the **Howard League** for **Penal Reform**

What if imprisonment were abolished for property offences?

What if...? Series of challenging pamphlets

LSE Mannheim Centre for CRIMINOLOGY

What if imprisonment were abolished for property offences?

A pamphlet for the Howard League for Penal Reform by
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the Howard League for Penal Reform

Foreword

The Howard League for Penal Reform and the Mannheim Centre at the London School of Economics are working in partnership on the 'What if?' pamphlet series with the aim of challenging conventional thinking on penal and criminal justice issues. We have been working with established thinkers, academics and practitioners to develop innovative, and perhaps controversial, ideas that can work as a stimulus to new policy initiatives and ultimately achieve change. In this edition of the series, Professor Andrew Ashworth asks the question 'what if imprisonment were abolished for property offences?'.

In the paper, Professor Ashworth proposes that imprisonment should not be imposed as a sentence for property offences. His argument is that the deprivation of liberty is a disproportionate response for an offence that deprives people of their property. He limits his proposition to 'pure property offences', and excludes those that are violent, threatening or sexual. The paper considers fines and community sentences as alternative sentencing options, and emphasises the importance of creating a system where community sentences are regarded as a form of hard penalty that punishes the perpetrator for their offence, as well as having sufficient rehabilitative content.

In essence, the paper argues for fair and proportional sentencing, which, if the proposal were adopted, would have far-reaching consequences for the penal system, and a significant impact on the size of the prison population in England and Wales.

The key messages chime well with the wider work of the Howard League, which is committed to reducing the flow of people into the penal system as a whole. This objective is currently being developed through our symposium 'What is justice? Re-imagining penal policy' (http://www.howardleague.org/what-is-justice/) which we hope will become a vehicle to influence the underpinning beliefs, ethics, and shape of the future criminal justice system.

We would like to thank all those who attended the seminar that preceded this pamphlet where Professor Ashworth tested his ideas. In particular we would like to acknowledge the contributions of Keir Starmer Q.C., the Director of Public Prosecutions, and Lord Falconer of Thoroton for their incisive and helpful thoughts on the proposals contained in this pamphlet.

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What if imprisonment were abolished for property offences?

The nub of the argument

My argument is that imprisonment should be abolished for property offences. The focus is on what may be termed 'pure property offences', that is, leaving aside offences intended to violate other rights as well as property. So I am not dealing here with offences that are violent, threatening or sexual. This means that excluded from this discussion are offences such as robbery (which requires the use or threat of violence),[1] blackmail (which requires a threat), and burglary of a dwelling (which is intended also to violate the right of privacy[2]). But that leaves a wide range of crime within the definition of 'property offences'. The central offence is theft, which can run from thefts from shops and from motor vehicles through thefts from employers and pickpocketing to lucrative thefts by persons in positions of significant trust. Also included are fraud, handling stolen goods and criminal damage.[3] My argument is that sentences of imprisonment are disproportionate to these offences and should therefore not be available to the courts.

The core case

Let us begin by examining the core case. Let us take a case of theft from a shop, a theft of clothing worth £250. The proposition is that the thief should not be sent to prison for this offence in any circumstances, because it is not sufficiently serious. This proposition should not be taken to suggest that property offences are unimportant, or that victims should receive less protection for their property – we need to keep issues of protection in mind as the argument progresses.

Two points need to be cleared up straight away. The first is that a theft from a shop of clothing valued at £250 does not do great harm: it is non-violent, non-threatening and non-sexual. It deprives the owner of a small shop of a significant amount of money, and in times of austerity that should not be undervalued, but in the overall scale of things this is not serious harm. I am not saying that this amount of property is unimportant and does not need protection. The argument is that this offence comes well down the scale of offence-seriousness, when compared with robbery or burglary, sexual offences or violence. Whether it is more or less serious than other offences down the scale, such as speeding, urinating in public or harassment, is something we cannot pursue here.

The second point is more difficult. The proposition is that the thief should not be sent to prison for this offence in any circumstances – which means, not even if he or she

1 For a critical assessment of the present definition of robbery, see Ashworth, A. (2002) 'Robbery Reassessed' Criminal Law Review, pp. 851–872.

2 Article 8 (1) of the European Convention on Human Rights guarantees the right to respect for private and family life, home and correspondence.

3 Except for criminal damage by fire (arson), which raises special considerations.

has 42 previous convictions.[4] Because the offence is relatively non-serious, imprisonment should not be available; no matter how many times the person has committed it. Many members of the public take the view that people who offend persistently should be punished more harshly than first-timers,[5] and that is surely right. The key questions are:

a) whether this means that the sentence should be more severe each time the person is convicted, so that the 42nd offence has to be punished more severely than the 41st, and the 41st more severely than the 40th, a cumulative approach to sentencing;[6] or

b) whether there should be a limit to cumulation, so as to enable us to say that a persistent shop thief should be punished more, up to a certain limit, but that the sentence for this relatively non-serious offence should never be equivalent, say, to that for a robbery or burglary; and

c) whether we can then say that the maximum sentence should be something less than imprisonment, so that theft from a shop can never be so serious as to justify this kind of severe sanction, the deprivation of liberty.

