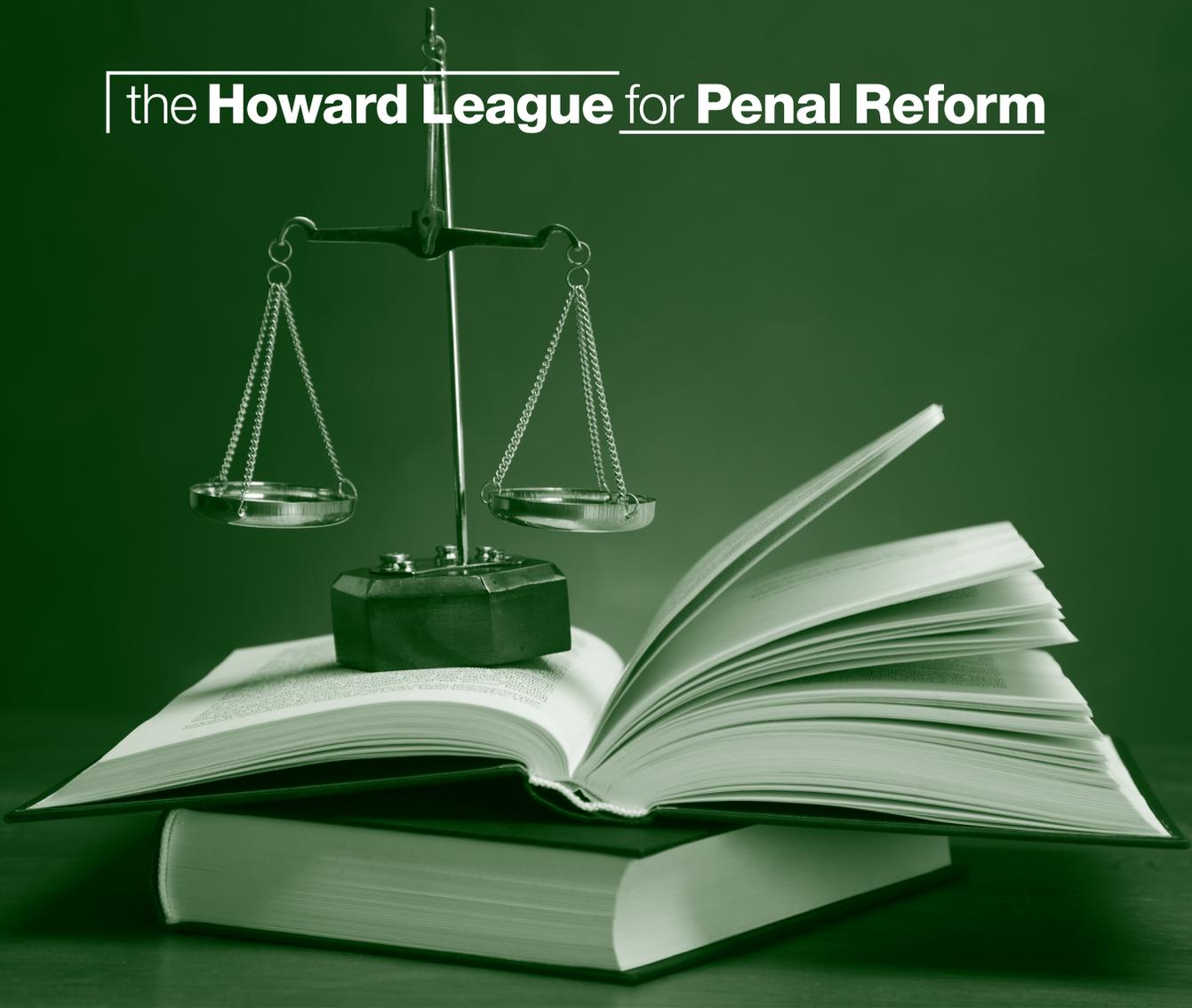


the **Howard League** for **Penal Reform**



## **Intelligent Justice**

---

**Balancing the effects of community sentences and custody**

# **Intelligent Justice: Balancing the effects of community sentences and custody**

A pamphlet for the Howard League for Penal Reform by  
Mike Hough, Stephen Farrall and Fergus McNeill

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

## Foreword

The debate over whether ‘prison works’ seems interminable. The Howard League for Penal Reform has well established views on this topic, but political realities make revisiting this question, and perhaps deconstructing assumptions on both sides of the argument, both timely and valuable.

The prison population in England and Wales has more than doubled since the mid 1990s. While the latest projections over the coming six years suggest that this growth may be slowing, there is no suggestion that the number of men, women and children incarcerated on any one day will drop below 80,000. Statisticians’ most optimistic assessment suggests numbers could at most drop to the level first reached in 2007 – an increase of 86 per cent compared to the prison population in 1991.

