), but not in 2012. As these positive moderation effects are smaller than the main effect of an offence being an isolated incident, this suggests individuals

still receive mitigation but that this is less substantial. That is, where both factors are present the probability of a custodial outcome is slightly reduced.

Addressing addiction or offending behaviour

Mitigation is permitted for assault offences, where the offender is deemed to be taking steps to address their addiction or offending behaviour. In 2011, whilst still using the old guidelines, incidents in which the offender was thought to be intoxicated but where mitigation of the offender taking steps to address their behaviour was also cited accounted for 4.4 per cent (n=407) such incidents. On introduction of the new guideline in 2011 this reduced to 3.2 per cent (n=175). The interaction term for this combination of case characteristics was found to be insignificant both before and after the introduction of the new assault guidelines.

Multilevel analyses

The interclass correlation (ICC) for a random intercept model on the 2011 data in which the old assault guideline was used suggested 2.4 per cent of variation in cases was due to the court at which they were processed (ICC=0.024). When controlling for covariates (offence type and sentencing factors) in the model this rose to 3.5 per cent (ICC=0.035), thus representing an increase of the share of unexplained variability at the court level. The random intercept model improved on the original logistic regression (log likelihood= -4675.1, df=1, chi square=103.52 p>0.001). However, including an additional random slope term to assess consistency in the probability of a custodial outcome for assault where intoxication is present did not (log likelihood=-4623.4, df=2, chi square=0.3391, p=0.8315). In the preferred random intercepts model, before the introduction of the new assault guideline, the odds of receiving a custodial sentence where intoxication was cited as aggravation was 1.75. (A full table of model covariates is available in Appendix II).

The ICC for a random intercept model on the 2011 data after the introduction of the new assault guideline suggested 2 per cent of the unexplained variability was due to the court at which they were processed; ICC=(0.0195) – slightly less than using the old guideline. When controlling for covariates (offence type and sentencing factors and an interaction between intoxication and the offence being an isolated incident) this rose again to 3.5 per cent (ICC= 0.035). This model also improved on the original logistic regression (log likelihood= -2631.7, df=1, chi square=36.713, p<0.001). And, once more, accounting for random slopes did not (log likelihood=-2613.4, df=2, chi square=0.35623, p=0.8385). In the settled upon random intercepts model, after the introduction of the new assault guideline, the odds of receiving a custodial sentence where intoxication was cited as aggravation was 1.38. This makes intoxication the weakest of all the significant aggravating factors since the introduction of the new guideline (a full table of model covariates is available in Appendix II). Moderation of the combined effect of the

aggravating effect of intoxication and mitigation of it being an isolated incident was once more controlled for in the random intercept model and was found to be significant (0.74598 (SE=0.24799) $p=0.003$). To illustrate the magnitude of this effect the probability of varying scenarios for an offence of Actual Bodily Harm (ABH) are displayed in Table 4 below. From these values it is possible to see how, even though the average effect of the offence being an isolated is stronger than for when intoxication is present, the interaction effect results in the former cancelling out the latter; bring the value back in line with reference case.

Table 4: Probability of custody for an offence of ABH with presence of sentencing factors

Sentencing factors present in case	Probability of custody
None (reference case)	0.620
Intoxication	0.691
Intoxication and isolated incident	0.389
Intoxication, isolated incident and interaction	0.572

The absence of a significant random slope term in either model points to how similar courts are in their application of intoxication as an aggravating factor in determining a custodial sentence as appropriate.^v By way of sensitivity analysis and to compare against the insignificant slope found in relation to intoxication, the significance of random slopes in relation to a small selection of other aggravating factors after the introduction of the new guidelines was examined; namely, having perpetrated the offence in the presence of others and having abused a position of power. For both the former and latter a non-significant random slope was observed in the 2011 data after the new guideline's introduction (Log likelihood= -2613.4, chi square= 1.1452, $df=2$, $p=0.5641$ and Log likelihood= -2613.4, chi square=0.7051, $df=2$, $p=0.7029$ respectively). Again, the insignificance of the random slopes associated with these aggravating factors suggests a certain level of consistency in the way they are applied across Crown Court locations.