We have other offences like this: in 1982, for example, imprisonment was abolished for begging and for soliciting for prostitution – the sanction is not available, no matter how many times the offence has been committed.[7] Community sentences and financial penalties are left to deal with the issue, because Parliament accepted that these offences are not serious enough to justify a deprivation of liberty. In other words, even if we start with the belief that those offending persistently should be punished more harshly than those offending for the first time, this does not indicate that prison is ever justified for this type of offence.[8] The same should apply to offences such as thefts from vehicles.

Prison and proportionality

Sentences should be proportionate to the seriousness of the crime. Keeping the sentence in proportion means both ensuring that the offence is not ranked higher than offences which are truly more serious (in terms of harm and culpability), and ensuring that the level of punishment is no more severe than can be justified by the elements of the offence. These are contestable issues, and it seems that section 152(2) of the Criminal Justice Act 2003 – which states that a custodial sentence should not be imposed unless the offence(s) were 'so serious that neither a fine alone nor a community sentence can be justified' – has had no noticeable restraining effect on sentencing practice for property offences in England and Wales. My argument here is that, for an offence that amounts to no more than a deprivation of property, it is difficult to justify a deprivation of such a fundamental right as that to personal liberty. The strength of this argument becomes clear if we reflect on some of the material deprivations involved in imprisonment:[9]

4 This is not a random or imaginary number: it is the average number of previous convictions in a survey of nearly 1,500 people convicted of theft from a shop: Sentencing Advisory Panel, (2008) Sentencing for Theft from a Shop. London: Sentencing Advisory Panel, p. 3.

5 Roberts, J., Hough, M., Jacobson, J. and Moon, N. (2009) 'Public Attitudes to Sentencing Purposes and Sentencing Factors: an Empirical Analysis' Criminal Law Review, pp. 771–782 (pp. 776–777).

6 On one view, this cumulation is exactly what current English law requires, or at least has as its default position: see Baker, E. and Ashworth, A. (2010) 'The Role of Previous Convictions in England and Wales', in Roberts, J., and von Hirsch, A. (eds) Previous Convictions at Sentencing: Theoretical and Applied Perspectives. Oxford: Hart Publishing.

7 Criminal Justice Act 1982, sections 70–71.

8 Cf. Sentencing Guidelines Council, (2008) Theft and Burglary in a building other than a Dwelling. London: Sentencing Guidelines Council p. 17, which singles out 'intimidation' as a reason for custody for 'theft from a shop' but also has a custodial starting point for offences with 'a very high level of planning.'

9 This list is adapted from Lippke, R. (2008) 'No Easy Way Out: Dangerous Offenders and Preventive Detention' Law and Philosophy, 27, pp. 383–414, (p. 408); see also Lippke, R. (2007) Rethinking Imprisonment. Oxford: Oxford University Press.

i) extreme restrictions on freedom of movement
ii) low levels of comfort and amenity
iii) idleness, with few opportunities for paid labour
iv) relative isolation from family members, friends and the wider community
v) significant loss of autonomy in everyday life
vi) substantial loss of privacy
vii) exposure to risk of personal harm

Other pains of imprisonment – such as the consequential effect on partners and children – may be added. The conclusion is that deprivation of the fundamental right to liberty of the person should be seen as too severe a response to an offence that concerns the (lesser) right to property. Moreover, deprivations of the basic right to liberty of the person, being the most severe sanction available, should be reserved for the most serious offences and not imposed for a type of offence much lower on the scale. In principle, therefore, no person should ever be subjected to the pains of imprisonment for a 'pure property offence', even if they have done it many times before. Instead, the priority should be to deal with such offences in the community, giving precedence to compensation or reparation for the victim and, where the offence is sufficiently serious, imposing a community sentence.

Moving outwards from the core: other 'pure property offences'

To sustain this argument we must move outwards from the basic offence of theft from a shop, and consider other forms of theft. We may start with pickpocketing: it is true that a person who has had his or her pocket picked may feel violated, may feel insecure and may be fearful of going to certain kinds of place; it is also true that the theft of a wallet or passport may lead to significant loss and inconvenience; it is likely that many such offences are committed by persistent perpetrators who target certain types of person (e.g. tourists); but we must ask whether these factors, taken together, justify depriving someone of their liberty through imprisonment. My argument is that these factors are not enough to justify imposing the pains of imprisonment on the perpetrator; only if the thief can be shown to have targeted someone who is vulnerable, such as a person who is elderly or infirm, does it come close.[10]

However, magistrates in the City of Westminster evidently take a different view: notices displayed in courts there announce to all court users that, because of the high prevalence of pickpocketing in the Westminster area, the court will adopt a much higher starting point than that indicated by the guidelines:

the starting point for any offender guilty of theft from the person, where the victim was not vulnerable, will be 18 weeks custody for a first time offender convicted after trial (with 12 weeks for an early plea). Clearly other factors may aggravate or mitigate in such a way as to depart from this basic starting point.

