

Sentencing Multiple- Versus Single-Offence Cases: Does More Crime Mean Less Punishment?

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The 'totality principle' in law aims to show mercy to offenders in multiple-offence (MO) cases and retain ordinal proportionality in punishing those who commit different categories of offence. The effect of this principle in practice, however, is largely unknown. The present study involved an analysis of data released by the Sentencing Council for England and Wales to estimate the prevalence of MO cases and compare the penalties they received against comparable single-offence (SO) cases. MO cases represented approximately half of the cases in the sample which included violent, property, drugs and driving offences. Offence-specific regression analyses revealed that MO/SO case status was not a significant predictor of receiving a custodial sentence or of custody length. Thus, by applying the totality principle, sentencers may be letting MO offenders 'off lightly'. Potential explanations for this unintentional effect on decision-making lies in how the totality principle is defined and interpreted, and recommendations are made for revising the guideline on application of the totality principle.

Key Words: courts, punishment, sentencing, totality principle

INTRODUCTION

Sentencing represents an important stage of the criminal justice process. At this stage, society (via the sentencer) officially responds to those who break its rules. The punishments meted out to offenders (e.g., fines, custody, community penalties and compensation orders) aim to give them their just deserts, incapacitate or deter them (and others) from committing crimes in the future, rehabilitate them, or enable them to make reparations. Although these competing, and sometimes, contradictory aims can create problems for the formal measurement of sentence effectiveness, these responses to crime may be informally evaluated by the public in terms of their perceived fairness (e.g., Jones *et al.* 2008; Jansson 2015). Scholarly debates and research on the fairness of sentences have often centred around different types of offenders such as those with previous convictions (e.g., Bagaric 2014) and those from different racial backgrounds (e.g., Albonetti 2017). However, to date, relatively little has been said about offenders who are to be sentenced for more than one offence in what are called multiple-offence (MO) cases (for a recent exception, see Ryberg *et al.* 2017).¹

1 In the literature, multiple offence is sometimes called 'simultaneous offence' and this is contrasted with single offence or 'sequential offence'. Multiple offence may also be referred to as multiple 'offender', and this is distinguished from repeat, persistent or serial offenders.

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In MO cases, the crimes defendants are to be sentenced for are typically linked in some way.² For example, crimes may be committed in conjunction with one another (e.g., assault of a homeowner during a residential burglary), they may be committed contemporaneously (e.g., theft from different shops on the same day), or against the same victim, perhaps over a period of time (e.g., sexual abuse). Thus, MO cases may involve the same type of offence or different types and the same or different victims.

Retributive and desert-based theories of punishment suggest that offenders should receive a punishment that is proportionate to the offence and offender (see [Bagaric 2000](#)). Indeed, the concept of proportionality is considered by many to be pivotal to effective and fair sentencing (see e.g., [Smith 2005](#); [von Hirsch and Ashworth 2005](#); [Schneider 2012](#)). However, the question of whether a specific punishment is proportionate is a difficult one to answer. And, this question becomes even more challenging when faced with offenders who must be sentenced for more than one offence. Legal commentators have debated whether the penalties meted out to offenders in MO cases ought to be more or less severe than those passed on offenders in single-offence (SO) cases (e.g., [Lippke 2011](#); [Bagaric and Alexander 2013](#); [Frase 2017](#)). Sentencing laws and policies in common law jurisdictions appear to suggest that offenders in MO cases ought to be treated more punitively than their SO counterparts (e.g., those who committed one burglary only or one assault only; see e.g., Sentencing Council 2012; [United States Sentencing Commission 2018](#); [National Judicial College of Australia 2019](#)). Whether this actually occurs in practice, however, is largely unknown.

In fact, surprisingly little is known about sentencing in MO cases. Official sentencing statistics refer only to the sentence meted out to the 'primary' or 'principal' offence; defined as that which received the highest penalty or, in a tie, which carries the highest maximum penalty. Although there is a wealth of past research on sentencing (for reviews, see [Spohn 2000](#); [Ulmer 2012](#); [Baumer 2013](#)), the fact that much of it has relied on official data means that researchers have focused on sentencing for the primary/principal offence and have not distinguished between MO and SO cases. Studies relying on other sources of sentencing data such as court records have also not appeared to delineate sentencing practice in MO as opposed to SO cases (for a review, see [Dhami and Belton 2015](#)). Laws and policies for sentencing in MO cases do exist, and these shed some light on how the legal system believes offences in MO cases *ought* to be sentenced.

Sentencing MO cases

The sentencing process in MO cases typically stems from that followed in SO cases. Beyond this, traditionally, when sentencing MO cases, many common law jurisdictions (e.g., United States, Canada, England and Wales, Australia, New Zealand) have rejected a simple cumulative approach whereby sentences for each offence are aggregated to produce a final sentence (e.g., Sentencing Council 2012; [United States Sentencing Commission 2018](#); [National Judicial College of Australia 2019](#)). A cumulative approach is deemed to be unacceptable partly because it could lead to crippling or crushing prison terms for offenders, and reduces their opportunity to lead a worthwhile life after release ([Bottoms 1998](#)). In addition, a simple cumulative approach could distort important distinctions between different categories of offence so that a series of less serious offences together receive a more severe penalty than a single more serious offence, thus violating the notion of ordinal proportionality ([Ashworth 2015](#); see also [Jareborg 1998](#)).

2 Although as [Wasik \(2012\)](#) points out, sometimes the 'associated' crimes may not be linked in any way, but are simply being sentenced on the same occasion. Also note that the prosecution has discretion in charging decisions, and as [Ashworth \(2015\)](#) suggests, prosecutors may or may not charge all offences. Similarly, defendants may not plead guilty to all offences and/or they may not be convicted of all offences.

The intricacies of different sentencing laws and policies aside, there are several approaches to sentencing in MO cases that aim to demonstrate ‘mercy’ or humanity and retain some notion of ordinal (or overall) proportionality. One approach that is used in several common law jurisdictions (e.g., England and Wales, Canada, Australia, New Zealand), but not the United States, is to apply the so-called ‘totality principle.’³ Thomas (1979) was the first to identify the use of this principle in his examination of sentencing in the Court of Appeal in England and Wales. In this jurisdiction, where the present study is based, the totality principle is now interpreted as comprising two elements (Sentencing Council 2012: 5, italics as in original):

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, in England and Wales, the totality principle is applied after the *initial* sentence for each offence in a MO case has been reached with reference to the relevant offence-specific sentencing guidelines. These guidelines apply equally to MO and SO cases and have low departure rates (e.g., 97–98 per cent of sentences fell within the stipulated ranges for some guidelines; Sentencing Council 2015b). In essence, the totality principle is applied after the sentencer has taken the steps for sentencing a SO case, i.e., after the sentence has (1) judged the offender’s culpability and the harm caused by the offence, (2) determined the seriousness of the offence in accordance with relevant aggravating factors (including previous convictions) and mitigating factors and (3) considered a reduction in sentence for a guilty plea.