Ordinal logit models (sentence severity)

For robustness' sake the analysis is replicated using the scale of severity suggested by Irwin-Rogers and Perry (2015). Using the 2011 data (in separate analyses for data pertaining to the old and new guidelines) additional ordinal logit models were run to differentiate between sentence severity. In these models crime type as well as all relevant aggravating and mitigating factors are controlled for (see Appendix III). A random intercept term accounts for the court location was included as this improved the fit of both ordered logistic

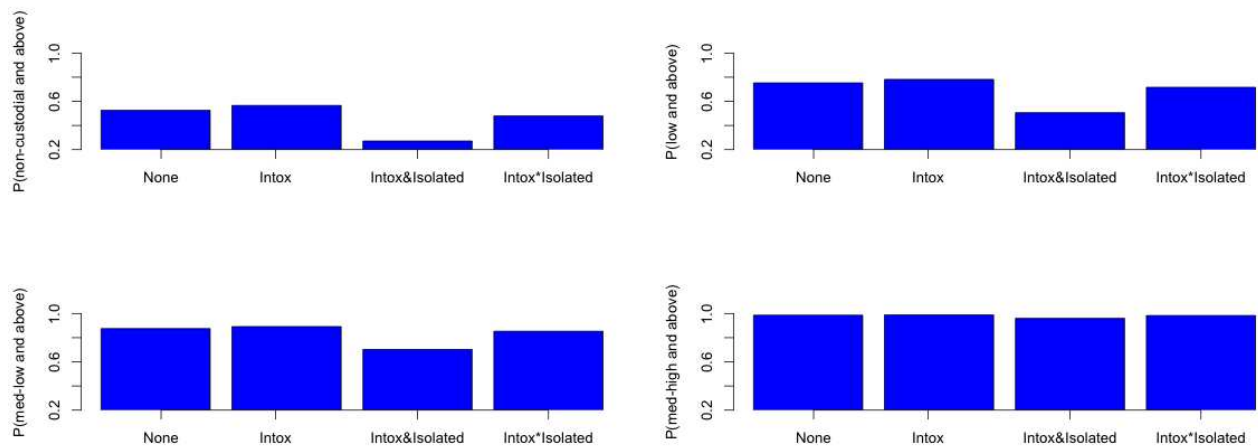
models (2011 old: Log likelihood =-9079.8, df=1, chi square=77.759, p<0.001, 2011 new: Log likelihood =-5612.7 df=1 chi square=22.632, p<0.001)^{vi}. In this model a more severe sentence was probable when intoxication was cited as a relevant aggravating factor both before and after the new Assault Guideline was introduced (odds ratio 1.665 and 1.176 respectively). The distribution of incidents across the ordinal response variable (scale of severity) is displayed in Table 5 below, with non-custodial or suspended sentence orders accounting for just over half of cases in each data set and high severity custodial sentences being the least common in each: although the proportion of medium/high and high severity custodial outcomes increased after introduction of the new guidelines. These findings confirm the uplift found with the probability of custody measure.

Table 5: Ordinal measure of disposal type and sentence severity

	Noncustodial sanction/SSO	Low severity	Medium-low severity	Medium-high severity	High severity	Total
2011 old	54.41% (5069)	15.47% (1441)	13.92% (1287)	10.68% (995)	5.52% (514)	100% (9306)
2011 new	52.73% (2920)	15.11% (837)	10.76% (596)	14.19% (786)	7.21% (399)	100% (5538)

Once more the interaction between the aggravating of intoxication and mitigation for an offence being an isolated incident was significant in 2011 after the introduction of the new assault guideline (0.902 (SE=0.215) p<0.001). As Figure 1 below highlights, the interaction term in this instance seems to make a more severe outcome more probable where intoxication features in an isolated incident.