10 Sentencing Guidelines Council (above, n. 8), p. 15, which singles out 'vulnerable victim' as the reason for custody. The Court of Appeal in *de Weever* [2010] 1 Cr. App. R. (S.) 16 linked 'vulnerability' to age and disability. Over the years sentences as high as three or four years have been approved for persistent pickpockets, especially those who target the elderly: see Ashworth, A. (2010) Sentencing and Criminal Justice 5th edn. Cambridge: Cambridge University Press, pp. 141–142.

This policy is of doubtful legality: it indicates a significantly inflated starting point,[11] and such local declarations are quite contrary to the spirit of sentencing guidelines.[12] If the hope is to increase deterrence, where is the evidence that other methods would not be equally effective? Even if there is robust evidence of deterrence – which is unlikely – can that be a justification for imposing such disproportionate sentences?

A different set of issues is raised by thefts in breach of trust. One question here concerns the attitude of the courts towards postal workers who steal from the mail – which is that a prison sentence is inevitable because of the breach of trust involved. One reason for this is deterrence: courts may believe that only a prison sentence will supply the necessary deterrent. The deterrence argument is not proven, because the twin responses of dismissal from employment and a civil action for recovery of the value of the stolen property, plus a community sentence on conviction, have not been systematically trialled. Another reason is censure: courts may believe that they must use the sentencing process to re-affirm that such offences seriously undermine the trust on which society relies for the conduct of important affairs, and they believe that only a sentence of imprisonment can convey the required censure.[13] That is one of the assumptions that this pamphlet is challenging. Why should prison sentences be regarded as the only coinage of censure?

Major breaches of trust by senior figures raise different issues. What if a prominent banker, MP or 'captain of industry' is convicted of theft? An offence of this kind must be condemned strongly, since it undermines the basis of trust on which dealings must take place. It may be true that the convicted perpetrator stands to lose a great deal, in terms of future employment, pension rights, and so on. The public humiliation stretches wide and deep.[14] However, this argument must be treated with caution. Nothing suggested in this pamphlet should be allowed to lead to inequality of treatment, and so a person who steals a large sum in breach of trust should not be treated more leniently than someone lower down the scale of trust, such as a postal worker. It is sometimes said that a public figure does not 'need' to go to prison, presents no danger to the public, and should be made to work for the community and pay back the losses. If this is true of an MP or a prominent banker, and if it is then argued that they should be dealt with by a community sentence and a compensation order, surely the same argument should be applied to the postal worker, the building society teller, and so forth.

So far we have been considering different types of theft. Let us now move to frauds, which again may be great or small. Some credit card frauds involve people cloning cards, stealing pin numbers, and other deliberate strategies to find their way into people's accounts so as to enrich themselves at the expense of others. The profits are sometimes modest, and sometimes run into thousands of pounds. If the loss is several thousand pounds, can the case be properly sentenced without using

11 The applicable national starting point for 'theft from the person not involving a vulnerable victim' is a community order (medium), in a range from a fine up to 18 weeks' custody: Sentencing Guidelines Council (above n. 8), p. 15.

12 Cf the leading case of *Blackshaw and others* [2012] 1 Cr. App. R. (S) 679, and the comments of Lord Judge C.J. at [20-21] on the Recorder of Manchester's purported guidance on sentencing for offences committed during the 2011 riots.

13 See e.g. *Murray* [2009] 2 Cr. App. R. (S.) 81 and *Kerling* [2011] 2 Cr. App. R. (S.) 341, the latter citing the custodial starting points in Sentencing Guidelines Council (above, n. 8), p. 11.

14 See the Court of Appeal's remarks in relation to Members of Parliament convicted of false accounting: *Chaytor* [2011] 2 Cr. App. R. (S.) 653.

imprisonment? Can the condemnatory force of conviction and community sentence be sufficient to send the message that such behaviour exploits fellow citizens and is not to be tolerated? Do we really think that prison is the only true way of 'sending a message' to potential and actual perpetrators of crimes? The answers to these questions are made more complex by the tension between, on the one hand, passing a proportionate sentence, and, on the other hand, ensuring that there is a good chance that the victims receive some compensation: is compensation more likely to be forthcoming if the convicted person is in prison, or if they are in the community and working?