Of course, as the above quote states, in MO cases, the sentencer must also decide if the sentences for each offence should be served (wholly or partly) concurrently or consecutively. This decision may be influenced by the strength of the association between the offences such that sentences for closely intertwined offences are likely to be served concurrently. The sentencing guideline on application of the totality principle in England and Wales states that where the sentences are to be served concurrently, the final sentence should be ‘appropriately aggravated by the presence of the associated offences’ (Sentencing Council 2012: 6). By contrast, where the sentences are to be served consecutively, sentencers should ‘add up the sentences for each offence and consider if the aggregate length is just and proportionate’ (7). Therefore, in both situations, an *adjustment* may be made to the initial sentence for one or more of the offences in a MO case; upwards for concurrent sentences and most likely downwards for consecutive sentences.

Comparing outcomes for MO- versus SO cases

It is clear that application of the totality principle would result in a final (overall) sentence for a MO case that is less severe than what would be passed following a simple cumulative approach. Beyond this, some legal commentators have noted that offenders in MO cases may receive a less

3 In the United States, one way to deal with MO cases is to reconfigure the offences into one, i.e., ‘when the conduct involves fungible items (e.g., separate drug transactions or thefts of money), the amounts are added and the guidelines apply to the total amount’ (United States Sentencing Commission 2018: 10; see also 363–78). Another way is to focus mainly (but not solely) on what is considered to be the most serious offence, i.e., ‘when nonfungible harms are involved, the offense level for the most serious count is increased (according to a diminishing scale) to reflect the existence of other counts of conviction’ (10; see also 363–78). Here, the sentence for the ‘focal’ (most serious) offence is increased or aggravated by the presence of other offences while the penalties for the other offences are reduced. Readers interested in sentencing for MO cases in the United States are referred to Frase (2017).

severe penalty than if they were sentenced for each offence on different occasions, i.e., if they were treated as SO cases (e.g., Wasik 2012). This is sometimes referred to as a 'bulk discount'.⁴ It is useful to consider how sentences in MO cases compare to SO cases not only because the public may expect such cases to be treated differently, but also because the law appears to do so.

Following the sentencing process in England and Wales described above, it would appear that an empirical comparison between MO and SO cases may be performed in at least three ways. One is to compare the *final* (overall) sentence meted out in a MO case with that in a SO case. This is problematic because it is unclear what a 'comparable' SO case would look like. For example, imagine a MO case involving a burglary and an assault that received three years in prison (one year for the burglary and two years for the assault to be served consecutively or even concurrently). Should the outcome in this case be compared to a SO case involving a burglary offence or a SO case involving an assault offence? Another way is to compare the *initial* sentence given to each offence in a MO case with its counterpart in a SO case. Using the above example, the one-year prison sentence for the burglary offence in the MO case would be compared to the outcome for a SO case involving a burglary, and the two-year prison sentence for the assault offence in the MO case would be compared to the outcome for a SO case involving an assault. The problem here is that the initial sentence does not reflect application of the totality principle in MO cases. Therefore, a third and preferable option is to compare the *adjusted* sentence given to each offence in a MO case with a comparable offence in a SO case. Here, comparability may refer to factors such as offence seriousness in the offence-specific guidelines. This analysis has the potential to demonstrate the impact of the totality principle on sentencing a specific offence in a MO case. The present study uses this latter approach.

THE PRESENT STUDY

The main aim of the present study was to examine application of the totality principle in England and Wales. This involves comparing the sentences meted out to offences in MO cases with those meted out to comparable offences in SO cases. For example, what sentence does an offender convicted of Robbery plus one or more other offences receive, compared to an offender convicted only of Robbery? Importantly, the present analyses aim to answer this question after controlling for potential differences between the two types of case, i.e., offender gender and age, offence seriousness, aggravating and mitigating factors and guilty plea reduction. A secondary aim was to measure the prevalence of MO and SO cases appearing at the sentencing stage of the justice process in England and Wales. An understanding of the prevalence of MO cases and the sentences they receive can be used to test theories of sentencing, evaluate the fairness of sentencing decisions and inform the development of sentencing guidelines and judicial training.

Dataset and variables

The present study used data collected in 2015 by the Sentencing Council for England and Wales, from Crown Courts, using the Crown Court Sentencing Survey (CCSS). In the Crown Court, sentences are passed on serious offences by professional judges. The CCSS has been used to gather information on factors that the Sentencing Council believes ought to influence sentencing decisions (often because they reflect the contents of offence-specific guidelines) so that it can monitor sentencing practice (Sentencing Council 2018). Courts are asked to complete the relevant form for every new criminal case sentenced. In MO cases, only information for the principal offence is provided, although the court does indicate the whether the case involved one or more than one offence status of a case.

4 It is sometimes contrasted with the penalty enhancing effect of prior convictions.

The Sentencing Council conducted the final iteration of the CCSS from 1 January to 31 March 2015 and released the data in 2018. The data collected are anonymized and organized into separate datasets reflecting groups of offences, many (but not all) of which are covered by offence-specific guidelines. The datasets released in 2018 were as follows: Arson, Assault, Burglary, Death, Driving, Drugs, Fraud, Robbery, Sexual offences⁵ and Theft. Although not all of the information collected by the CCSS is made available in the datasets, for the first time in the short history of the CCSS which started in October 2010, the datasets included a variable indicating whether the case involved MO or SO.⁶

In addition, two outcome variables are recorded in the datasets. The first is sentence type, which refers to immediate custody and various non-custodial options (e.g., discharge, fine, community order, suspended sentencing order). The second outcome variable is applicable only to cases where the offender was sentenced to immediate custody. Here, the length of time in custody is coded into several categories from less than 12 months up to life or an indeterminate period. The present study examines both outcome variables.

