

Judgment using the 'totality principle': When more crimes mean less punishment

Mandeep K. Dhama

Middlesex University, London, UK, E-mail: m.dhama@mdx.ac.uk

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BACKGROUND

- When sentencing offenders guilty of more than one offence, courts have typically rejected a simple cumulative approach, whereby sentences for each offence are aggregated to produce a final sentence.
- Instead, many common law jurisdictions prefer to sentence based on a judgment of the 'totality' of the multiple offences in a case. Thus, sentencers aim to demonstrate 'mercy' and retain some ordinal proportionality across different offence types, while also punishing multiple offence (MO) offenders more harshly than their single offence (SO) counterparts.
- However, application of this so-called 'totality principle' is under-studied (Thomas, 1979).
- In England and Wales the principle comprises two elements (Sentencing Council, 2012, p. 5):

1. all courts, when sentencing for more than a single offence, should pass a total sentence which reflects all the offending behaviour before it and is just and proportionate. This is so whether the sentences are structured as concurrent or consecutive. Therefore, concurrent sentences will ordinarily be longer than a single sentence for a single offence.

2. it is usually impossible to arrive at a just and proportionate sentence for multiple offending simply by adding together notional single sentences. It is necessary to address the offending behaviour, together with the factors personal to the offender as a whole.

- Thus, the totality principle is applied after the *initial* sentence for each offence in a MO case has been reached using offence-specific sentencing guidelines. Then, an *adjustment* may be made for one or more of the offences to reach a *final* sentence in the case.

PRESENT STUDY

In order to demonstrate use of the totality principle in sentencing, this study compared the *adjusted* sentence given to offences in MO cases with the sentence meted out to comparable offences in SO cases, controlling for other sentencing-relevant variables.

METHOD

Dataset and Variables

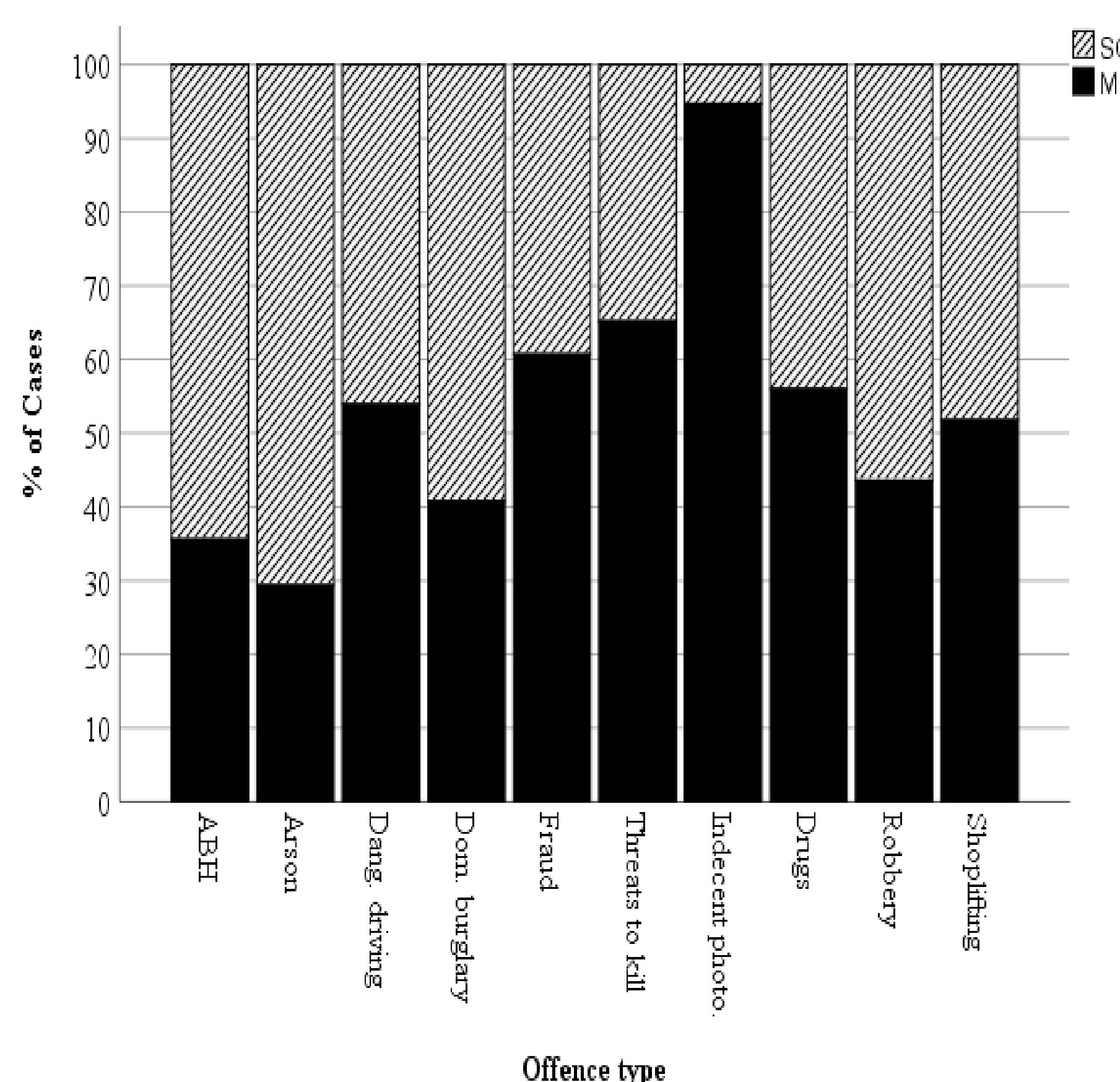
- Data was collected in 2015 (released in 2018) by the Sentencing Council for England and Wales, from Crown Courts, using the Crown Court Sentencing Survey.
- Offence-specific datasets indicated the MO/SO status of a case and provided other sentencing-relevant information:
 - Offence seriousness (a categorical judgment indicating harm and culpability)
 - Presence of specific aggravating factors
 - Presence of specific mitigating factors
 - Percentage reduction in sentence for any guilty plea
- The two outcome variables are:
 - Immediate custody v. various non-custodial options.
 - If immediate custody, the length of time in custody is coded into categories.
- In MO cases, only information for the 'principal' offence is provided (i.e., that which received the highest penalty or, in a tie, which carries the highest penalty). Information on the other offences and sentences, and whether the final sentence was concurrent or consecutive is unavailable.
- Data on the most common offence type were extracted from each of 10 datasets.

