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# INTOXICATION AND SENTENCING

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A review of policy, practice and research

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# EXECUTIVE SUMMARY

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- Intoxication resulting from substance use commonly features as a contributory factor in offending and thus in many cases sentenced by the courts. Despite this, the role of intoxication at sentencing has received little research attention. In England and Wales, no formal sentencing guidance on how intoxication ought to be considered in sentencing existed prior to 2004. Rather, practice was guided by case law or appeal judgements, which were mixed in their assessment of the role of intoxication. Since 2004, English and Welsh sentencing guidelines mandate alcohol and drug intoxication as an aggravating factor. This position has been maintained by the Sentencing Council in its offence-specific guidelines and expanded definitions accompanying the guidelines.
- Intoxication can be considered by courts in sentencing; both as part of the context of the offending behaviour and in terms of the treatment needs of the offender. However, in making intoxication an aggravating factor, the guidance suggests intoxicated offenders are more culpable for their offence and that this ought to be reflected in an increased sentence. This position is contested however.
- There are a number of challenges faced by sentencers in determining the relevance of intoxication. These include, but are not limited to:
  - The assumption that intoxication always serves to aggravate offending
  - Distinguishing between intoxication arising from legal and illegal substances
  - Determining the role intoxication played in offending
  - Defining voluntary intoxication
  - Considering addiction as a mitigating factor
  - Overlap with other mitigating factors
- Research suggests intoxication has been found to aggravate or mitigate sentences, depending on the context. Recent, nationally representative, studies find intoxicated violent aggressors are blamed more so than sober aggressors, in line with existing sentencing guidance. However, the context of the offence and offender demographics appear to influence the way in which intoxication affects the final sentence. Moderating factors identified in the research literature include aetiological conditions leading to addiction, an offence being an isolated incident, concomitant drug and alcohol use, offender drinking with the victim and the offence occurring in a private setting.
- Despite this emerging evidence, there is limited research in the English and Welsh context which examines the impact of intoxication across a range of offence types and subsections of the population. And little is known about the (in)equality of the application of intoxication based on demographic characteristics, other than one study highlighting how being female increased the aggravation applied. Consequently, we have only limited understanding about the way in which guidance pertaining to intoxication is being applied in practice. Given the prevalence of intoxication in cases coming before the courts, this is a significant evidence gap and this paper identifies several research priorities.

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# 1. INTRODUCTION

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Alcohol and drug related offending present a perennial criminal justice challenge. Not only are illicit drug and alcohol use associated with offences where intoxication is an element of the offence, such as driving under the influence, but intoxication is a contributory factor in many crimes (Lightowlers and Pina-Sánchez 2017). Indeed, in 2019/20, alcohol intoxication was believed present in as many as two in every five (42%) violent crimes and drug intoxication in around three in ten (29%) such offences (Stripe 2020). Moreover, intoxication is the most common aggravating factor in assault offences in England and Wales (Lightowlers and Pina-Sánchez 2017) and many convicted for offences were under the influence of alcohol or drugs or were assessed as having a substance use problem (Prison Reform Trust 2017). However, the relationships between substances and offence types vary. Alcohol intoxication is known to be strongly associated with violent offences (Parker and Auerhahn 1998), whilst drugs are more commonly associated with acquisitive or property offences (Bennett and Holloway 2004; Leidenfrost et al. 2017).

Whilst substance use may be implicated in offending, it does not always play a causal role in the offending behaviour. Rather, there are varying mechanisms by which alcohol and drug intoxication can be linked to crime (Goldstein 1985; EMCDDA 2007). For example, as well as offences being wholly attributable to substance use (the substance-defined model), a substance use disorder may have compelled an individual to commit a crime to feed their addiction (economic-compulsive model). Or criminal behaviour may be a result from involvement with illicit drug markets – such as fighting over territory or in collecting debts (the systemic model). As such, drug and/or alcohol-related offences potentially require sentencing considerations that span a wide range of biological, psychological and social factors.

This makes consideration of the specific role of intoxication resulting from substance use challenging. In England and Wales, intoxication may be considered by courts in sentencing both as part of the context of the offending behaviour and in terms of the treatment needs of the offender. However, intoxication itself is a nebulous concept that is challenging to objectively verify or quantify. Its relevance, therefore, has always proven difficult to determine in structuring sentencing practice, and its status as a sentencing factor remains contested (Dingwall 2006; Lightowlers and Pina-Sánchez 2017; Lightowlers 2019; Warner et al. 2018). Several ambiguities and challenges persist in determining the role and relevance of intoxication in sentencing.