Finally, beyond the gender and age of the offender, the datasets also contain information on offence type (i.e., the offence for which the offender was either found guilty or pled guilty) and sentencing relevant factors. These latter factors are the steps followed by sentencers in all cases (and before they apply the totality principle in MO cases), namely determination of offence seriousness, identification of the presence of a range of aggravating and mitigating factors including previous convictions and the percentage reduction in sentence given for a guilty plea. All of these variables are included in the present study.

The definition and coding of the predictor variables in the present study are as follows:

- *Offender gender*: In the CCSS datasets, offender gender is coded as male or female.
- *Offender age*: In the CCSS datasets, offender age is coded into five categories (i.e., 18–24, 25–34, 35–44, 45–54, 55 and over). For present purposes, these were recoded into two categories (i.e., 18–24 versus 25 and over).
- *MO/SO case status*: In the CCSS datasets, this variable is coded as SO or MO.
- *Offence seriousness*: This variable refers to a categorical judgement made after examination of specific factors indicating greater/lesser harm and higher/lower culpability as they are listed in the offence-specific guideline.⁷ In the CCSS datasets, offence seriousness was coded into three categories (i.e., 1 = most serious, 2 = medium, 3 = least) for actual bodily harm (ABH), Domestic burglary and Robbery and into five categories (from 1 = most serious to 5 = least) for shoplifting. Offence seriousness is not a distinct variable in the sentencing guidelines for three offence types (i.e., Dangerous driving, Possession with intent to supply and Fraud) and so is not in the respective datasets.
- *Aggravating factors*: The aggravating factors contained in each guideline differ depending on the specific offence, but often include factors such as previous convictions, offence committed on bail, being under the influence of alcohol/drugs, failure to comply with a current court order and being on licence. The CCSS datasets code the presence (or absence) of each factor.

5 For present purposes, the dataset for indecent photographs of children was amalgamated with the one for sexual offences because they are covered by the same guideline.

6 It was thus not possible to study multiple years because data on MO/SO case status were not made available in previous releases of the CCSS data.

7 For example, in the Assault offences, guideline factors indicating:

- Greater harm are injury/fear of injury which is serious in the context of the offence; victim particularly vulnerable; and sustained or repeated assault on same person.
- Lesser harm are injury/fear of injury which is less serious in the context of the offence.
- Higher culpability are offence motivated by/demonstrating hostility to race/religion, disability and/or sexual orientation/transgender identity; significant degree of premeditation; threatened/actual use of weapon/equivalent; intention to cause more serious harm; deliberately causes more harm than necessary; targeting of vulnerable victim(s); leading role in group or gang; offence motivated by/demonstrating hostility to age or sex.
- Lower culpability are subordinate role in group or gang; greater degree of provocation; lack of premeditation; mental disorder/learning disability were linked to the commission of the offence; and excessive self-defence.

For present purposes, small sample sizes precluded examination of specific aggravating and mitigating factors, and so the number of aggravating factors in each case was calculated.

- *Mitigating factors*: The mitigating factors contained in each guideline also differ depending on the specific offence, but often include factors such as showing remorse, good character, addressing addiction, medical condition, lack of maturity, mental disorder and having dependents. The CCSS datasets code the presence (or absence) of each factor. For the reasons mentioned above, the number of mitigating factors in each case was calculated.
- *Reduction in sentence for guilty plea*: In England and Wales, the reduction in sentence for a guilty plea is determined by an 'overarching' guideline (see [Sentencing Council 2007](#)). The reduction in sentence is not an aspect of mitigation. The reduction may be anywhere from one-third (for a guilty plea at the earliest reasonable opportunity) to one-tenth (for a guilty plea during trial), although there is some discretion allowed. In the CCSS datasets, this is a continuous measure.

Before moving to the present analyses and findings, it is worth noting some more limitations of the CCSS. First, the CCSS datasets refer to a sample of sentenced cases, although the average response rate is relatively high for a paper-based survey of professionals (e.g., over 60 per cent; Sentencing Council 2015a), and sentencers who completed the survey may have been more likely to comply with the guidelines. Second, the CCSS does not collect data on offender race, and although data on court was collected it was not released for 2015. Evidence suggests that both of these factors may play an unwanted role in sentencing (e.g., [Hood 1992](#); [Pina-Sánchez and Linacre 2013](#)). However, the present study is unable to capture the effect of such factors on sentencing in MO and SO cases. Finally, some other potentially useful information (i.e., details of the other offences in MO cases, the sentences passed on these offences, and whether the overall sentence in MO cases was concurrent or consecutive) was not available. The implications will be discussed later. Nonetheless, the CCSS provides the most detailed and comprehensive picture of sentencing practice in England and Wales that is currently available, and it has been the source of data for numerous quantitative studies of sentencing in this jurisdiction (e.g., [Pina-Sánchez and Linacre 2013](#); [Roberts and Pina-Sánchez 2014](#); [Pina-Sánchez et al. 2017](#); [2018](#); [Lightowlers and Pina-Sánchez 2018](#)).

ANALYSES AND FINDINGS

In order to ensure there were a sufficient number of cases for comparison between MO and SO cases while also examining a broad range of offences, data on the most common offence type were extracted from each dataset. These were as follows: Arson endangering life ($n = 57$), S.47 ($n = 1,057$; hereafter called ABH), Dangerous driving ($n = 351$), Domestic burglary ($n = 1,036$), Section 1 Fraud Act 2006 ($n = 280$; this refers to fraud by false representation, failing to disclose information or abuse of position; hereafter called Fraud), Making threats to kill ($n = 37$), Possession with intent to supply ($n = 933$), Possession of indecent photograph of child ($n = 185$), Robbery ($n = 605$) and Theft from shops and stalls ($n = 204$; hereafter called Shoplifting).

Prevalence of MO and SO cases

Information on the MO/SO status of a case was available in 67.2 per cent of the sample ($n = 3,187$ out of 4,745). Of these cases, 48.7 per cent ($n = 1,551$) were MO cases and 51.3 per cent ($n = 1,636$) were SO cases. [Figure 1](#) shows the proportion of MO and SO cases within each offence type. As can be seen, MO cases represented half or more of the cases sentenced for six of the ten offence types studied. Indeed, MO cases accounted for the vast majority of cases of Possession of indecent photograph of child.