FINDINGS

Prevalence of MO and SO Cases

- MO/SO case status information was available in 67.2% of the sample ($n = 3,187$ out of 4,745). Of these cases, 48.7% ($n = 1,551$) were MO cases and 51.3% ($n = 1,636$) were SO cases.
- Figure 1 shows that MO cases represented half or more of the cases sentenced for six of the 10 offence types.

Figure 1. Percentage of MO and SO Cases by Offence Type



Comparison of MO and SO Case Outcomes

- Logistic regression analyses examined the association between MO/SO case status and outcome for each offence type, controlling for offender characteristics (i.e., gender and age), and sentencing-relevant factors (i.e., offence seriousness, aggravating and mitigating factors, and guilty plea reduction). The criterion variables in the models were (1) custody, and (2) custody length.
- Table 1 shows that MO/SO case status was a significant predictor in only one model (i.e., Possession with intent to supply). Here, the odds of a MO case receiving immediate custody were 2.03 times greater than its SO counterpart. Thus, for the remaining six offence types offenders in MO cases were not significantly more likely to receive immediate custody than their counterparts in SO cases.

Table 1. Predictors of Non-custodial Penalty v. Immediate Custody by Offence Type

	Assault (ABH)	Dangerous driving	Domestic burglary	Fraud	Drug (Pw/S)	Robbery	Shoplifting
Constant							
Gender (1=male)	★		★		★		
Age (1=18-24)							★
SO/MO							★
Seriousness	★	N/A	★	N/A	N/A		
Seriousness(1)	★	N/A	★	N/A	N/A		
Seriousness(2)		N/A		N/A	N/A		
# aggravating	★	★	★		★	★	
# mitigating	★	★	★	★	★	★	★
% guilty plea				★			
Nagelkerke R ²	.51	.47	.46	.19	.31	.42	.50
N	455	208	545	278	520	272	86

Note. For offence seriousness the last category (least serious) was used as the reference category.

- Table 2 shows that MO/SO case status was only a significant predictor of custody length in one model (i.e., Robbery). Here, the odds of a MO case receiving over 3 years in custody were 2.49 times greater than its SO counterpart. Thus, for the majority of offence types, offenders in MO cases were not significantly more likely to receive longer terms in custody than their counterparts in SO cases.

Table 2. Predictors of Custody Length by Offence Type

	Assault (ABH)	Dangerous driving	Domestic burglary	Fraud	Drug (Pw/S)	Robbery	Shoplifting
Constant							
Gender (1=male)							
Age (1=18-24)					★	★	
SO/MO						★	
Seriousness	★	N/A	★		N/A	★	
Seriousness(1)		N/A	★		N/A	★	
Seriousness(2)		N/A			N/A	★	
# aggravating	★	★			★	★	
# mitigating	★	★			★	★	★
% guilty plea			★		★		★
Nagelkerke R ²	.16	.12	.22	.17	.20	.57	.30
N	455	208	545	157	278	245	86

Note. 1 year v. over 1 year in custody (ABH, Dangerous driving, Domestic burglary, Fraud, and Shoplifting), up to 3 years v. over 3 years (Possession of drugs with intent to supply and Robbery). Model for Fraud was not statistically significant.

DISCUSSION

- MO cases represent common court business.
- For six of the seven offence types examined, offenders in MO cases were not significantly more likely to receive immediate custody (or a longer period in custody) than their counterparts in SO cases.

MO offenders "getting off lightly"

- The reason for this anomaly most likely lies with the current guideline on the totality principle which is applied in MO cases after application of the offence-specific guidelines. Specifically:
 - Personal mitigation is double-counted in MO cases as opposed to SO cases.
 - The effect of personal mitigation may also be over-weighted relative to the effect of aggravating factors in MO cases as opposed to SO cases.
 - Finally, the downwards adjustment for consecutive sentences may be too much, and/or the upwards adjustment for concurrent sentences may be too little, or the two adjustments may cancel each other out.

Next Steps

- Test these explanations in a laboratory setting.
- Make further recommendations for improving sentencing guidelines in England and Wales (Dhama, 2013).

REFERENCES

- Dhama, M. K. (2013). Sentencing guidelines in England and Wales: Missed opportunities? *Law and Contemporary Problems*, 76, 287-305.
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- Thomas, D. A. (1979). *Principles of Sentencing. The Sentencing Policy of the Court of Appeal Criminal Division.* 2nd edition. London: Heinemann.