Different jurisdictions take a varying approach to the consideration of intoxication in sentencing. Some deem it aggravation – as is the case in England and Wales. However, others see it as irrelevant (or a neutral factor); for example, in France and Germany, alcohol intoxication is not considered to be an aggravating factor in crime (Bègue et al. 2020). There was also considerable objection to adopting a uniform position whereby intoxication would always be deemed aggravation in the Australian context (Law Society of NSW 2015). The very fact that approaches to considering intoxication in sentencing vary across jurisdictions reflects the contested nature of intoxication in sentencing. That is to say, there is no ‘right’ or ‘wrong’ approach and the role intoxication plays in

sentencing is culturally and politically determined, rather than being a ‘black and white’ matter of legal principle.

In sentencing policy and practice, the complex role of intoxication is often overlooked. As such, sentencing practice reflects wider social norms relating to substance use (Lightowlers and Pina-Sánchez 2017; Lightowlers 2019; Lightowlers et al. 2020). Additionally, there are different opinions amongst sentencers about the purposes of sentencing (Dingwall 2006) and likely a range of beliefs about alcohol and drug use. Moreover, intoxication may resonate with different principles of sentencing (Dingwall and Koffman 2008); as no one sentencing objective prevails over another, sentencers are left to choose between these based on their own perceptions of each case. This further complicates the task of determining the *relevance* of intoxication and leaves open questions as to whether it ought to be considered a mitigating, neutral or aggravating factor (Padfield 2011). Whilst individual characteristics and the offending context may play a role in determining the relevance of intoxication, interpretations based on such features can be subject to implicit biases. In turn, this can undermine consistency in sentencing and result in disparity of sentencing outcomes (Lightowlers and Pina-Sánchez 2017; Lightowlers 2019; Lightowlers et al. 2020).

This paper explores the role of intoxication at sentencing. It identifies key issues and ambiguities in considering intoxication and sentencing and discusses implications for sentencing policy and practice. It charts recent research findings and highlights gaps in our understanding. Having done so, the paper concludes that the implicit interpretations and assessments contained in sentencing policy and practice about the role played by intoxication in offending often go unchallenged. Having highlighted how aspects of the current guidance are not fully clarified, it calls for further research on intoxication at sentencing.

## 2. SENTENCING AND INTOXICATION IN ENGLAND AND WALES

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Prior to 2004, courts were guided by case law or appeal judgments. However, these did not always interpret intoxication as aggravation. They were mixed in their assessments of the role intoxication played; with some suggesting intoxication was a neutral factor (*Bradley*;<sup>1</sup> *Attorney General's Reference No.79 of 1999*;<sup>2</sup> *Parkhouse*<sup>3</sup>) and others suggesting (either expressly or by implication) it

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1 (1980) 2 Cr. App. R. (S.) 12.

2 [2000] 2 Cr. App. R. (S.) 124.

3 [1999] 2 Cr. App. R. (S.) 208.

was a mitigating factor (*Abrahams*;<sup>4</sup> *Spence*<sup>5</sup>). Moreover, none had status as 'guideline judgments', designed to give guidance to sentencers on the issue.

The Sentencing Guidelines Council (created by the Criminal Justice Act 2003) was given authority to issue sentencing guidelines to promote transparency and public confidence in sentencing. At this point, the judiciary were not obliged to follow the guidance issued by the Sentencing Guidelines Council but were required to have regard to them. The Sentencing Guidelines Council for England and Wales issued the first guidance for sentencers concerning intoxication in its 2004 guideline on '*Overarching Principles: Seriousness*'. It advised that, unless the offence is wholly attributable to the substance use, the court could consider the relevance of having committed the offence while under the influence of alcohol or drugs in determining the culpability and harm caused by the offence (Sentencing Guidelines Council 2004). They advised that alcohol and drug intoxication was an aggravating factor on the basis that it increases the offence seriousness (Sentencing Guidelines Council 2004, para. 1.22). Consequently, the guideline deemed an offender more culpable for their offence if they were voluntarily intoxicated.

Subsequently, the Magistrates' Court Sentencing Guidelines (Sentencing Guidelines Council 2008) also suggested intoxication ought to be treated as an aggravating factor, sustaining the notion that intoxication ought to aggravate an offence based on its seriousness. This early formal guidance on intoxication sets a precedent for considering the presence of (voluntary) intoxication as increasing offence seriousness (aggravation). Intoxication cannot, based on the current guidelines, be cited as mitigation. This accords with a more general pervading 'malevolent assumption' about intoxication in socially disadvantageous events, whereby alcohol consumption is attributed directly to socially disadvantageous events (e.g. crimes) occurring after alcohol consumption (Collins 1981; Dingwall 2006; Lightowlers 2019). This does little to allow for the consideration of key contextual factors that may affect intoxicated behaviour. Indeed, some commentators remain unconvinced that intoxication does in fact increase the seriousness of the offence and call for justification of this approach (Dingwall and Koffman 2008).