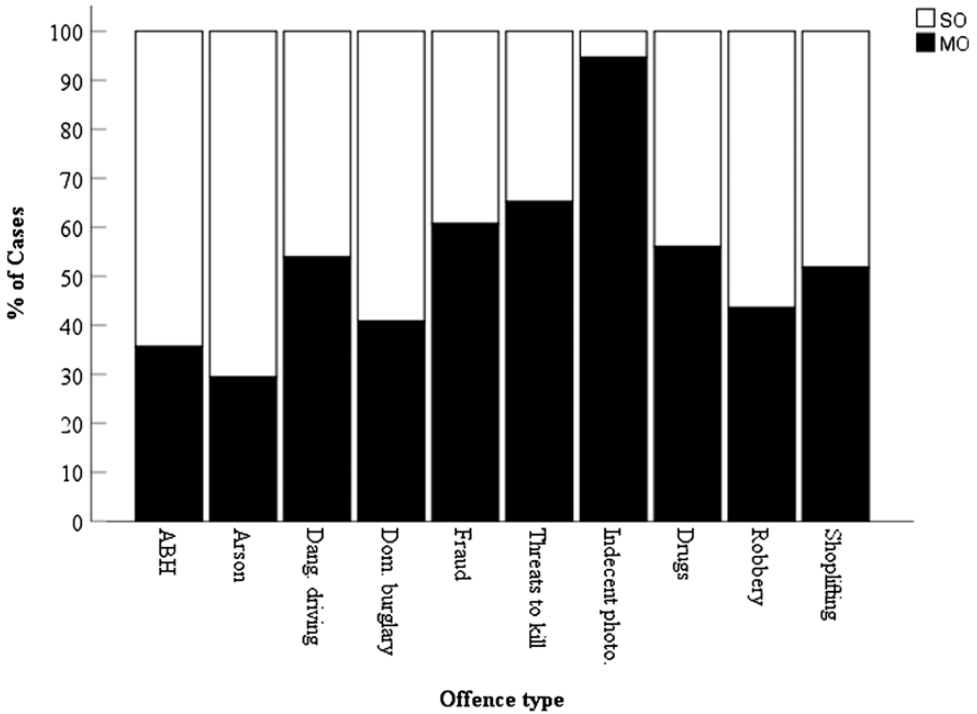


Fig. 1. Percentage of MO and SO cases within offence type.

Comparison of outcomes between MO and SO cases⁸

Logistic regression analyses were performed to examine the association between MO/SO case status and outcome, 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). It is important to control for any differences between MO and SO cases that could account for differences in their outcomes. As mentioned earlier, the totality principle is applied after the sentencer has followed the steps applicable to both MO and SO cases, i.e., he/she has judged the offender's culpability and the harm caused by the offence, determined the seriousness of the offence in accordance with relevant aggravating factors including previous convictions as well as mitigating factors and considered a reduction in sentence for a guilty plea (e.g., see Sentencing Council 2011). Each of these factors may influence outcomes. Specifically, penalty severity ought to be positively associated with offence seriousness and aggravating factors including previous convictions, but negatively associated with mitigating factors and percentage reduction in sentence for a guilty plea. Thus, in the following analyses, these factors were taken into consideration when comparing outcomes between MO and SO cases.

Immediate custody

Binary logistic regression models were computed for each offence type. The criterion variable in the models was custody, which was measured as whether the offence received a non-custodial penalty or immediate custody. The predictor variables were: offender gender and age, MO/SO case status, offence seriousness, number of aggravating factors including previous convictions,

⁸ Further analyses were not conducted on three offence types. This was due to the small sample size for Arson endangering life and Making threats to kill and due to the small number of SO cases for Possession of indecent photograph of child.

number of mitigating factors and percentage reduction in sentence for a guilty plea. All variables were entered simultaneously into the models.

Appendix A (Table A1) presents the full results of the regression analyses.⁹ In summary, Nagelkerke's R^2 values ranged from 0.29 (for Fraud) to 0.51 (for ABH), indicating that the models contributed to prediction of the outcome. In fact, the model chi-square statistics show that all of the models predicted the data better than their respective constant only models. The models' rates of successfully predicting immediate custody rose and ranged from 68.8 per cent (for Fraud) to 92.6 per cent (for Robbery).

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.

Custody length

For those cases that received immediate custody, the association between MO/SO case status and length of time in custody was also examined. As noted earlier, this variable is coded into several categories in the available datasets. Preliminary analyses revealed that the majority of all MO and SO cases that received immediate custody for each of the seven offence types were given a sentence length that fell into only two categories, and so the sentence length categories were divided into two for present purposes.

Binary logistic regression models were then computed for each offence type. The criterion variable was up to one year versus over one year in custody for five offence types (i.e., ABH, Dangerous driving, Domestic burglary, Fraud and Shoplifting), and up to three years versus over three years for two offence types (i.e., Possession of drugs with intent to supply and Robbery). As before, the predictor variables were: offender gender and age, MO/SO case status, offence seriousness, number of aggravating factors including previous convictions, number of mitigating factors and percentage reduction in sentence for a guilty plea. All variables were entered simultaneously into the models.

Appendix B (Table B1) presents the full results of the regression analyses. To summarize, Nagelkerke's R^2 values ranged from 0.12 (for Dangerous driving) to 0.57 (for Robbery) indicating that the models contributed to prediction of sentence length. The model chi-square statistics show that six of the seven models predicted the data better than their respective constant only models. The exception was the model for Fraud, which will not be interpreted further. For the other six models, prediction success rates rose and ranged from 69.2 per cent (for Dangerous driving) to 83.7 per cent (for ABH).

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 three 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.

DISCUSSION

Several common law jurisdictions suggest that when faced with MO cases, sentencers should apply the totality principle (e.g., Sentencing Council 2012; [National Judicial College of Australia](#)

⁹ Although the coefficients for the control variables are reported in the present paper, their effects will generally not be interpreted following the advice of Westreich and Greenland (2013), who point to the problem of treating such effects as independent even though they were estimated in an adjusted model. Since the main focus of the present study is to examine the effect of MO/SO case status, only the coefficient for this variable will therefore be interpreted.

2019). The present study represents a first attempt at empirically examining how application of this principle in England and Wales affects outcomes for offences in MO cases as compared to their counterparts in SO cases. This is an important issue for several reasons. First, MO cases represent common court business—they represented approximately half of the sentenced cases in the samples derived from CCSS datasets examined in the present study. Second, perceptions of the fairness of sentences may shape public confidence in the justice system as a whole (e.g., [Hough and Roberts 2004](#)). Finally, sentences may be appealed on the basis that they are too severe or too lenient ([Wasik 2012](#)).