Figure 1: Inverse probabilities of sentence severity



DISCUSSION

Given that being ‘under the influence of alcohol/drugs’ remains one of the most controversial sentencing factors (Dingwall and Koffman, 2008; Padfield 2011; Irwin-Rogers, and Perry, 2015), this study set out to examine how this sentencing factor is applied in practice and since the introduction of the new Sentencing Council’s Definitive Guideline on assault offences (2011). Appealing directly to Padfield’s (2011) call for more empirical evidence on how sentencers work in practice, the study pioneered the quantitative analysis of sentencing practice in relation to alcohol-related violence and set out to explore whether:

1. intoxication has a mitigating or aggravating effect on the probability of custody and severity of sentence;
2. this effect is moderated through other characteristics of the case;
3. any effect of intoxication is (in)consistently applied in sentencing across Crown Court locations; and
4. the effect of intoxication is more (in)consistent than other factors.

Intoxication aggravates sentence outcomes

Modelling 2011 data relating to both before and after the introduction of the Sentencing Council’s new assault guideline findings *firstly* confirm an aggravating effect of intoxication on both the probability of custody and sentence severity before and after the new guideline. The probability of receiving a custodial outcome where intoxication is cited as present has decreased from 75 to 38 per cent, once accounting for all relevant sentencing factors and the nested structure of the data. However, interpreting this change should be done cautiously as results are not directly comparable given that sentencing factors varied using the old and new guidelines. Nonetheless, these findings accord with the Councils’ own overall assessment of the impact of the assault guidelines (Sentencing Council 2015), which point to a general downward impact of the guideline. The Sentencing Council suggest this is

driven by a majority of common assault offences within the category of assault offences for which the guideline has a downward impact.

Case characteristics play a role in moderating the aggravation of intoxication

Secondly, the significant moderating effect of an offence being isolated incident on the effect of intoxication in 2011, 2013 and 2014 operates to ensure aggravation is still present but at a lesser level. Until now, it has remained unclear to what extent the mitigation of offences being 'isolated incidents' would negate any aggravation of intoxication since the Sentencing Council's Definitive Guideline on Assault Offences was introduced (2011). The combined use of these factors seems to provide some discretion in adapting the sentence to the particular circumstances of the offender; perhaps, where they show willingness to change their ways or access treatment. However, this does not appear to be operating in 2012 as the effect is too small.

Further, where offending is considered 'out of character' (a mitigating factor in the Sentencing Guidelines for assault; Sentencing Council 2011) it was hypothesised that such mitigation would also serve to reduce the aggravation intoxication. This was primarily based on previous research which suggested considerably variability in whether intoxication served to aggravate or mitigate sentences (Shapland 1981; Rungay 1998; Dingwall 2006; Padfield 2011; Irwin-Rogers and Perry, 2015). The absence of a moderating effect of an offence committed whilst intoxicated being 'out of character' was therefore somewhat surprising and suggests the guidelines are either being formulaically applied to structure sentences or perhaps appropriate intoxication is simply not being cited where mitigation is seen as more appropriate. In any case, the social and psychological processes by which aggravating and mitigating factors assist in the 'performance of justice' seem to remain opaque (Hutton 2013).

Providing sufficient judicial discretion and consistency in sentencing is, of course, a difficult balance to strike. The distinct ways in which alcohol could influence offending and thus sentencing practice signifies the importance of exploring effects based on substantive questions and clear understanding of the potential interacting process. To date interactions between aggravating and mitigating sentencing factors have not been explored in the literature. However, as illustrated in the findings of this study, their inclusion can add valuable insights. Although, it is important to have meaningful hypotheses to test in relation to moderation that relate to the details of the sentencing process—statistician enquiry alone is not enough to justify their inclusion.

The aggravation of intoxication is reasonably consistent

Finally, findings from this study point to reasonably consistent prevalence and influence of the presence of intoxication as an aggravating factor between 2011 and 2014. A significant random intercept in the multi-level models suggests different levels of assault offences between locations; this corresponds to expectations given that different areas will have

differing rates of (violent) crime. However, the lack of an effect of a random slope in these models points to reasonably consistent application of intoxication as an aggravating factor across Crown Court locations both pre-and post the new assault guideline. This finding is corroborated with further findings that suggest there is consistency in the way in which other aggravating factors, such as having perpetrated the offence in the presence of others and having abused a position of power, are applied. Moreover, the ICCs of the random intercept models also suggest the unexplained variability due to the court at which cases were processed reduced slightly since the introduction of the new assault guideline. This in turn may suggest a potential increase in consistency and corroborates Pina-Sanchez and Linacre's (2014) earlier findings of consistency in sentencing assault offences across Crown Court locations.