What about a major fraudster who devises an investment scheme, publishes a false prospectus, attracts millions of pounds from a wide range of people, and then cannot pay it back? Must he or she be sent to prison? Sometimes the money is difficult to trace, and the perpetrator offers to help the authorities track it down and recover at least a proportion of the lost funds. Should a deal be done, such that the perpetrator receives only a community sentence in exchange for assistance? More victims are helped by keeping the fraudster in the community, so what would be the point of imprisonment? Again, we should ask whether prison is the only coinage of censure. Could we not achieve sufficient censure by conviction, a community sentence (preferably involving unpaid work), and a compensation order and/or confiscation? What about disqualification from being a company director, or from involvement in financial advising? That sounds like a way of preventing repetition of the exploitative behaviour, but it remains important to consider all the options and to ensure that the principle of equal treatment is respected so that the fraudster does not receive a better outcome than the 'common thief'.

The 'equal treatment' issue must also be considered in relation to the prosecution of companies for fraud. The government has tabled amendments to the Crime and Courts Bill 2012 introducing deferred prosecution agreements (DPA), applicable only to companies. In essence, a company would be able to admit wrongdoing and pay a fine, and the prosecution would be suspended. The benefit to the government and the Serious Fraud Office is said to be a significant reduction in costs by avoiding the time and expense taken by a prosecution. The supposed benefit to the companies would be the avoidance of prolonged bad publicity from a trial and, presumably, some reduction in the penalty. Whilst there is no question of imprisoning companies, it is doubtful whether they should benefit from a special regime that avoids prosecution when 'ordinary' defendants are dragged through the courts for property offences involving a small fraction of the economic value of corporate fraud. Moreover, the DPA approach does not apply to individuals who, as corporate executives, are implicated in these fraudulent dealings. Their cases should be dealt with in the same way as those of the major fraudsters discussed in the previous paragraph.

Now to add two further elements to our sketch of the property offences to which the general argument should be applied. We have mentioned a range of thefts and frauds. A close cousin of these is the offence of handling stolen goods: this covers the person who buys the proceeds of thefts or frauds – who buys a television or other electrical equipment or jewellery knowing or believing that it has been stolen. It is sometimes said that handling is a more serious offence than stealing, because without handlers ('fences') there would be no thieves. But that sounds rather glib; many of those involved in 'knocking out' stolen goods are not major players, and many of those who succumb to an offer of cheap goods in a pub or a car-park are people who probably would not get involved in stealing the goods in the first place. At the level of maximum penalties, theft has seven years and handling stolen goods has 14 years, but that should not mean that 'common or garden' handlers or receivers need to go to prison. This is not to deny that they are doing wrong, and that they are part of the process of victimisation aimed at ensuring that the owner of goods does not get them back. But, in the grand scheme of things, many handling offences are much less serious than offences that are violent, threatening or sexual.

Lastly, we should mention benefit fraud and tax evasion. Benefit fraud is a drain on the public purse, but many of those involved are people without financial resources. The Department of Work and Pensions (DWP) has, over the years, devised various ways of clawing back overpaid benefits, even from people with very low incomes. Whereas prison was much used for these defaulters in the 1980s, the more recent trend has been to rely on the DWP's administrative penalties. Prosecutions are still brought, but imprisonment is used much more infrequently.[15] The question for us is whether we can take that one step further, and deal with these cases and other thefts and frauds by means of claw-back, confiscation of assets and community sentences. This is almost the position reached by Her Majesty's Revenue and Customs (HMRC) in relation to tax evasion: the response to most cases is through the Civil Investigation of Fraud (CIF) procedures, as a result of which the perpetrator may be required to pay a penalty such as double the underpaid tax, and prosecution is used only against professionals or against those who refuse the 'offer' of a compounded penalty.[16] Prosecutions are not frequent, and prison is a rarity, even where the amounts evaded are significant. This is not to hold up the HMRC as a model, not least since both the House of Commons Public Accounts Committee and the National Audit Office have found that HMRC's procedures when negotiating settlements for underpaid tax with large companies were unsatisfactory.[17] However, the innovative use of claw-back methods by both DWP and HMRC suggests that there is scope for using similar methods for a broader range of property offences.

15 See campaigns.dwp.gov.uk/campaigns/benefit-thieves/penalties.asp Cf. *Graham and Whatley* [2005] 1 Cr. App. R. (S.) 640, and Sentencing Guidelines Council (2009) Sentencing for Fraud – statutory offences. London: Sentencing Guidelines Council, pp. 25–26.

16 See further www.hmrc.gov.uk/prosecutions/crim-inv-policy.htm

17 See Public Accounts Committee (2012) H.M. Revenue and Customs: Compliance and Enforcement Programme, 87th report. London: The Stationery Office; and also www.guardian.co.uk/politics/2012/jun/14/hmrc-tax-collection-failures-nao.