Thinking along the lines of retributive or just desert theories, the public might expect that the penalties meted out to offences in MO cases would be more severe (i.e., more likely to receive immediate custody and/or longer custodial sentence lengths) than those passed on comparable offences in SO cases. However, the present analyses revealed that for six of the seven offence types examined, MO/SO case status was not a significant predictor of immediate custody or custody length. Importantly, this was true after taking into account the effect of offender gender and age, as well as other sentencing relevant variables such as offence seriousness, number of aggravating factors (including previous convictions) and mitigating factors and guilty plea reduction. Thus, 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.

The sentencing ranges in the current offence-specific guidelines in England and Wales are equally applicable to offences in MO and SO cases. The fact that the present study compared application of the totality guideline against several different offence-specific guidelines, and found similar results suggest that the explanation for the observed findings may lie in the current guideline on the totality principle. This guideline is applied in MO cases after application of the offence-specific guidelines (see [Wasik 2012](#) who argues that the totality principle should instead be incorporated into the offence-specific guidelines). It appears that application of the totality principle as stated in the guideline means that some offenders in MO cases (especially those serving their sentences concurrently) may be ‘getting off lightly’ compared to their SO counterparts. The impact of this principle on sentencing may appear unfair to the public. The extent to which it is effective in reducing crime is unknown. Regardless, the present findings are unlikely to inspire confidence in the justice system.

Potential explanations

The following discussion of the potential explanations in relation to the totality guideline ought to be considered tentative, given this is the first empirical study of this issue, and given the limitations of the study (which will be mentioned later). A close examination of the guideline on application of the totality principle in England and Wales points to several possible explanations for why an offence in a MO case may receive the same or a less severe penalty than its counterpart in a SO case. These explanations may act alone or in conjunction with one another and ought to be examined in future research.

First, although personal mitigation, which has the effect of reducing penalty severity, is common to both MO and SO cases, it may be that personal mitigation is considered (at least) twice in MO cases. The first opportunity is when an initial sentence is considered for each offence (as per the offence-specific guidelines) and the second is when the totality principle is applied (see quote from Sentencing Council 2012 presented earlier). In fact, [Pina-Sánchez et al. \(2018\)](#) revealed that for a combination of assault offences, some factors including personal mitigation may be considered twice even before the totality principle is applied. In the present context, personal mitigating factors such as remorse, previous good character and addressing addiction may be double-counted (or even triple-counted) in MO cases compared to SO cases. In order to test this explanation, a comparison of the initial and adjusted sentences given to offences in MO

cases is required, taking account of the presence of personal mitigating factors. This, however, cannot be easily done using real sentencing data because sentencers faced with MO cases do not typically record their initial sentences before adjustments are applied, and so another methodological approach is required to test this potential explanation.

Second, in MO cases as opposed to SO cases, the effect of personal mitigation may be over-weighted relative to the effect of aggravating factors, which are meant to increase penalty severity. This is because application of the totality principle explicitly requires sentencers to consider personal mitigation again (as mentioned above), but not aggravating factors. The offence-specific guidelines do not indicate the weight that should be attached to specific aggravating and mitigating factors, or the relative weight that should be given to each set of factors. This means that sentencers are afforded considerable discretion. Indeed, the CCSS only collected data on aggravating and mitigating factors that were specified in the guidelines. The fact that these lists of factors are non-exhaustive means that sentencers could have considered other factors. Past research points to some of the mitigating factors that may be particularly influential in sentencing (e.g., [Jacobson and Hough 2007](#); [Irwin-Rogers and Perry 2015](#); [Maslen 2015](#); [Belton 2018](#)). Consistent with the second potential explanation, in the present study, the number of *mitigating* factors present in a case was a significant predictor of immediate custody for all of the seven offence types studied (and this variable was a significant predictor of custody length in five models). The weight attached to this variable was greater than that attached to the number of aggravating factors in most of the models (i.e., five out of seven models predicting immediate custody and three out of six models predicting custody length). The few exceptions included Possession with intent to supply (when predicting immediate custody) and Robbery (when predicting custody length), which, consistent with this second explanation, were both offence types where MO cases were more likely to be treated punitively compared to their SO counterparts.

Finally, as mentioned earlier, the sentence for one or more of the offences in a MO case may be adjusted downwards if sentences are to be served consecutively, and adjusted upwards if they are to be served concurrently. It may be that the downwards adjustment is too much, and/or the upwards adjustment is too little, especially when considering the aforementioned penalty reducing effects of personal mitigation, or that the two adjustments cancel each other out. Unfortunately, the CCSS dataset did not include information on how the sentence was meant to be served. Since offences in MO cases are typically intertwined it is likely that sentences in the majority of MO cases would be served concurrently (Sentencing Council 2012).¹⁰ As an extreme example, imagine if the sentences in all of the MO cases in the present study were to be served concurrently—the fact that the dataset contains information on the sentence for the offence which received the highest penalty suggests that any upwards adjustment for concurrent sentences was insufficient. This situation would undermine [Wasik's \(2012\)](#) assertion that concurrent sentences result in a greater 'internal sum' and better reflect the sentences for individual offences compared to consecutive sentences which require some offences to be 'undersentenced' and so should be preferred. Clearly, further research is needed to empirically examine the effect of how a sentence is served to properly test this final explanation (see [Lippke 2011](#) for forms of 'consecutivism' and 'concurrentivism').

Limitations and future research directions

The present study relied on data from the CCSS. Although this source of data provides some external validity and generalizability (see [Dhami and Belton 2017](#)), it limited the breadth of ques-

10 In some jurisdictions such as the State of Victoria, Australia, where the totality principle is applied, there is a statutory presumption in favour of passing concurrent sentences ([Wasik 2012](#)). This is also true for some American jurisdictions (see [Frase 2017](#)).

tions that could be asked about application of the totality principle as well as the depth of the answers that could be provided. Thus, several avenues for future research remain. These include testing the robustness of the present findings and their potential explanations using a variety of methods and other data sources, as well as building on these findings in order to provide a more comprehensive understanding of sentencing in MO cases.