Since the establishment of the Sentencing Council in 2010 (as the successor to the Sentencing Guidelines Council), sentencing guidelines have been issued which sentencers must follow unless 'contrary to the interests of justice' (section 59 of the Sentencing Code). The Sentencing Council continued the approach of the Sentencing Guidelines Council to recognise intoxication as an aggravating factor in its offence-specific guidelines.

More recently, the Sentencing Council published expanded definitions for a range of sentencing factors, in which they clarify that intoxication stemming from the voluntary<sup>6</sup> consumption of legal or illegal substances increases 'the seriousness of the offence provided that the intoxication has contributed to the offending', as offenders 'must accept the consequences of the behaviour that

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4 (1980) 2 Cr. App. R. (S.) 10.

5 (1982) 4 Cr. App. R. (S.) 175.

6 Some guidance is given as to what can be considered in determining whether or not it is voluntary.

results, even if it is out of character'<sup>7</sup> (Sentencing Council 2019). So, whilst the Sentencing Council has not issued a separate specific guideline on the issue of intoxication (or addiction), some clarification is offered in the Expanded Definitions (Sentencing Council, 2019) on how intoxication ought to be considered. How this guidance translates into practice remains unknown and considerable discretion remains in its application, when and to whom it applies. It has been argued that this can result in disparities, in how much, in which circumstances, and for whom intoxication serves to aggravate sentencing outcomes (Lightowlers and Pina-Sánchez, 2017; Lightowlers, 2019; Lightowlers et al., 2020). Consequently, this leaves open the prospect of 'prejudice and discrimination, whether conscious or not... by such factors as race and ethnicity, socioeconomic status, age and gender (e.g. Mazerolle, Marchetti, & Lindsay 2003; Zemore et al. 2016)' (Room 2020, p. 297).

### 3. KEY ISSUES

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The ambiguity around the role of intoxication is longstanding. Despite the guidelines attempting to bring more consistency across sentencing, challenges remain regarding the role, relevance and weight of intoxication in sentencing.

#### Why does alcohol or drug intoxication constitute an aggravating factor?

Within the existing guidance, there is no explicit rationale as to why a person who voluntarily consumes alcohol or drugs and commits a (violent) offence is more culpable than a person who commits the same offence sober (Dingwall 2006; Dingwall and Koffman 2008). The implicit assumption is that an offender ought to have foreseen the adverse consequences associated with their intoxication and taken steps to avoid this as a trigger for offending. However, whilst it is not the case that someone who is intoxicated is *automatically* more culpable than a sober aggressor, or their offending more serious, an assessment as to the risk of reoffending based on an offender's drinking (for example, whether this is regular or not) may influence the extent to which aggravation is applied to sentence outcomes. The Sentencing Council notes in its expanded explanations that the seriousness of the offence will increase if the 'offender is voluntarily intoxicated at the time of the offence provided that the intoxication has contributed to the offending' (thus, making intoxicated offenders more culpable). However, as Tata (2020, p. 42) notes:

*'On the one hand, this [committing an offence under the influence of alcohol or drugs] may be listed as mitigating in that the person's normal inhibitions were limited. Intoxication can suggest that the offender did not really know what they were doing or acted out of character. Yet on the other hand, intoxication can also be regarded as an aggravating factor suggesting a recklessness, lack of respect for others, or selfish disregard for the consequences.'*

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<sup>7</sup> That is, it is not mitigation to say he or she would not have done it but for being intoxicated.

Despite the clear and consistent message from the Sentencing Council that alcohol intoxication constitutes an aggravating factor, this approach oversimplifies some of the inherent complexity in determining the role of intoxication in offending. Indeed, how intoxication shapes blame and responsibility for one's actions is not straightforward, and the current guidance lacks nuances that are essential in such considerations. What is more, the current approach does not accord with scientific understanding of how intoxication impacts behaviour – which tells us intoxication is a matter of degree and affects people in different ways (Room 2020), nor prevailing social or cultural beliefs held about how intoxication may diminish responsibility or disavow offending behaviour, as seen when defendants raise intoxication as part of their defence (Dingwall and Koffman 2008). Of course, if sentencing guidance included a diminished culpability claim this would spawn many claims to this effect absolving offenders of responsibility for their actions. However, greater clarity and nuance in indicating how the aggravation of being 'under the influence of alcohol or drugs' is intended to be used across a variety of offence types (which are intoxication-related – such as assault, rather than intoxication-defined – such as drink driving) would assist sentencers; especially as the strength of association is known to vary between offence type and the substance used.