The purposes of sentencing property offences and how to achieve them

I have mentioned the need for innovative responses to property offences, but before we explore them we must return to a point made at the very beginning. The result of any change in sentencing policy must not be to deprive victims of protection for their property. We should try to ensure that victims are in no worse position, and possibly a better position, than before. However, it is not clear that variations in sentence levels have much to do with the protection of property. Preventive measures – locks, opportunity reduction, smart design, moral education etc. – may be much more effective than the sanctions of the criminal law, especially when such a low proportion of those who steal are actually reported, detected, prosecuted and convicted (about 3–4 per cent).[18] This is not to say that the criminal law is useless, and that the police and courts should pack up and go home. Far from it, we need those institutions in order to avert a descent into anarchy. But it is one thing to support those institutions as underpinning the whole system, in the background, and quite another to assume that increasing or decreasing the use of prison sentences will have a 'hydraulic effect' on the level of thefts. There is no evidence for that.

What are the purposes of sentencing those who commit property offences? This is a large question, going well beyond the confines of this pamphlet. Since I have developed my views elsewhere,[19] I will just make three points here. First, the sentencing process should be such as to condemn the offence and to censure the perpetrator for committing it. The amount of censure should be proportionate to the seriousness of the wrongdoing. Secondly, the post-offence processes should be such as to ensure victim compensation, at least to the greatest degree possible. And thirdly, imprisonment should not be available for 'pure property offences', and therefore it is important to assess the alternative forms of sentence in terms of proportionality, reparation and (for those who offend persistently) effectiveness in changing behaviour. In particular, community sentences should be regarded as the primary engine for changing the behaviour of those who have not responded to measures taken before.

If imprisonment were not available, what approach should courts take? First, we must rule out suspended sentences. In law, a suspended sentence order is a form of prison sentence,[20] and that is one reason to conclude that if we are ruling out imprisonment we should also rule out suspended sentence orders. In terms of sentencing practice, to allow suspended sentences would (for some people who offend) simply be to postpone the

18 Unless the figures have changed markedly since Barclay, G., Tavares, C. (eds) (1999) Digest 4: Information on the Criminal Justice System in England and Wales. London: Home Office, p. 29.

19 Ashworth (above, n. 10); von Hirsch, A. and Ashworth, A. (2005) Proportionate Sentencing: Explaining the principles, Oxford: Oxford University Press.

20 Criminal Justice Act 2003, s. 189.

inevitable. Most people who breached a suspended sentence would be sent to prison. Admittedly this would only be a proportion of those given suspended sentences, but the result would still be to open up a route into prison for those committing property offences.

The major alternatives are fines (with compensation orders) and community sentences. A few of the most minor offences (thefts from a shop under £200; criminal damage under £300) may currently be dealt with by the police using a Penalty Notice for Disorder.[21] Where a perpetrator is prosecuted and convicted, a fine is the starting point for the least serious range of shop thefts. Fines are also within the range where there is some planning or a low level of intimidation involved in the theft,[22] for pickpocketing not involving a vulnerable victim[23] and for the lowest band of trademark offences.[24] Given the success of DWP and HMRC in ensuring payment even by people on state benefits, it would be wrong to conclude that because so few thieves and fraudsters are in employment there is little sense in imposing financial sanctions on them. Indeed, a compensation order in favour of the victim should be made first in these cases, especially where the perpetrator has limited means and cannot pay both compensation and fine. There will always be some people who default on their payments, but one of the most welcome developments of recent years has been the dramatic reduction in the use of imprisonment for non-payment of fines and the substitution of other, non-custodial methods.[25]

More serious property offences may be dealt with appropriately by a community sentence under the Criminal Justice Act 2003, which re-shaped the sentence as a single order with a range of possible requirements, including supervision, curfew with electronic tagging, and unpaid work ('community payback'). Two particular worries about community sentences should be highlighted – that some of them are not taken seriously by courts or perpetrators, and (a contrary view) that in many cases courts are forced to use prison for breach of the conditions of the sentence, so that they become prison sentences in thin disguise. Greater flexibility is certainly required if community sentences and their breach are not to flourish as back-door routes into prison for offences not serious enough to warrant prison in the first place, and it is good to see legislation moving in this direction.[26]

However, the problem of how community sentences are regarded by courts, those who offend and the wider public remains crucial to the success of my proposal. It is important to regard them as censuring restrictions on liberty, as a form of hard treatment imposed on perpetrators for their offence. Even a community sentence with a requirement of supervision carries with it a number of restrictive conditions. The tendency has been to regard prison as the only real punishment, and so to reason that if community sentences have been tried and have 'failed', then the court must resort to imprisonment. But the false step in this reasoning is to rely on the 'failure' of the community sentences, when the fact is that prison is just as likely to lead to 'failure'– over 50 per cent of prisoners reoffend within two years of release, and for young

21 For an assessment of these developments, see Padfield, N., Morgan, R., and Maguire, M. (2012) 'Out of Court, Out of Sight?', in Maguire, M., Morgan, R., and Reiner, R. (eds), Oxford Handbook of Criminology 5th edn. Oxford: Oxford University Press.