The consistency with which intoxication is applied across locations calls into question whether further prescriptive guidance is necessary in structuring sentencing with reference to this aggravating factor. It may be that the guideline as it stands does leave sufficient space for subjective judgement (or 'instinctive synthesis') about an individual case (see Hutton 2013). However, some commentators have called for the guidelines to offer greater direction regarding sentencing factors, particularly ones of an ambiguous nature (Roberts, 2008).

Of course whilst relative consistency may be the case in practice currently, this does not mean that inconsistency does never and could never occur. Nor does it necessarily excuse the Sentencing (Guidelines) Council for failing offer a rationale for why intoxication ought to be treated as aggravation in the first place. After all, in their review of the impact intoxication should have in (retributive) desert-based sentencing framework, Dingwall and Koffman (2008) remain unconvinced there is adequate evidence to suggest intoxication ought to aggravate on the basis that it increases the offence seriousness (as set out in SGC (2004) para 1.22). Further guidance, would need to be considered both in relation to the Sentencing Council's position and objectives as well as the dangers of over formulaic sentencing, as cautioned by Padfield (2011), which limits the extent to which a sentence can be tailored to the offender and is likely to have tangible impacts on rehabilitation and reoffending rates.

Study merits and limitations

Of course this study suffers a number of methodological limitations. In the adopted framework intoxication is assumed to be voluntary and the binary measure of whether intoxication was present or not does not allow for an accurate distinction between whether this in fact related to drug or alcohol intoxication. On the basis that alcohol consumption and its presence in offending, especially violent offending, is more common we have proceeded to use this as a proxy for alcohol intoxication in light of it being the best available measure and data to date. However, we are aware this conflates both types of intoxication and that the intoxication resulting from combined drug and alcohol use is also possible.

Finally, the CCSS suffers from a degree of non-response which has the potential for missing data to be non-random. Whilst in 2011 the overall national response rate was 61 per cent, this varied by Crown Court location between vary from 20 per cent to 95 per cent; ranging between 20 and 95 per cent (Sentencing Council 2012). The authors thus firmly support further qualitative efforts to explore sentencing practice in relation to intoxication since the introduction of Sentencing Council's Definitive Guideline on assault offences (2011).

Notwithstanding these limitations the CCSS data remains the most detailed and comprehensive record of sentencing practice in England and Wales and here provide unique and valuable insights into how sentencing practice has been shaped since by the introduction of the Sentencing Council's Definitive Guideline on assault offences (2011). In its current form, it does not allow for an assessment as to whether sentencing practice is consistent across judges, which may provide valuable further examination as to the extent to which practice is uniform across individuals involved in sentencing. Nor does it capture details of the defendant such as their socio-economic status. Age gender and ethnicity are captured but are not made publically available. Such detail, if released, could improve insights into whether the aggravation of intoxication is being uniformly applied to different subpopulations. Further research on how intoxication may be impacting sentence severity would also benefit from further distinction and granularity in relation to sentence outcomes both in relation to sentence length (currently only publically available as interval censored) as we as to detail on non-custodial outcomes and conditions attached to sentences, such as Alcohol Treatment Requirements (ATRs; introduced by the Criminal Justice Act 2003). And of course, questions also remain about the proportionality of response in relation to intoxication as do questions as to whether aggravation is applied similarly in domestic violence cases compared to other forms of assault, such as street and pub brawls^{vii}.