At the same time, the realities of running a justice system during an age of austerity are becoming ever clearer. The Ministry of Justice must achieve £2bn annual savings by March 2015 and the failure to deliver sentencing reforms originally proposed by Kenneth Clarke has meant that around £130m of potential savings have been lost. A recent report by the National Audit Office found that the agency in charge of prisons and probation is now projected to overspend by £32m in 2012-13 alone.

If that is the difficult context for policymakers, then this paper, written by three leading criminologists on behalf of the Howard League, provides a framework for new thinking that might provide an escape from the current prisons crisis. The Ministry of Justice does not have the funds to build its way out of the overcrowding in the system, and there is little scope for further efficiency savings without endangering key principles of security and giving up on any pretence of a ‘rehabilitation revolution’. As the Chief Inspector of Prisons wrote in his most recent annual report, “if a rehabilitation revolution is to be delivered, there is a clear choice for politicians and policy makers – reduce prison populations or increase prison budgets.”

This paper begins by examining the perennial arguments around the efficacy of community sentencing over short spells in custody. An even-handed analysis concedes that the picture is not a simple one, and that indeed it is the very complexity of the problem that necessitates a value-based approach to penal policy. It suggests that any cost-benefit analysis must take into account the long term impact of dramatic increases in imprisonment, which bring with them increases in a number of social problems that themselves sow the seeds for future crime: be it family breakdown, drug and alcohol addiction or poor physical and mental health. In the United States for example, this has seen the creation of a system “that feeds upon itself” and which has left many individual states near bankruptcy.

The authors conclude by asking for a new emphasis on not simply the prevention of reoffending through deterrence or incapacitation, but on constructing a penal system which seeks to encourage compliance with the law. This idea that people respond best when buying into behaviour such as abiding by the law, rather than being constantly compelled or cajoled into doing so, has powerful implications for future policymaking. It suggests, for example, that a narrow focus on paying providers by their results using the limited picture of reconviction rates may not be the best way to structure prisons and probation. It also suggests that an overweening focus on containing risk, essentially basing a system on a fear of failure, precludes redemptive narratives that promise more success in changing lives and reducing crime. Is the penal system to be based on unaffordable expansion and a fear of failure, or shall it live within its means and celebrate success? This is a question that must be answered sooner rather than later.

**Frances Crook**  
**Chief Executive, The Howard League for Penal Reform**

## Introduction

This paper revisits the much argued question about the relative merits of prison and community sentences. We decided to write it out of a sense that debate has become trapped in an unproductive Punch and Judy fight about which of the two sentences ‘works’ better. To anticipate our conclusions, assessed in narrow instrumental terms the arguments are more finely balanced than either side usually recognise. However, pro- and anti-prison camps are really arguing – in an oblique sort of way – about broader values, and if this paper helps to promote a more mature debate about penal policy that recognises this, we shall have succeeded in our task.

To understand the dynamics of the current penal debate, one has to look back to the 1970s, when ‘progressive’ thinking tended to be sceptical about what ‘treatment’, whether in criminal justice or social work or psychiatry, could actually achieve. At that time, the case for minimising the use of imprisonment relied on the argument that neither custodial nor community sentences ‘worked’ very well in reducing reoffending, so the cheaper option was the better one. This perspective became quite institutionalised in the probation service, which at the time used statistical assessment techniques (or ‘risk of custody scales’) to identify which of their ‘clients’ were most likely to get prison sentences, enabling them to offer sentencers a tailor-made alternative for this group. Using tools to assess the risk of reoffending was a much later development.

Towards the end of the 1980s, however, there emerged a greater sense of optimism that well designed community-based programmes could actually do more good than harm, and (more importantly) more good than prison. Much of the evidence for this came from North American evaluations (or meta-analyses of numerous evaluations), especially of cognitive behavioural programmes; the research suggested that properly designed and implemented programmes could reduce re-offending, as measured by reconviction rates. At the same time as encouraging evidence about programmes was emerging, the Conservative administration of the day developed policies to promote ‘punishment in the community’ and to get the probation service to ‘move centre stage’. This policy change was premised, it should be said, not so much on the optimistic new research findings but more on concern about rising prison costs and on a related desire to recast community sentences as ‘proper’ and proportionate punishments in their own rights, rather than as (rehabilitative) alternatives to punishment.

This ‘decarceral’ policy and the 1991 Criminal Justice Act which put it into effect, were badly received. Crime at the time was still rising rapidly and the opposition party (as ‘New’ Labour) was beginning to offer a credible challenge to

the Conservatives as the party that would be tough on crime. The Conservative administration did not abandon its plans for community sentences, but moved them swiftly away from centre stage, and rapidly amended key parts of the 1991 Act. In parallel, it adopted a much tougher line on penal policy, best exemplified by the claim in 1993 of Home Secretary Michael Howard that “prison works”. This shift in the climate of penal debate prompted a substantial toughening up of sentencing – even if there was no actual legislative change (Hough and Jacobson, 2003). The threshold for passing a prison sentence was lowered, and sentence length grew. Accordingly the number of prisoners started to rise; in 1991 there were 43,000 prisoners, by 2007 there were 80,000.