22 Sentencing Guidelines Council (2008) Magistrates' Court Sentencing Guidelines. London: Sentencing Guidelines Council, p. 103a

23 Ibid., p. 102a.

24 Ibid., p. 105.

25 Summarised in Ashworth, A. (2010) Sentencing and Criminal Justice 5th edn. Cambridge: Cambridge University Press, pp. 337–338.

26 Legal Aid, Sentencing and Punishment of Offenders Act 2012, s. 67, restoring discretion to courts in breach proceedings and restoring the power to impose a fine.

people the figure is closer to 80 per cent. The argument here is that imprisonment is disproportionately severe anyway, and so we must re-assess and, if necessary, re-package community sentences and financial orders so as to ensure that they have sufficient censuring impact as well as sufficient rehabilitative content.

Finally, there is growing evidence that various forms of restorative justice are welcome to some victims, and that such processes are no less effective than court sentences in turning perpetrators away from crime.[27] It still worries me that, because some victims are not willing to become involved,[28] restorative justice leads to inequities between those perpetrators who are invited to participate and those who are not. I will leave it to others to advocate the greater use of restorative justice processes, particularly if they can show that it would help to underline the value of property to people, to their lives, and to communities. At present, there seems to be an imbalance between restorative aspirations and the rather patchy restorative practices in England and Wales.[29]

Is prison fair when the offence is against property?

I have argued that property offences are mostly well down the scale of offending. In the grand scheme of things, we should be reserving our most severe form of punishment (deprivation of liberty) for our most serious types of offending (violent, threatening or sexual offences); to use prison for 'pure property offences' is disproportionate. Judges have made this point several times over the years. A decade ago, Lord Woolf C.J. took some steps in this direction:

In the case of economic crimes, for example obtaining undue credit by fraud, prison is not necessarily the only appropriate form of punishment. Particularly in the case of those who have no record of previous offending, the very fact of having to appear before a court can be a significant punishment.[30]

Laudable as this was, it really missed the target because most of the 'economic crimes' that come before the courts are committed by those who offend persistently, not those offending for the first time. The initial objective should be to ensure reparation or compensation for the victim. Then, as emphasised above, the major issue to be confronted if prison were removed as a sentencing option for property offences would be to devise more imaginative and more effective ways of dealing with people who persistently offend, other than to simply 'up the ante' every time. Sometimes people try to justify this use of imprisonment by saying that it 'gives the police and public a rest'; but that obscures the fact that prison is unlikely to do much good and the perpetrator is likely to return to law-breaking soon after release. A focused community regime for recidivist thieves would be a better start: it is true that there would be the problem of how to respond to those who do not comply, but we have not yet been down this road and it must be tried. Compared

27 Shapland, J., Robinson, G., and Sorsby, A. (2011) Restorative Justice in Practice: Evaluating what works. Cullompton: Willan.

28 Hoyle, C. (2012) 'Victims, the Criminal Process, and Restorative Justice', in Maguire, M., Morgan, R., and Reiner, R. (eds), Oxford Handbook of Criminology 5th edn. Oxford: Oxford University Press, p. 418.

29 Hoyle, C. (2010) 'The Case for Restorative Justice', in Cuneen, C., and Hoyle, C., Debating Restorative Justice. Oxford: Hart Publishing, pp. 26–30.

30 *Kefford* [2002] 2 Cr. App. R. (S.) 495, at [10]; see also *Mills* [2002] 2 Cr. App. R. (S.) 229 on women property offenders.

with a major fraudster, the seriousness of a repeat pickpocket's offending is diminutive, so it is a great social injustice to use prison in one type of case and not the other. If the Probation Service cannot devise a programme to persuade the persistent pickpocket to change their habits and lifestyle, it is unlikely that prison can achieve this effect.

We should not overlook the fact that a considerable amount of repeat offending is linked to drug addiction or usage. A survey of thefts from shops showed that drugs were the main motivating factor for the offending in 24 per cent of cases.[31] Insofar as there is a relationship between drugs and property crimes generally, this is a social and medical problem which the criminal justice system should not be expected to solve. It is not only an issue for property offences, but its significance here is sufficiently large to underline the point that prison is neither the right nor fair way of responding to the problem.[32] A re-appraisal of official responses to drug abuse, including medical and social approaches, is long overdue.

What If?