### Lack of distinction between legal and illegal substances

Drug and alcohol intoxication are both considered as a single aggravating factor in sentencing. For example, in the expanded explanations, reference to 'being under the influence of alcohol or drugs' suggests both alcohol and drugs are prescribed to aggravate similarly in sentencing (Sentencing Council 2019). Presumably because the state of intoxication – regardless of the substance consumed – is thought to impact similarly on decision making and culpability. Thus, sentencers are asked to consider intoxication from both alcohol and drug use similarly, notwithstanding their differing legal status. However, alcohol's legal status and widespread availability distinguishes it considerably from illicit drug consumption and there is substantial evidence to suggest differences in the effects of different substance use on criminal behaviour (Leidenfrost et al. 2017).

Moreover, at sentencing, some might deem it appropriate to consider illicit consumption as holding more weight than licit drug consumption as it comprises further offending behaviour. In any case, when applying judicial discretion to the aggravation of intoxication, perceptions of culpability are likely to vary given different perceptions of the acceptability of alcohol and drug use and the extent to which they are expected to impact comportment (Room 1996; Rumgay 1998; Lightowlers 2019). It has thus been argued that distinguishing between legal and illegal substances is important to understand how they may be impacting sentencing outcomes (Lightowlers 2019). Moreover, as the factor is currently described, it is also potentially problematic for cases in which the interaction between prescribed drug use and the consumption of other substances might impact upon offending behaviour.

### What is meant by 'contributed to the offending'?

It is unclear how intoxication having 'contributed to the offending' (Sentencing Council 2019) will be established in practice. Whilst much of the literature points to an association between substance use and offending (especially alcohol's role in violence), this does not mean that intoxication is necessarily the cause of such behaviour or sufficiently explains it. Indeed, it is likely that the association between substance use and crime is a complex interplay of several (biological,



psychological and social) factors including the social and environmental context of a particular offence. Whilst the Sentencing Council is rightly careful to avoid causal language in their description, it is still unclear how to determine that the offending was attributable to an offender's intoxication. The terminology deployed by the Sentencing Council thus leaves sentencers faced with the task of determining whether a person was relevantly intoxicated based upon their 'lay knowledge' (Quilter and McNamara 2018) about the effects of alcohol and other drugs. This may introduce a degree of variability in practice. Moreover, intoxication is presented by the current guidelines as a dichotomous state (either present or absent), rather than as matter of degree as in clinical interpretation (Room 2020). Indeed, intoxication may be interpreted as synonymous with use, despite a 'great deal of variation in the extent and manifestations of intoxication' (Room 2020, p. 285) and, it is not often possible to objectively verify whether someone was in fact intoxicated as opposed to having consumed alcohol and/or drugs prior to the incident (but may no longer be under the influence).<sup>8</sup>

### What is meant by 'voluntary intoxication'?

It is unclear how the voluntary nature of intoxication is to be established. Whilst sympathetic to the distinction between self-induced intoxication and intoxication that is not self-induced, challenges are presented when considering those suffering from addiction. The Sentencing Council acknowledge that in such instances an individual's intoxication may be considered involuntary, aligning with a disease concept of alcoholism, and encouraging treatment. However, recent evidence from a study of magistrates in England and Wales points to the varied interpretation of the role of intoxication in the case of drug addicted and intoxicated offenders; varying based on the extent to which sentencers believe that people have contributed to both starting and continuing their addiction (Sinclair-House 2018; Sinclair-House et al. 2020). This evidence suggests that magistrates 'deny excuse to offenders where they are understood to have created the circumstances of their own defence' (Sinclair-House 2018, p. 2). What is less established is the validity and scientific evidence base upon which such decisions rest. Sinclair-House concludes that whilst addiction is understood by magistrates as a brain disease in theory it is treated so 'in practice only where conventional aetiological narratives are confounded by varying perceptions of voluntariness in drug-use' (2018, p. 2). Establishing voluntary intoxication may also prove problematic for cases in which the interaction between prescribed medications and the consumption of non-prescribed substances might affect offending behaviour.

### How to consider addiction?

As noted, the Sentencing Council recognise that addiction may need to be considered separately from recreational or voluntary consumption. Addiction is thus understood as requiring treatment rather than punishment and there are provisions in sentencing guidance to encourage the court to 'have regard to the extent to which the offender has engaged with any assistance in dealing with the addiction' (Sentencing Council 2019). Precisely what is meant by this is not clear, especially as it shares considerable overlap with the explicit mitigating factor of 'determination, and/or demonstration of steps taken to address addiction or offending behaviour' (e.g. assault guidelines;

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<sup>8</sup> Although in determining liability the recent Court of Appeal judgment in *R v Taj* [2018] EWCA Crim 1743 suggests intoxication can be understood in its broadest sense and is not confined to cases where substances are still in a person's system.