First, beyond issues discussed above regarding whether sentences in MO cases were concurrent or consecutive, the CCSS datasets did not contain information on the other offences in MO cases (e.g., their nature, when they were committed), or the sentences that these other offences received. Research ought to examine the effect of whether or not the other offences occurred in a single transaction. Roberts and de Keijser (2017) suggest that offenders convicted of more than one offence committed close in time should not be viewed as culpable as those whose offences were committed over a longer time period. Consistent with their view, they cite Robinson's (2013) finding that research participants gave greater punishment discounts when offences were temporally contiguous. Future research could also be directed at how application of the totality principle is affected by whether or not the other offences in a MO case are similar or different. In addition, the research could investigate how application of the totality principle is affected by whether or not the applicable sentences in a MO case are of the same type (i.e., all custodial) or different types (i.e., custodial and non-custodial). It is reasonable to expect that sentencers may find their task more difficult when sentencing a variety of offence types (partly because they fall within different guidelines), and when applicable sentences are measured in different units that need to be aggregated somehow (e.g., amount of fine, length of time in custody). As the cognitive task becomes more complex, people may increasingly resort to intuitive (rather than analytic) judgement strategies (Hammond 1996; 2000). The extent to which task complexity and any resultant changes in cognitive strategy may lead to penalty reducing effects for MO cases should be investigated.

The generalizability of the present findings should also be established in the context of other jurisdictions that apply the totality principle when sentencing MO cases. For instance, in Australia, interpretation and application of the principle is left to the discretion of individual sentencers (see Bagaric and Alexander 2013). While some are attracted to this holistic approach (for a review, see Dhimi *et al.* 2015), there is considerable research across jurisdictions, using different methodologies and examining different decisions that has attested to the problems associated with judicial discretion (e.g., Konečni and Ebbesen 1982; English *et al.* 2006; Guthrie *et al.* 2007; von Helversen and Rieskamp 2009; Rachlinski *et al.* 2015; Dhimi *et al.* 2020) and lack of guidance (see Dhimi *et al.* 2015). Although some have raised concerns about what guidelines can achieve in terms of tailoring sentences to the circumstances of individual offences and offenders (Roberts *et al.* 2018), the effect of judicial discretion on sentencing MO cases compared to their SO counterparts remains to be examined.¹¹

There may be several reasons for applying the totality principle beyond demonstrating mercy and retaining ordinal proportionality (see Ryberg 2005; Lippke 2011; Bagaric and Alexander 2013), however, the laws and policies dictating its delineation are typically vague and ill-defined, even in jurisdictions such as England and Wales where guidelines exist on this principle (Wasik 2012). Therefore, an alternative approach may be warranted. Legal scholars have debated the principles that ought to underlie sentencing in MO cases and called for alternative approaches to deal with such cases (e.g., Lovegrove 2004; Ryberg 2005; Lippke 2011; Wasik 2012; Bagaric and Alexander 2013; Manson 2013; Frase 2017; Hoskins 2017). For now, the potential ex-

11 Researchers may have to use other methods because although official Australian sentencing data is collected on the MO/SO status of a case, these 'do not provide details about how many other counts [offences] there were, what offences they were or what penalties they incurred' (Personal e-communication dated 23 April 2019 to the author from the Judicial Commission of New South Wales Australia).

planations for the present findings discussed above in relation to the guidelines in England and Wales, which although needing further investigation, suggest that attention should be paid to how sentencers are asked to use personal mitigating factors in MO cases, as well as how they increase or reduce sentences in these cases depending on whether they are to be served concurrently or consecutively. In addition, the order of reasoning specified in the guidelines could be examined.¹² Wasik (2012), e.g., questions whether the issue of how the sentence is to be served (concurrently versus consecutively) ought to come before or after applying the totality principle.

In addition to the above avenues for future research, the outcomes (e.g., reoffending rates) of sentences meted out to offenders in MO versus SO cases could also be measured because such knowledge could inform more effective sentencing. In addition, public opinion surveys could glean levels of support for sentencing policies that result in more lenient or more harsh sentences for offenders in MO cases compared to their SO counterparts.

A scientific, evidence-based approach to policy-making in sentencing may be fruitful. In order for researchers to properly investigate and understand sentencing practice, jurisdictions should not only release data on the MO/SO status of sentenced cases, but also on all of the offences being sentenced in MO cases, the sentences that each offence received, and whether these were to be served concurrently or consecutively. Without such information, both research and official statistics provide only a partial and skewed picture of sentencing. The need for an effective and fair system is clear—sentencing has implications for the lives of offenders and their families, victim satisfaction with the justice process, the work and resources of criminal justice agencies, and ultimately for public safety.

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12 It has been noted that in Australia, some sentencers may start the reasoning process in MO cases with application of the totality principle (Wells 1992; Lovegrove 2004).

APPENDIX A

Table A1. Regression models predicting non-custodial penalty versus immediate custody for each offence type

Predictor	B (SE)	Wald (df)	Exp(B)	Lower, upper 95% CI
ABH				
Constant	1.27 (1.17)	1.18 (1)	3.56	
Gender**	-1.94 (0.70)	7.80 (1)	0.14	0.04, 0.56
Age	-0.04 (0.27)	0.02 (1)	0.96	0.57, 1.64
MO/SO case status	0.14 (0.27)	0.27 (1)	1.15	0.68, 1.93
Offence seriousness***		31.93 (2)		
Offence seriousness (1)**	1.77 (0.59)	8.96 (1)	5.85	1.84, 18.59
Offence seriousness (2)	0.36 (0.59)	0.38 (1)	1.44	0.45, 4.58
Num. of aggravating factors***	0.48 (0.07)	42.66 (1)	1.62	1.40, 1.87
Num. of mitigating factors***	-0.94 (0.12)	63.51 (1)	0.39	0.31, 0.49
% guilty plea reduction	-0.03 (0.02)	3.57 (1)	0.97	0.95, 1.00
Dangerous driving				
Constant	1.47 (1.54)	0.91 (1)	4.34	
Gender	-0.69 (0.94)	0.54 (1)	0.50	0.08, 3.14
Age	-0.10 (0.37)	0.07 (1)	0.91	0.44, 1.86
MO/SO case status	-0.16 (0.35)	0.20 (1)	0.85	0.43, 1.71
Num. of aggravating factors***	-0.99 (0.17)	36.46 (1)	0.37	0.27, 0.51
Num. of mitigating factors***	0.89 (0.16)	31.58 (1)	2.42	1.78, 3.30
% guilty plea reduction	-0.03 (0.03)	1.29 (1)	0.97	0.92, 1.02
Domestic burglary				
Constant*	2.67	6.53 (1)	14.42	
Gender***	-1.82 (0.52)	12.19 (1)	0.16	0.06, 0.45
Age	0.14 (0.29)	0.25 (1)	1.16	0.66, 2.02
MO/SO case status	0.36 (0.30)	1.40 (1)	1.43	0.79, 2.58
Offence seriousness***		21.61 (2)		
Offence seriousness (1)***	2.24 (0.54)	17.17 (1)	9.35	3.25, 26.92
Offence seriousness (2)	0.34 (0.39)	0.74 (1)	1.40	0.65, 3.01
Num. of aggravating factors***	0.90 (0.15)	34.88 (1)	2.47	1.83, 3.33
Num. of mitigating factors***	-0.94 (0.13)	49.72 (1)	0.39	0.30, 0.51
% guilty plea reduction	-0.04 (0.02)	3.75 (1)	0.96	0.92, 1.00
Fraud				
Constant	-1.08	0.37 (1)	0.34	
Gender	-0.76 (0.43)	3.23 (1)	0.47	0.20, 1.07
Age	0.71 (0.68)	1.09 (1)	2.03	0.54, 7.72
MO/SO case status	-0.07 (0.39)	0.031 (1)	0.93	0.44, 2.00
Num. of aggravating factors	0.08 (0.19)	0.19 (1)	1.09	0.75, 1.58
Num. of mitigating factors***	-0.64 (0.14)	19.43 (1)	0.53	0.40, 0.70
% guilty plea reduction*	0.05 (0.03)	3.99 (1)	1.05	1.00, 1.10