Conclusion

Despite intoxication being the most common form of aggravation in assault offences, the Sentencing (Guidelines) Council has yet to formally justify its position on treating intoxication as an aggravating factor in the first place. Reflecting on its sustained position to treat intoxication only as aggravation, the Sentencing Council may wish to consider clarifying how the guidance in relation to intoxication ought to be applied in practice: namely, how much intoxication ought to aggravate a sentence and/or in which circumstance this ought to be moderated by other characteristics of the case. Such guidance is particularly welcomed in relation to the contentious factor of intoxication, especially given tensions between practitioners favouring flexibility within which to tailor a sentence to a particular case and the principal of 'legal certainty' requiring a degree of predictability in sentencing. Moreover, given that sentencing practice reflects wider social norms held in relation to alcohol use, ongoing monitoring of sentencing and the way in which the presence of intoxication shapes such practice it is encouraged to ensure transparency and

accountability. This can also assist in ensuring inconsistency does not 'creep' in as the new Sentencing Council Guidelines become 'old news'.

REFERENCES

- Broad R. and Lightowlers C. (2015). Policy and practice tensions in tackling alcohol abuse and violence in Probation settings. *Probation Journal*. 62(3) 251–267.
- Dingwall G. (2006) *Alcohol and crime*. Willan Publishing, Cullompton, Devon
- Dingwall G and Koffman L (2008). Determining the impact of intoxication in a desert-based sentencing framework. *Criminology and Criminal Justice* 8: 335-348.
- Graham K et al. (1998). Alcohol and aggression: current directions in research on understanding and preventing intoxicated aggression. *Addiction* 93(5): 659–676.
- K and Homel R 2008. *Raising the bar: preventing aggression in and around bars, pubs and clubs*. Devon, UK: Willan Publishing
- Graham L., Parkes T., McAuley A. and Doi L. (2012). *Alcohol problems in the criminal justice system: an opportunity for intervention*. Copenhagen: World Health Organisation.
- HM Inspectorate of Prisoners for England and Wales (HMIP, 2015). *HM Chief Inspector of Prisons for England and Wales Annual Report 2014–15*. London, Inspectorate of Prisons.
- Handler P (2013). Intoxication and Criminal Responsibility in England, 1819–1920. *Oxford Journal of Legal Studies* 33(2): 243–262.
- Hutton N. (2013). The Definitive Guideline on Assault Offences: The Performance of Justice. Chapter 6 in (Ed.s) Ashworth A. and Roberts J. *Sentencing Guidelines: Exploring the English Model*. Oxford: Oxford University Press pp. 86-103.
- Irwin-Rogers, K. & Perry, T. H., (2015). Exploring the Impact of Sentencing Factors on Sentencing Domestic Burglary. In: *Sentencing Guidelines: Exploring Sentencing Practice in England and Wales*, ed. Roberts J. V., pp. 213-239.
- Lightowlers C. (2015). *Sociology of Alcohol abuse and crime*. The SAGE Encyclopedia of Alcohol: Social, Cultural, and Historical Perspectives. Thousand Oaks, California: Sage Publications. <http://knowledge.sagepub.com/view/the-sage-encyclopedia-of-alcohol-social-cultural-and-historical-perspectives/n13.xml>
- Lightowlers C. (2011). Exploring the temporal association between young people’s alcohol consumption patterns and violent behaviour. *Contemporary Drug Problems* 38(2): 191-212.
- Lightowlers C., Elliot M. and Tranmer M. (2014). The Dynamic Risk of Heavy Episodic Drinking on Interpersonal Assault in Young Adolescence and Early Adulthood. *British Journal of Criminology* 54 (6): 1207-1227. Doi: 10.1093/bjc/azu055

Lightowlers C. (2012) A study of the development of drinking patterns and violent behaviour amongst young people in England and Wales: secondary analysis of the Offending Crime and Justice Survey. PhD Thesis, University of Manchester, UK.

ONS (2015). Focus on Violent Crime and Sexual Offences : 2013/14. Findings from the 2013/14 Crime Survey for England and Wales and police recorded crime over the same period on violent crime and sexual offences. Available at <http://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/compendium/focusonviolentcrimeandsexualoffences/2015-02-12>

Padfield N. (2011). Intoxication as a sentencing factor: mitigation or aggravation. In Roberts JV. (Ed.) *Mitigation and Aggravating at Sentencing*. Cambridge University Press, Cambridge. Chapter 5: 81-101.