I have recognised that there is a wide range of 'pure property offences', from the 'core case' of a theft of goods worth £250 from a shop through to multi-million pound frauds. There is also a wide range of possible sentences, and we should not assume that a sentence of imprisonment is the only available currency of censure. Indeed, imprisonment is the most severe sanction, with many material deprivations as well as the deprivation of personal liberty, and that is one strong reason why it should be seen as a disproportionate response to 'pure property offences'. The challenge, then, is to persuade the courts to emphasize reparation and compensation to victims, to revive their use of financial penalties more broadly (compensation orders and fines), to persuade the courts to use community sentences where they would now impose imprisonment, and to persuade the public to accept that many such sentences amount to significant restrictions on liberty.

What effect would such a change of policy have on the prisons? Removing people who have committed property offences from prisons would be significant at the reception stage, since those convicted of theft or handling stolen goods form the largest offence group entering prison (some 20,000 per year, to which we can add around 5,000 for fraud and 1,000 for criminal damage). Looked at in terms of the prison population in 2012, it would take away 8 per cent of adult male sentenced prisoners (some 5,000) and 21 per cent of female sentenced prisoners (over 700).[33]

What effect would such a change of policy have on the protection of property – would it result in a free-for-all, with nobody's possessions safe and people resorting to vigilantism and private security? The answer would probably depend on how the change of policy was managed. It may well be more difficult to lower the severity

31 Sentencing Advisory Panel (above, n. 2), p. 3. For discussion of the complex relationship between drugs and acquisitive crimes, see Measham, F., and South, N. (2012) 'Drugs, Alcohol and Crime', in Maguire, M., Morgan, R., and Reiner, R. (eds), Oxford Handbook of Criminology 5th edn. Oxford: Oxford University Press, pp. 706–707.

32 The 'drug court' movement, although significant in its context (see the classic text by J. Nolan, Reinventing Justice: the American Drug Court Movement (2003)), is second best to treating the issue primarily as a medical problem.

33 Berman, G. (2012) Prison population statistics: www.parliament.uk/briefing-papers/SN04334.pdf.

of punishments than to increase their severity, not least if newspapers fanned the flames with headlines such as 'a thieves' charter.' But with the support of government ministers, and some short-term vigilance by the police, such a change might be accomplished without too much difficulty. It would require a considerable act of political courage to carry it through.

What if the arguments were regarded as too radical for the age, and so efforts were made to allow a certain amount of 'wriggle-room' to the courts in certain cases? My argument here has been for a general approach to 'pure property offences', an approach without exceptions. However, there are those who might be sympathetic to the overall thrust of the argument but might also be convinced that some 'pure property offences' are so serious only a custodial sentence would suffice. Concepts such as 'public confidence' are often used to bolster the argument. If this line were adopted, the law might be drafted so as to prohibit courts from imposing a custodial sentence on a person who only commits 'pure property offences' (as defined) unless there were exceptional circumstances that rendered the offence so extraordinarily serious that no sentence lower than custody would meet the justice of the case. Such an exceptional case would require committal to the Crown Court: it would not be open to magistrates to use custody for 'pure property offences'. The exceptional circumstances must relate to the offence, not the perpetrator, and so a mere accumulation of previous convictions would not be sufficient, as argued above. The legislative provision should be interpreted in line with the general policy, rather than being seen as an invitation to restore previous sentence levels; the courts have in the past applied the 'exceptional circumstances' criterion loyally,[34] but it would be important for either the legislature or the Sentencing Council to indicate the types of offence that might properly be treated as exceptional.

What would be the characteristics of 'extraordinarily serious' cases that amount to 'exceptional circumstances'? One example that might be given would be a theft or fraud targeting an elderly or disabled victim, the exploitative element – combined with the theft or fraud of a significant sum or item – taking the offence above the usual combinations of factors. A similar example might be targeting a person's life savings: the victim need not be 'vulnerable,' since the essence of this category would be that the thief or fraudster was knowingly taking such a substantial portion of the person's wealth as to reduce their living standard enormously. Some might argue that theft of railway signalling wire might justify an exception, on the grounds that it jeopardises the safety of rail travellers. But a preferable response would be to prosecute for an offence such as endangering rail passengers if the evidence supports that; if it does not, then it should not be smuggled in as an aggravating factor for theft. Finally, what about those people found guilty of enormous frauds or thefts, running into millions? It would not be difficult to characterise some such

34 Some might say 'too loyally', in some of the cases such as the mandatory minimum sentence for possessing firearms; see Ashworth (above, n. 10), pp. 26–27.

offences as 'extraordinarily serious', particularly if the amount involved was several million pounds – for example, a scheme to defraud banks of some £20 million.[35] However, the emphasis should be on compensation for the victim(s), and on devising non-custodial measures that carry sufficient censure to dispense with the felt need to impose a prison sentence.