Table A1. Continued

Predictor	B (SE)	Wald (df)	Exp(B)	Lower, upper 95% CI
Possession with intent to supply*				
Constant	0.57 (0.77)	0.56 (1)	1.78	
Gender***	-0.70 (0.48)	12.54 (1)	0.18	0.07, 0.47
Age	0.08 (0.21)	0.14 (1)	1.08	0.72, 1.61
MO/SO case status***	0.71 (0.20)	12.21 (1)	2.03	1.37, 3.02
Num. of aggravating factors***	0.44 (0.11)	17.65 (1)	1.56	1.27, 1.91
Num. of mitigating factors***	-0.39 (0.06)	46.54 (1)	0.68	0.61, 0.76
% guilty plea reduction	0.02 (0.01)	1.79 (1)	1.02	0.99, 1.05
Robbery				
Constant	-0.68 (1.64)	0.17 (1)	0.51	
Gender	0.72 (1.13)	0.41 (1)	2.05	0.23, 18.64
Age	0.25 (0.55)	0.21 (1)	1.28	0.44, 3.74
MO/SO case status	0.68 (0.58)	1.41 (1)	1.98	0.64, 6.11
Offence seriousness		3.97 (2)		
Offence seriousness (1)	1.78 (1.23)	2.10 (1)	5.93	0.53, 65.91
Offence seriousness (2)	0.86 (0.55)	2.44 (1)	2.37	0.80, 6.98
Num. of aggravating factors**	0.63 (0.20)	10.47 (1)	1.88	1.28, 2.76
Num. of mitigating factors***	-0.79 (0.19)	18.41 (1)	0.45	0.32, 0.65
% guilty plea reduction	0.01 (0.03)	0.20 (1)	1.01	0.96, 1.08
Shoplifting				
Constant	-6.28 (3.34)	3.53 (1)	0.00	
Gender	0.28 (0.80)	0.12 (1)	1.33	0.28, 6.35
Age	-0.22 (0.82)	0.07 (1)	0.81	0.16, 4.04
MO/SO case status	0.19 (0.65)	0.09 (1)	1.21	0.34, 4.33
Offence seriousness		4.61 (4)		
Offence seriousness (1)	0.74 (1.21)	0.37 (1)	2.09	0.19, 22.62
Offence seriousness (2)	1.40 (1.00)	1.96 (1)	4.05	0.57, 28.71
Offence seriousness (3)	1.37 (1.00)	1.88 (1)	3.95	0.55, 28.15
Seriousness (4)	1.68 (0.89)	3.59 (1)	5.35	0.95, 30.29
Num. of aggravating factors	0.53 (0.31)	2.90 (1)	1.70	0.92, 3.14
Num. of mitigating factors***	-0.98 (0.27)	12.83 (1)	0.38	0.22, 0.64
% guilty plea reduction*	0.18 (0.09)	4.16 (1)	1.19	1.01, 1.41

Note. Gender (1 = male, 2 = female), Age (1 = 18–24, 2 = 25 and over), MO/SO status (1 = single offence, 2 = multiple offence), seriousness (for ABH, Domestic burglary and Robbery: 1 = most serious, 2 = medium, 3 = least; for shoplifting: 1 = most serious to 5 = least). The last category (least serious) was used as the reference category in the regression models. * $p < 0.05$, ** $p < 0.01$, *** $p < 0.001$. *Gender was not entered into the model for Possession with intent to supply due to large standard errors associated with the coefficient of this variable. ABH: $N = 455$, Nagelkerke $R^2 = 0.51$, Model $\chi^2 = 220.91$ (8), $p < 0.001$. Dangerous driving: $N = 208$, Nagelkerke $R^2 = 0.47$, Model $\chi^2 = 89.68$ (6), $p < 0.001$. Domestic burglary: $N = 545$, Nagelkerke $R^2 = 0.46$, Model $\chi^2 = 183.84$ (8), $p < 0.001$. Fraud: $N = 278$, Nagelkerke $R^2 = 0.19$, Model $\chi^2 = 38.47$ (5), $p < 0.001$. Possession with intent to supply: $N = 520$, Nagelkerke $R^2 = 0.31$, Model $\chi^2 = 135.34$ (6), $p < 0.001$. Robbery: $N = 272$, Nagelkerke $R^2 = 0.42$, Model $\chi^2 = 58.38$ (8), $p < 0.001$. Shoplifting: $N = 86$, Nagelkerke $R^2 = 0.50$, Model $\chi^2 = 40.02$ (10), $p < 0.001$.