Sentencing Council 2011). Thus, sentencers are presented with the challenge of disentangling the influence of addiction and other forms of substance use and how best to address this as part of the sentence (for example, by adding to the sentence a requirement to abstain or attend treatment).

Indeed, there are challenges in deciding how best to hold intoxicated offenders to account while striking the correct balance of the rehabilitative and punitive aims of punishment. Of course, the relevance of the often-conflicting sentencing principles is also known to be shaped by personal ideology (Carroll et al. 1987). This in turn interacts with personal and subjective judgements surrounding substance use and the nature of addiction (Dingwall 2006; Lightowlers 2019; Lightowlers and Pina-Sánchez 2017; Lightowlers et al. 2020; Sinclair-House 2018; Sinclair-House et al. 2020). Whilst pre-sentence report writers and defence advocates might indicate an offender's addiction and/or possible treatment options that could form part of a sentence requirement, there remains considerable stigma in disclosing addiction and accessing treatment (especially amongst some sub-populations, Kulesza et al. 2016), as well as challenges in recognising addiction in the first place. This further complicates sentencing. Moreover, given longstanding shortages in alcohol support and treatment programmes (Rumgay 1998; Padfield 2011), there are likely to be regional disparities in the availability of treatment and thus the extent to which treatment requirement orders are deployed.

### Overlap with other mitigating factors

There can be challenges in arriving at the appropriate 'mix' of sentencing factors. Clearly, flexibility is required to tailor a sentence to a specific case (Padfield 2011). However, as sentencing is known to be shaped by normative moral and social judgements about blameworthiness, in practice this leaves considerable room for confusion and disparity in application. In the case of intoxication, the Sentencing Council (2011; 2019) suggests the aggravating factor of being 'under the influence of alcohol/drugs' is 'applicable even where the offender has acted out of character as a result of being intoxicated'. On the basis that 'an offender who has voluntarily consumed drugs and/or alcohol must accept the consequences of the behaviour that results, even if it is out of character'. This clearly signals overlap with two other mitigating factors; 'Good character and/or exemplary conduct' and an offence being an 'isolated incident' (Sentencing Council 2011).

Previous commentators have suggested intoxication can sometimes mitigate sentences if a court is convinced the drinking and offending was uncharacteristic behaviour (e.g. Padfield 2011). In the case of the specific mitigation of an offence being an isolated incident, there is some evidence based on analysis of the Crown Court Sentencing Survey (CCSS) that the aggravation of intoxication is reduced where mitigation of it being an isolated incident is also cited (Lightowlers and Pina-Sánchez 2017). The combined use of these factors seems to provide some discretion in adapting the sentence to the offender's circumstances; perhaps, where they show willingness to change their ways or access treatment. It would thus appear such balancing is already taking place in practice based on the combination of aggravating and mitigating factors presenting themselves in a case.

## 4. RECENT RESEARCH FINDINGS

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Despite the prevalence of alcohol and drug related crime, intoxication in sentencing has received surprising little attention (Dingwall 2006; Padfield 2011). To date, studies examining the use of intoxication in sentencing – explicitly or as part of wider studies considering sentencing – have produced mixed results and highlight the varied way in which intoxication has been dealt with in practice. Both empirical observation and case law in the English and Welsh context has suggested considerable variability, with intoxication serving to aggravate or mitigate sentences depending on the circumstances and context (Shapland 1981; Rumgay 1998; Dingwall 2006; Padfield 2011; Irwin-Rogers and Perry 2015). Indeed, Padfield (2011) notes that even when intoxication is noted as an aggravating factor it may serve to mitigate sentences if the drinking and offending behaviour were deemed 'out of character'. And Dingwall underscores how intoxication has been previously dealt with in 'something of a haphazard manner by sentencers, depending on their personal sentencing philosophy and with consequent issues about consistency and fairness' (2006, p. 144).