There is room for debate about the scope of the exceptions, if exceptions were thought necessary. But most cases would still be dealt with under the general policy. The thief who steals a handbag containing an irreplaceable photograph and fails to return it; the person who takes someone's car from an isolated farmhouse, with the result that a pregnant woman cannot be taken to hospital in time; the thief who steals a mobile phone from a youngster, causing great anxiety to parents who cannot contact or be contacted by the youngster; all these are cases in which a 'pure property offence' causes considerable anxiety or distress to the victim or others affected by it, but all of them should be dealt with under the existing policy. Only if it can be shown that the thief deliberately targeted a vulnerable victim should the case be lifted to such a high level of moral turpitude as to justify considering whether, contrary to the general approach, deprivation of liberty is an appropriate response to a 'pure property offence'.

Thus the crucial argument for me remains the argument from fairness and proportionality. Is it not an abuse of state power to deprive a person of liberty – and thereby to condemn her or him to the conditions of a local prison – for an offence that involved no violence, no threats and no sexual assault? Should we not redouble our efforts to respond to property offences in a more appropriate way?

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35 *Lee and Williams* [2009] 1 Cr. App. R. (S.) 383; transfer of £15 million obtained, of which £14 million recovered; sentences of 5 years and 9 months upheld.

References

Ashworth, A. (2002) 'Robbery Reassessed'. Criminal Law Review, pp. 851–872.

Ashworth, A. (2010) Sentencing and Criminal Justice, 5th edn. Cambridge: Cambridge University Press.

Baker, E. and Ashworth, A. (2010) 'The Role of Previous Convictions in England and Wales', in Roberts, J., and von Hirsch, A. (eds), Previous Convictions at Sentencing: Theoretical and Applied Perspectives. Oxford: Hart Publishing. pp. 185–206.

Barclay, G., Tavares, C. (eds) (1999) Digest 4: Information on the criminal justice system in England and Wales. London: Home Office.

Berman, G. (2012) Prison population statistics. As at 24 May 2012: www.parliament.uk/briefing-papers/SN04334.pdf [accessed: 12 February 2013].

HM Revenue and customs, HMRC Criminal Investigation Policy. Available at: http://www.hmrc.gov.uk/prosecutions/crim-inv-policy.htm [accessed 12 February 2013].

Hoyle, C. (2010) 'The Case for Restorative Justice', in Cuneen, C. and Hoyle, C. Debating Restorative Justice. Oxford: Hart Publishing.

Hoyle, C. (2012) 'Victims, the Criminal Process, and Restorative Justice', in Maguire, M., Morgan, R., and Reiner, R. (eds), Oxford Handbook of Criminology 5th edn. Oxford: Oxford University Press, pp. 398–425 (p. 418).

Lippke, R. (2007) Rethinking Imprisonment, Oxford: Oxford University Press.

Lippke, R. (2008) 'No Easy Way Out: Dangerous Offenders and Preventive Detention' Law and Philosophy, 27, pp. 383–414.

Measham, F., and South, N. (2012) 'Drugs, Alcohol and Crime', in Maguire, M., Morgan, R., and Reiner, R. (eds), Oxford Handbook of Criminology 5th edn. Oxford: Oxford University Press, pp. 686–716.

Nolan, J. (2003) Reinventing Justice: the American Drug Court Movement. Princeton: Princeton University Press.

Padfield, N., Morgan, R., and Maguire, M. (2012) 'Out of Court, Out of Sight?', in Maguire, M., Morgan, R., and Reiner, R. (eds), Oxford Handbook of Criminology 5th edn. Oxford: Oxford University Press, pp. 955–985.

Public Accounts Committee (2012) HM Revenue and Customs: Compliance and Enforcement Programme, 87th report. London: The Stationery Office.

Roberts, J., Hough, M., Jacobson, J., and Moon, N. (2009) 'Public attitudes to sentencing purposes and sentencing factors: an empirical analysis' Criminal Law Review, pp. 771–782 (pp. 776–777).

Sentencing Advisory Panel (2008) Sentencing for Theft from a Shop. London: Sentencing Advisory Panel.

Sentencing Guidelines Council (2008) Theft and Burglary in a building other than a Dwelling. London: Sentencing Guidelines Council.

Sentencing Guidelines Council (2008) Magistrates' Court Sentencing Guidelines. London: Sentencing Guidelines Council.

Sentencing Guidelines Council (2009) Sentencing for Fraud – statutory offences. London: Sentencing Guidelines Council.

Shapland, J., Robinson, G., and Sorsby, A. (2011) Restorative Justice in Practice: Evaluating What Works for Victims and Offenders. Cullompton: Willan.

Syal, R., and Malik, S. (2012) 'Audit office attacks tax deals for corporations' Guardian, 14 June. Available at: www.guardian.co.uk/politics/2012/jun/14/hmrc-tax-collection-failures-nao [accessed 12 February 2013].

von Hirsch, A., and Ashworth, A. (2005) Proportionate Sentencing: Exploring the Principles. Oxford: Oxford University Press.

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