

**WHY THE
COURTS SHOULD
USE
IMPRISONMENT
LESS**

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FACTS: INCREASING USE OF PRISON

Prison population (England and Wales) virtually doubled, from 44,246 in June 1993 to 86,048 in June 2012

Most of this increase (85%) was in sentenced prisoners; 13% was in recalls to prison for breach of conditions; only 2% of increase related to people remanded in prison pending their trial.

We will focus on sentenced prisoners.

STEEP RISE IN SENTENCED PRISONERS

Three sources of increase:

1) use of prison sentences by courts rose from 16% of adult offenders in 1993 to 28% in 2002 (a two-thirds increase); relatively stable since then, helped by re-introduction of suspended sentences.

2) average length of prison sentences has increased, e.g. from 14.3m in 2000 to 17.4m in 2011.

3) Rapid increase in life and indeterminate sentences, from 8% to 19% of prison population.

MORE CRIME, MORE PRISON; OR MORE PRISON, LESS CRIME?

Increase in prison sentences does not reflect increase in crime: *Crime Survey for England and Wales 2012-13* found 8.6m crimes against adults, lowest since 1981 and under half of 1995 figure;

Some 60% CSEW crimes are property offences, down 44% since 2002

14% CSEW crimes are offences of violence, up 13% since 2007

ACROSS EUROPE

Almost all countries in EU are experiencing falling crime rates: between 2007 and 2011 only Turkey, Bulgaria and Hungary saw significant increases.

No clear link between higher prison and lower crime: the 'hydraulic' explanation depends on the knowledge and thought processes of offenders and potential offenders ...

WESTERN EUROPEAN PRISON RATES

Czech Republic	154
England and Wales	148
Scotland	147
Spain	147
Portugal	136
Italy	106
France	101
Netherlands	82
Germany	78
Sweden	67
Finland	58

MAXIMUM SENTENCES

High maxima, many life-carrying offences including drug crimes, arson and robbery

Indeterminate ‘public protection’ sentences, 2005-2012: ‘the limitations in our ability to predict future serious offending call into question the whole basis on which offenders are sentenced to IPPs ... and which ones are suitable for release’

Mid-range maxima use the 7-times table (e.g. causing death by dangerous driving), and have high maxima irrespective of value of property (7 years for theft, 14 years for handling stolen goods, etc).

Role of public opinion: are sentences too low? What sentence would you give in this case?

ALTERING THE SCALE?

‘The upper limit for all offence types is set at 15 years, except for murder and a few other felonies involving the death of another. Currently, there are just over 100 life sentences per year. It does not matter what kind of felony or how many felonies the offender has committed: be it numerous aggravated robberies, awful kidnappings, a series of most humiliating rapes, or acts of particularly harmful arson, the maximum sentence is 15 years’ imprisonment.’

Hoernle (2013), 198, describing German law.

No review of logic or structure of maxima in England and Wales: abandoned in 1978 because of ‘overwhelming difficulties’ in reaching agreement.

THE MEANING OF PRISON

Extreme restrictions on freedom of movement

Loss of autonomy – following orders

Loss of privacy

Exposure to risk of humiliation and/or harm

Isolation from family and friends

Basic facilities may be poor

Effect on other family members

WHERE SHOULD THE CUSTODY THRESHOLD BE?

- 1) 'Prison only' offences**
- 2) Offences committed by women**
- 3) 'Pure' property offences**
- 4) Mandatory minimum sentences**
- 5) Young offenders**

1. 'PRISON ONLY' OFFENCES

Perverting the course of justice: the offence 'strikes at the heart of the criminal justice system' and 'save in exceptional circumstances an immediate custodial sentence must follow.'

Sweeney J. in *Huhne and Pryce* (2013).

Same applies to making a false allegation of rape: prison is 'unavoidable.'

MORE 'PRISON ONLY' OFFENCES

***Crosskey (2013)*, 8 months for hacking and invading privacy, 'inevitable'**

***Hinchcliffe (2013)*, 2 years for 4 deliberate offences of flouting environmental laws**

***Gasiunas (2013)*, 2 years for handling stolen bags of clothes for charity worth £3,000.**

***Kidd and Bianchy (2008)*, 12 months for forging will so as to inherit £142k house.**

***Vaiculevicius (2013)*, 3 months each for man and woman who openly had sex in park on Sunday afternoon when drunk.**

2. CRIMES COMMITTED BY WOMEN

*** Sharp increase in women in prison, from 1,500 in 1992 to 4,500 in 2002, falling back to 3,850 in 2013**

*** Baroness Corston was ‘dismayed to see so many women frequently sentenced for short periods of time for very minor offences, causing chaos and disruption to their lives and families, without any realistic chance of addressing the causes of their criminality ... we must find better ways to keep out of prison those women who pose no threat to society.’**

Corston Report (2007), i and 5.