With the advent of better-quality data on sentencing in the Crown Court – in the form of the CCSS in 2010,<sup>9</sup> there was renewed opportunity to examine many aspects of sentencing. As such, scholarship on intoxication as an aggravating factor also increased, focusing mainly on violent offences (Lightowlers and Pina-Sánchez 2017; Lightowlers 2019). Using the CCSS, Irwin-Rogers and Perry (2015) found intoxication to have one of the weakest associations with sentence severity for burglary offences. Indeed, they obtained a mitigating (but non-significant) effect in their modelling. However, Lightowlers and Pina-Sánchez (2017) found more severe sentences were imposed where intoxication featured in assault offences heard at Crown Court (in line with existing sentencing guidance), but also that this was moderated if the offence was deemed to be an isolated incident. This is consistent with earlier scholarship suggesting sentencers may impose lenient sentences if offenders appear willing to change or commence treatment (Rumgay 1998, Padfield 2011), or if their offending is considered 'out of character' (Lightowlers and Pina-Sánchez 2017, p. 135).

In another study using CCSS data, Lightowlers (2019) also found the influence of intoxication does not uniformly aggravate male and female violent offending sentenced at the Crown Court. Rather, the aggravation (or 'uplift' in sentence) afforded to women because of their intoxication was higher than for males;<sup>10</sup> thus raising concerns about gender equality and the interpretation of intoxication in shaping sentencing practice. Since the decommissioning of the CCSS in 2015, Lightowlers et al. (2020) used an online database of sentencing remarks to demonstrate how contextual factors such as concomitant drug use, the offender drinking together with the victim, and the offence occurring

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9 The CCSS served as a sentencing census between 1 October 2010 and 31 March 2015. Judges were asked to complete a paper-based survey upon passing sentence in the Crown Court, which captured not only details of the sentence and defendant characteristics but also factors considered in determining the appropriate sentence (Sentencing Council 2014). See: <https://www.sentencingcouncil.org.uk/research-and-resources/data-collections/crowncourt-sentencing-survey/>

10 While the chances of a female offender going to prison, or attracting a more severe sentence, was still lower than for her male counterpart, the increase in probability where intoxication featured in an offence for females was more than twice that applied to male offenders (Lightowlers 2019).

in a private setting interact with intoxication to increase the severity of sentences for violent offences.

Surveying magistrates in England and Wales, Sinclair-House (2018) and Sinclair-House et al. (2020) studied how sentencers understood addiction as a brain disease. They found varied interpretations of the role alcohol intoxication played when considering drug addicted and otherwise intoxicated offenders. Sentence outcomes varied dependent upon the causes of their addiction and were influenced by perceptions of whether their drug use was voluntary or not. Guidance is thus subject to varied interpretation by magistrates – and whilst ‘addiction is understood as a brain disease in theory, [it] is treated so in practice only where conventional aetiological narratives are confounded by varying perceptions of voluntariness in drug-use’ (Sinclair-House 2018, p. i). Indeed, their evidence suggested ‘addiction was more likely to evoke punishment considerations by magistrates, rather than rehabilitation’ (Sinclair-House et al. 2020, p. 36). They note this approach is ‘consistent with legal rules relating to intoxication but... counter to norms around mental-illness and choice’ or prescription of addiction as a mitigating factor in sentencing guidance. These findings highlight how ‘legal rules concerning intoxication, prior-fault and mental disease conflict, and sentencing guidelines lack clarity’ and thus the authors call for ‘greater clarity in sentencing guidance on addiction specifically, and mental disorders more generally’ (Sinclair-House et al., 2020 p. 36).

The Sentencing Council has not reviewed the specific impact of intoxication as a sentencing factor and how it is interpreted and used. This exercise could prove useful, given the prevalence of this circumstance in a range of offences and its contested nature. This may be particularly important as any unintended consequences in its application will likely have wide repercussions. A recent assessment of three of the Sentencing Council’s guidelines (domestic burglary, supply/possession with intent to supply a controlled drug, and theft from a shop or stall) concluded that ‘several factors related to addiction to drugs or being under the influence of alcohol or drugs were... found to be applied inconsistently’ (Sentencing Council 2021a, p. 17).

Whilst intoxication is identified as an aggravating factor, addiction may serve to mitigate sentence severity. However, it is not always easy to tease out when and how these factors ought to operate alongside each other. Moreover, there has been limited research on how mitigation associated with addiction is understood and applied in practice – both independently and alongside the aggravation of intoxication. Although one study (Lightowlers and Pina-Sánchez 2017) found that addiction decreased sentence severity for assault offences.<sup>11</sup>

Therefore, whilst recent findings tend to follow the direction given in sentencing guidelines – with intoxication serving to aggravate outcomes and addiction mitigating them – it also suggests divergent ways in which intoxication is interpreted depending upon the context and offender characteristics. This creates the potential for unwarranted disparities and bias in sentence outcomes, for example, the gendered way in which intoxication aggravates sentence outcomes (Lightowlers 2019) and how the role intoxication plays depends on the origins of addiction (Sinclair-House 2018; Sinclair-House et al. 2020). These studies confirm that how intoxication shapes

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<sup>11</sup> As was the case too in Lightowlers (2019).

culpability is not straightforward, and how it should influence sentencing is contested. There is thus a need to further understand the intended and actual interpretation and application of intoxication in sentencing policy and practice.