APPENDIX B

Table B1. Regression models predicting custody length for each offence type

Predictor	B (SE)	Wald (df)	Exp(B)	Lower, upper 95% CI
ABH				
Constant	0.08 (1.93)	0.01 (1)	1.09	
Gender	0.78 (0.65)	1.45 (1)	2.18	0.61, 7.70
Age	0.10 (0.30)	0.11 (1)	1.10	0.62, 1.97
MO/SO case status	0.34 (0.30)	1.32 (1)	1.40	0.79, 2.50
Offence seriousness***		23.45 (2)		
Offence seriousness (1)	1.02 (0.62)	2.69 (1)	2.76	0.82, 9.31
Offence seriousness (2)	-0.47 (0.58)	0.66 (1)	0.63	0.20, 1.95
Num. of aggravating factors*	-0.15 (0.07)	4.51 (1)	0.86	0.75, 0.99
Num. of mitigating factors***	0.46 (0.13)	13.22 (1)	1.59	1.24, 2.04
% guilty plea reduction	-0.00 (0.02)	0.02 (1)	1.00	0.97, 1.03
Dangerous driving				
Constant	-0.29 (1.34)	0.05 (1)	0.75	
Gender	-0.20 (0.87)	1.34 (1)	0.82	0.15, 4.50
Age	0.38 (0.33)	0.30 (1)	1.47	0.77, 2.82
MO/SO case status	0.17 (0.32)	10.28 (1)	1.19	0.64, 2.23
Num. of aggravating factors**	0.42 (0.13)	5.62 (1)	1.51	1.18, 1.95
Num. of mitigating factors*	-0.27 (0.11)	0.83 (1)	0.76	0.61, 0.96
% guilty plea reduction	0.02 (0.02)	0.05 (1)	1.02	0.98, 1.07
Domestic burglary				
Constant	3.35 (1.37)	5.96 (1)	28.53	
Gender	0.54 (0.80)	0.45 (1)	1.71	0.36, 8.18
Age	0.26 (0.30)	0.79 (1)	1.30	0.73, 2.33
MO/SO case status	0.05 (0.30)	0.03 (1)	1.05	0.58, 1.91
Offence seriousness**		13.16 (2)		
Offence seriousness (1)***	3.89 (1.08)	13.03 (1)	48.65	5.90, 401.05
Offence seriousness (2)	0.34 (0.40)	0.70 (1)	1.40	0.64, 3.08
Num. of aggravating factors	-0.04 (0.13)	0.10 (1)	0.96	0.75, 1.23
Num. of mitigating factors	-0.07 (0.13)	0.30 (1)	0.93	0.73, 1.20
% guilty plea reduction**	-0.10 (0.03)	11.89 (1)	0.90	0.85, 0.96
Possession with intent to supply				
Constant	-1.01 (0.96)	1.11 (1)	0.37	
Age*	0.72 (0.33)	4.85 (1)	2.05	1.08, 3.89
MO/SO case status	0.29 (0.32)	0.81 (1)	1.33	0.72, 2.48
Num. of aggravating factors**	0.41 (0.13)	9.66 (1)	1.51	1.16, 1.96
Num. of mitigating factors*	-0.31 (0.13)	5.83 (1)	0.74	0.57, 0.94
% guilty plea reduction***	-0.07 (0.02)	12.93 (1)	0.93	0.90, 0.97
Robbery				
Constant***	-7.22 (1.87)	14.86 (1)	0.00	
Gender	0.30 (1.02)	0.09 (1)	1.35	0.18, 9.85

Table B1. Continued

Predictor	B (SE)	Wald (df)	Exp(B)	Lower, upper 95% CI
Age**	1.04 (0.38)	7.60 (1)	2.82	1.35, 5.88
MO/SO case status*	0.91 (0.36)	6.32 (1)	2.49	1.22, 5.06
Offence seriousness***		18.61 (2)		
Offence seriousness (1)***	4.24 (0.98)	18.14 (1)	69.72	9.89, 491.59
Offence seriousness (2)***	3.56 (.88)	16.30 (1)	35.31	6.26, 199.23
Num. of aggravating factors***	0.65 (0.12)	30.24 (1)	1.19	1.52, 2.41
Num. of mitigating factors**	-0.40 (0.15)	7.46 (1)	0.67	0.51, 0.89
% guilty plea reduction	-0.05 (0.02)	3.73 (1)	0.96	0.91, 1.00
	Shoplifting			
Constant*	6.80 (3.20)	4.54 (1)	904.97	
Gender	-0.76 (0.71)	1.13 (1)	0.47	0.12, 1.89
Age	0.26 (0.72)	0.13 (1)	1.29	0.32, 5.31
MO/SO case status	-0.44 (0.56)	0.64 (1)	0.64	0.22, 1.91
Offence seriousness		4.24 (4)		
Offence seriousness (1)	-1.34 (1.08)	1.55 (1)	0.26	0.03, 2.16
Offence seriousness (2)	-1.33 (0.87)	2.32 (1)	0.27	0.05, 1.46
Offence seriousness (3)	-1.68 (0.87)	3.72 (1)	0.19	0.03, 1.03
Seriousness (4)	-0.88 (0.74)	1.40 (1)	0.42	0.10, 1.78
Num. of aggravating factors	0.17 (0.22)	0.63 (1)	1.19	0.77, 1.83
Num. of mitigating factors*	0.52 (0.22)	5.79 (1)	1.68	1.10, 2.58
% guilty plea reduction*	-0.18 (0.08)	4.66 (1)	0.83	0.71, 0.98

Note. The model for Fraud was not statistically significant ($N = 157$, Nagelkerke $R^2 = 0.17$, Model $\chi^2 = 11.82$ [6], $p = 0.066$), and so it is not presented. * $p < 0.05$, ** $p < 0.01$, *** $p < 0.001$. ABH: $N = 455$, Nagelkerke $R^2 = 0.16$, Model $\chi^2 = 43.47$ (8), $p < 0.001$. Dangerous driving: $N = 208$, Nagelkerke $R^2 = 0.12$, Model $\chi^2 = 18.62$ (6), $p = 0.005$. Domestic burglary: $N = 545$, Nagelkerke $R^2 = 0.22$, Model $\chi^2 = 63.21$ (8), $p < 0.001$. Possession with intent to supply: $N = 278$, Nagelkerke $R^2 = 0.20$, Model $\chi^2 = 41.05$ (6), $p < 0.001$. Robbery: $N = 245$, Nagelkerke $R^2 = 0.57$, Model $\chi^2 = 134.86$ (8), $p < 0.001$. Shoplifting: $N = 86$, Nagelkerke $R^2 = 0.30$, Model $\chi^2 = 21.96$ (10), $p = 0.015$.

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