Pina-Sánchez, J. and Linacre, R. (2013). Sentencing consistency in England and Wales: Evidence from the crown court sentencing survey. *British Journal of Criminology* 53: 1118-1138.

Pina-Sánchez, J. (2015). Defining and Measuring Consistency in Sentencing. In: Roberts J (Ed.) *Exploring Sentencing Practice in England and Wales*. Palgrave MacMillan. Basingstoke, pp 76-92.

Roberts J. (2008). Aggravating and Mitigating Factors at Sentencing: Towards Greater Consistency of Application. *Criminal Law Review*: 264-76.

Rumgay J (1998). *Crime, Punishment and the Drinking Offender*. Basingstoke: Macmillan.

Sentencing Council (2011) *Assault Offences: Definitive Guideline*. Available at <http://sentencingcouncil.judiciary.gov.uk/>.

Sentencing Council (2012). *Crown Court Sentencing Survey*. Available at https://www.sentencingcouncil.org.uk/wp-content/uploads/CCSS_Annual_2011.pdf

Sentencing Council (2015) *Assessing the impact and implementation of the Sentencing Council's Assault Definitive Guideline*. Available at <https://www.sentencingcouncil.org.uk/wp-content/uploads/Assault-assessment-synthesis-report.pdf>

Sentencing Guidelines Council (SGC) (2004) *Overarching Principals: Seriousness*. London: Sentencing Guidelines Council.

Shapland J. (1981). *Between Conviction and Sentence: The Process of Mitigation*. London: Routledge.

Strategy Unit (2004). *Alcohol misuse: how much does it cost? Annex 5*. Cabinet Office, London. Available at

http://webarchive.nationalarchives.gov.uk/20100407182953/http://www.cabinetoffice.gov.uk/media/cabinetoffice/strategy/assets/econ_annexes.pdf

ⁱ A distinction exists between crimes of ‘basic’ and ‘specific’ intent in the law. The former implies no further harm or consequence was intended beyond committing the criminal act (actus reus). The latter suggests further purpose or intended consequences (i.e. where the mens rea goes beyond the actus reus). For example, in relation to violent offences, an offence under section 20 of the Offences Against the Person Act 1861 is defined as ‘wounding’ and a crime of basic intent. However, under section 18 of the same act, where specific intent to cause grievous bodily harm is deemed present this can form a graver offence of ‘wounding with intent to do some grievous bodily harm’.

ⁱⁱ This purports that alcohol acts as a disinhibitor to release violent tendencies by weakening the brain’s ability to restrain impulsive behaviour (Graham 1980).

ⁱⁱⁱ Created in 2010 by the Coroners and Justice Act 2009 taking over the role of its predecessor the Sentencing Guidelines Council which was created by the Criminal Justice Act 2003.

^{iv} Figures from the Crime Survey for England and Wales highlight that victims believe their assailants have been drinking in around 53% of violent offences (ONS 2015). Earlier attributable fractions from the New-ADAM Arrestee Survey suggest that in between 12% and 47% of crime alcohol is directly implicated, depending on the crime type, with 37% of Violence against the person offences estimated as being perpetrated under the influence of alcohol compared to 17% of burglaries (Strategy Unit, 2004).

^v The absence of court level identifiers for 2012-14 prohibits such analyses in these years for further comparison and monitoring of trends.

^{vi} Once again, introducing a random slope term for the aggravation of intoxication across court locations did not improve on the random intercept models (2011 old: LL=-10901 df= 2 chi square=0.4781, p=0.7874), 2011 new: LL= -9079.1, df=2, chi square=1.5178, p=0.4682).

^{vii} As domestic violence is not a distinctly classified Home office offence type, it is not currently possible to distinguish these type of assault cases using the CCSS data. To try and proxy for this interaction analyses were run using the aggravation of the victim having been forced to leave home which is thought to apply, were relevant, to domestic violence cases in the 2011 data since the introduction of the new assault guideline. However, this aggravation is only cited in 1.2% of all the cases in these data. This makes for too few cases with which to tease out any (interaction) effect. Moreover, it is a relatively crude measure to start with.