## 5. RESEARCH GAPS AND PRIORITIES

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### Paucity of evidence about intoxication in sentencing

There is insufficient evidence as to how intoxication is interpreted and used at sentencing (Lightowlers and Pina-Sánchez 2017). Rectifying this would help ensure transparency and accountability in sentencing. It would also advance our understanding of how intoxication is understood as a ‘problem’ by the judiciary and how this, in turn, influences outcomes (Lightowlers and Pina-Sánchez 2017). Additionally, there persists a lack of clarity offered by the Sentencing Council as to why intoxication is deemed aggravation and the extent to which it should serve to increase sentences. Lightowlers and Pina-Sánchez thus call for ‘ongoing monitoring of sentencing and the way in which the presence of intoxication shapes such practice’ (2017, p. 146).

Our limited understanding is mostly derived from case law, earlier studies using court observations and recent quantitative analysis of CCSS data. Whilst these latter quantitative analyses are helpful, they are insufficient to understand how sentencers consider intoxication at sentencing. Alongside primary qualitative data capture, secondary analysis of sentencing remarks within court records can provide a useful resource in this regard; allowing examination of the ‘intersection of subjectivity and objectivity in the court process’ (Jacobson et al. 2016, p. 55). Indeed, court records are believed to represent the ‘most comprehensive source of data available for research on sentencing’ offering ‘a highly detailed, representative and accurate picture of the sentencing process’ (Dhami and Belton, 2015, p. 21). They contain information not only on ‘legal factors that ought to influence the sentencing decision, but also a host of extra-legal ones that may have a potentially biasing effect on sentencing’ (Dhami and Belton 2015, p. 21).

Furthermore, studies based on the CCSS tell us little about sentencing practice in the magistrates’ courts. This is a key limitation as the magistrates’ courts deal with most of the cases where intoxication features as a factor. Other than Sinclair-House (2018), few studies have sought to engage magistrates with this issue and research how they deal with the myriad ways in which intoxication features in a wide range of offences in their courts.

Another next step for researchers is to engage magistrates, as well as other members of the judiciary, in designing, participating in, and using research that arises from their own courts and considers how decisions relating to intoxication interact with the purposes and principles of sentencing. This will allow further insights into how the role of intoxication in sentencing is being interpreted and applied in practice.

## Data capture on intoxication in sentencing

Sentencing data are key for guideline development and monitoring, as they assist in understanding the impact of the guidelines on sentencing practices and outcomes and can identify disparities (Guilfoyle and Marder 2021). Many of the sentencing guidelines to date have been evaluated based on the CCSS, which has also generated much academic work on sentencing, including the role of intoxication. The CCSS allowed ‘several key sentencing topics to be examined in more detail and depth than was previously possible’ (Bottoms 2018, p. 36). Prior to this there was no comprehensive national database capturing sentence outcomes and associated aggravating and mitigating factors.

The CCSS was decommissioned in 2015, owing in part to resource constraints (Bottoms 2018). In its place the Sentencing Council rely on ad hoc bespoke data collections on specific offence types. The revised approach precludes ongoing monitoring of how intoxication serves to impact sentences across a range of offence types and over time (Lightowlers 2019) and limits the Sentencing Council’s ability to meet its duty, under section 128 of the Coroners and Justice Act 2009, to monitor the operation and effect of sentencing guidelines (Bottoms 2018; Lightowlers 2019). There is a need to capture – on an ongoing basis – longitudinal data on the use/role of intoxication (and indeed other legal and extra-legal factors) in sentencing.

Ideally, these data would achieve further granularity to determine sentence outcomes (both custodial and non-custodial) and the role of intoxication. They could measure, amongst other things, the presence of alcohol and drug intoxication (and distinguish between substances) as well as whether the offender had been drinking immediately prior to an offence. Useful detail would also include associated alcohol and/or drug treatment orders or monitoring requirements,<sup>12</sup> as questions also remain as to the use and efficacy of such orders. Such data collection would also assist in evaluating the work of specialist drug and alcohol courts which have emerged to address some of the challenges in dealing with those with drug and alcohol problems in England and Wales. For example, such data would allow outcomes associated with these specialist hearings to be compared to similar cases heard in non-specialist hearings.