WOMEN IN PRISON

‘Short-term prison sentences have little or no impact on offending, with 70 per cent of women offenders who received a sentence of three months or less reconvicted of an offence within two years.’

Angiolini Report (2012), 3.

Is this use of prison value for money?

Is public safety enhanced by it?

3. 'PURE' PROPERTY OFFENCES

Focus on property offences not involving violence, sex or intimidation.

Is it right to use deprivation of liberty as response to pure property offences? For serious violent or sexual offences, prison may be proportionate and protective.

What about repeat offenders? What if it is his/her 42nd offence of theft?

Other approaches: prioritise reparation and compensation; try claw-back approaches used for benefit fraud by DWP and HMRC; community sentences.

Presumption that no prison, unless exceptional? Response from Leveson LJ.

4. MANDATORY MINIMUM SENTENCES

Domestic burglary, class A drug dealing, etc

5 years minimum for firearm possession

Rehman (2006): replica gun openly bought on internet, ignorance of law, reduced to 1 year;

Beard (2008): old ammunition found, ignorance of law, reduced to 2 years;

Nightingale (2013): automatic pistol given to him by Iraqi special forces as mark of respect, and he never got round to disposing of it (and ammunition).

5. YOUTH SENTENCING

Number of youths dealt with in court down 18% between 2010/11 and 2011/12; custody down 6%, and down 47% since 2001/02.

3,500 in custody in 2002/03, down to 1,963 in 2011/12; reprimands/final warnings, and youth rehabilitation orders used instead.

Crime wave? Convictions of youths down 22% between 2010/11 and 2011/12, and down 47% since 2001/02.

NOT ONLY THE CRIME ITSELF

- A. previous convictions**
- B. multiple offences**
- C. aggravating factors**
- D. mitigating factors**

A. PREVIOUS CONVICTIONS

42 previous offences? How to approach the sentencing of repeat offenders? Focus on the seriousness of the latest offence, or cumulative sentencing based on record?

Law says that ‘court must treat each previous conviction as an aggravating factor’ if its relevance and recency justify it. Any ceiling?

Disproportionate sentences; personal factors, esp. drugs and alcohol

B. MULTIPLE OFFENCES

Not a question of ‘doing the arithmetic’ because of the ‘totality principle’, enshrined in law and guideline: is the overall sentence just and proportionate to the overall criminality?

The Stuart Hall case, 13 indecent assaults, trial judge applied totality principle in arriving at 15 months prison sentence; Court of Appeal agreed that totality principle applies, but held that 30 months better reflected seriousness of crimes.

C. AGGRAVATING FACTORS

Well-known aggravating factors include planning and premeditation, abuse of position of trust, preying on vulnerable people.

But how much aggravation? *Cooper* (2012), confidence trick on man of 77, paid £29,000 for repairs to drains when no work necessary; starting point = 2 years, but because older person targeted and recently released from prison, sentence of 5 and a half years upheld.

D. MITIGATING FACTORS

Mitigation may include spur-of-the-moment decisions, out of character, making voluntary reparation, mental disorder ...

Most frequent and most powerful is plea of guilty: scale of one-third (early plea) down to 10% (at door of court): saves time and cost, spares victims and other witnesses.

Proposal to increase to 50%, but would that discount be excessive? What do the public think?

THE RESULTING DEMOGRAPHICS

21% ethnic minorities (10% general pop.)

20-30% learning disability

25% female prisoners and 15% males report psychotic symptoms (4% general pop.)

24% in care or fostered as child

55% committed offences related to drugs

47% have no qualifications (15% general pop.)

32% had worked in 4 weeks prior to prison, 13% have never had a job.

‘SHOW ME THE WAY OUT’

Not covered all aspects of prison sentences, but highlighted some sentences that may be considered unnecessary or too high. How do we move away from present practices?

Corporatist/consensual politics v. majoritarian democracies: the German example

Role of the press: reducing prison use a ‘criminal’s charter’?

Role of the public (a considered, informed public) v. role of senior judiciary & politicians

The model of the Bank of England monetary policy committee, and the ‘Scotland’s Choice’ commission. Would political parties commit to this?