Questions also remain as to how we reconcile multiple (and intersecting) legal and nonlegal factors. It has been cautioned that, ‘although sentencing guidelines are aimed at reducing bias in sentencing, they may indirectly standardize practice in a way that is contrary to gender equality and the ideals of justice’ (Lightowlers 2019, p. 710) thus it is important to monitor impact and other dimensions, such as ethnicity and socio-economic status. Capturing data on legal and nonlegal factors – including detailed demographic information about defendants – is key to monitoring the impact of sentencing guidelines on minority and disadvantaged groups and is thus also key to exploring issues of (in)equality in the treatment of intoxication at sentencing. Such information also allows for further study of intersectional influences in how intoxication is being applied to inform sentences amongst those with (multiple) protected characteristics. In turn this can advance further critical and relational

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<sup>12</sup> For example, Alcohol Treatment Requirements introduced by the Criminal Justice Act 2003 and the more recent introduction of alcohol monitoring tags as part of Alcohol Abstinence Monitoring Requirements (AAMR) introduced as part of provisions within the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

studies of how intoxication shapes punishment in different contexts and for whom (Lightowlers 2019).

Advances have been made in England and Wales in making administrative court data available for accredited researchers for approved projects (*c.f.* the Ministry of Justice’s Data First Programme<sup>13</sup>). These data contain information on the case and sentencing outcomes as well as characteristics of defendants and allow for repeat presentations in both magistrates’ courts and the Crown Court to be examined. However, unlike the earlier CCSS they do not capture all relevant sentencing factors considered. This limits their ability to assist us with monitoring the use of intoxication as a sentencing factor in arriving at sentence outcomes. However, these data do provide ‘new opportunities for analysis to better understand users, their journeys, and outcomes across the justice system and with a range of other public services’ (Sentencing Council 2021b, p. 52). They should facilitate research on the application/use and efficacy of a range of different court outcomes associated with mandating drug and alcohol treatment and/or monitoring.

### Understanding associated mitigation

Ongoing sentencing outcome data capture should also include all other relevant sentencing factors considered and the demographic characteristics of the offender. Not only does this allow for the study of other aspects of sentencing, but also for explicit examination of mitigating factors such as addiction, maturity, caregiving, isolated incidents, and good character, amongst others, and their overlap with intoxication.

In its current format, guidance on intoxication is not clear on the way in which overlapping mitigating factors ought to be dealt with. The Sentencing Council suggest the ‘court should have regard to the extent to which the offender has engaged with any assistance in dealing with the addiction’ (Sentencing Council 2019). However, precisely what is meant by this is not clear as it shares considerable overlap with the mitigating factor of ‘determination, and/or demonstration of steps taken to address addiction or offending behaviour’ (e.g. assault guidelines; Sentencing Council 2011). The expanded explanations emphasise that ‘care should be taken to avoid double counting factors including those already taken into account in assessing culpability or harm or those inherent in the offence’ (Sentencing Council 2019). This introduces a degree of confusion in how to reconcile the mitigating role associated with addiction. How sentencers are ‘balancing’ these factors in practice is not well understood. Finally, whilst it is important to consider how the role intoxication and addiction jointly play in shaping sentence outcomes, it is also important to devote further independent consideration to the role of addiction as a mitigating factor as less research has focused on this factor.

Further research that engages critically with the underpinning assumptions associated with prescribing intoxication as aggravation currently in England and Wales is thus encouraged. Given intoxication is subject to heavy moralisation (Room 2020), it is also important to consider whether and how this sentencing factor serves to disproportionately criminalise certain forms of intoxication performed by certain social groups. For example, investigating whether its interpretation and

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<sup>13</sup> See: <https://www.gov.uk/guidance/ministry-of-justice-data-first>.



application are subject to aged, racial, gendered, and classed biases. Further research into such issues would engage with important debates concerning the application of justice, legitimacy of sentence decision making concerning intoxication, and public confidence in courts.

## 6. CONCLUSION

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Given its prevalence in cases coming before the courts and potential impact, intoxication as a sentencing factor has not been subject to as much scrutiny, monitoring and research as it warrants. It remains a contentious factor in sentencing and there is only a limited body of research and scholarship in the English and Welsh context which examines its impact across types of offence and offenders. This is hampered further still by the lack of detailed data collection and ongoing monitor of the use of intoxication as a sentencing factor. Moreover, given ambiguities in the existing guidance, sentencers are left to draw upon their own personal sentencing philosophies and beliefs about intoxication to arrive at decisions, thus exposing potential for unwarranted disparities and bias in sentencing outcomes. Furthering our understanding about how this sentencing factor is interpreted and applied by sentencers in practice would thus be of considerable value. Especially as, hitherto there has been limited explicit assessment of the impact of this factor on sentencing and the equity with which it is applied.



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