This shift of emphasis prompted renewed interest in questions of the ‘incapacitative’ effects of imprisonment. If prison works, is this through deterrence, or simply by keeping people who offend locked up and out of circulation? How much crime is actually prevented by keeping people in prison (through ‘incapacitation’)? How big a deterrent effect does prison have in stopping people from reoffending in future (through ‘individual deterrence’)? And how big an effect does prison have on the rest of the population (through ‘general deterrence’)? For the most part, these questions had been ignored by advocates of community punishment in the 1980s, at a time when there was still a political consensus that imprisonment should be used as sparingly as possible. It was at this point that the Home Office started once again to pay real attention to reconviction studies, and to try to estimate the size of incapacitation effects.

Since the mid 1990s the arguments between the two camps have not progressed very far. Advocates of alternatives to custody argued then and still argue, that these are not only cheaper but more effective in terms of reducing reoffending. They variously argue that:

- (a) The general deterrent effects of tough sentencing are unproven
- (b) The right sort of community sentences achieve lower reconviction rates than imprisonment
- (c) They do so at a much lower cost than imprisonment
- (d) They are less damaging than custodial sentences for individuals and communities.

Those who favour tougher punishment have counter-argued that:

- (a) differences in reconviction rates are small or non-existent
- (b) but in any case the way that reductions in offending are measured – using reconviction rates – fails to take account of incapacitation effects
- (c) prison is cost-effective when properly and fully costed.

## Who is right?

Perhaps the most hotly contested of these arguments is the one about incapacitation effects – the impact of keeping people who have offended out of circulation. But first, let us consider what is known about general deterrence, and about the rehabilitative and deterrent impacts of sentences on people who receive them.

### *General deterrence*

That people should still argue about general deterrence in criminal justice probably reflects two things: first, most of the population tend to respond well to deterrent threat for less serious regulations, such as traffic offences, and find it inconceivable that others may react differently; and secondly, most of us refrain from committing crimes of any severity for reasons quite unconnected with deterrence. Most of us take an instrumental approach to many of life's decisions, weighing up costs and benefits; and yet normative factors – or a sense of right and wrong – also guide much of our behaviour. These two realities provide room for heated argument about deterrence.

There is evidence that people's behaviour can be readily shaped through various regulatory mechanisms, provided that these are seen to carry at least a degree of legitimacy, and the threat of imposing a penalty is regarded as plausible. For example, compliance with the London congestion zone regulation is very high. Yet, a small proportion of the population is remarkably unresponsive to deterrent threat, or actually responds to deterrence with defiance. The criminological consensus is that there are general deterrent effects for offences the commission of which typically involves a significant degree of rational decision-making, and the key factor determining the magnitude of the effect is the likelihood of punishment, rather than the severity of punishment. A small but certain penalty will be much more effective than a large but uncertain one. Crucially, individuals vary in their responsiveness to deterrent threats, and some are sufficiently stubborn – or sufficiently dispossessed – to be inured to deterrent threat. People with little or no stake in conformity – with nothing much to lose – are hard to deter; as are people who can't or won't weigh up the medium and long term consequences of their actions before acting.

### *The impact of punishment on the punished: differences in reconviction rates*

Conventionally, criminologists have distinguished between individual (or special) deterrence, where people who have broken the law learn from being punished that further offending is no longer in their interests, and rehabilitative treatment, where the impulse to offend is removed, or some other 'cause' of offending is tackled. In reality, a rehabilitative penalty can have deterrent effects (by helping people to think more consequentially), and deterrent sentences can rehabilitate (by encouraging people to engage with interventions). Both deterrence and rehabilitation are usually measured by reconviction rates – that is, whether once sentenced, the individual is caught again and brought before the courts for punishment.

Different categories of penalty – fines, community sentences, imprisonment – have widely differing reconviction rates. However, this is principally because judges and magistrates take into account factors such as the seriousness of the offence and the criminal history of the person being sentenced; these factors are themselves correlated with reconviction. Thus someone who steals something of low value from a shop for the first time has a low risk of reoffending, and to reflect the low gravity and low risk, he or she will typically be fined. Someone with thirty previous convictions who burgles a home is very likely to reoffend, and will typically go to prison. As a result of this, reconviction rates for those sent to prison are on average much higher than those who are fined – but that is unsurprising. Simple comparisons of reconviction rates for different types of penalty therefore tell us very little.

However, it is possible to use a range of statistical techniques to create groups that are much more comparable in terms of their demographic characteristics and their criminal histories. When this is done, the different ‘outcomes’ of different types of penalty – and of different lengths of prison sentence – become much smaller. Where differences remain – and they sometimes do – it is difficult to assess whether these are real, or if they simply reflect inadequate statistical matching. Thus the most recent analysis conducted by the Ministry of Justice (MoJ) suggests that for young people, low level community service orders have a lower reconviction rate than high level ones, which in turn have a slightly lower reconviction rate than a custodial sentence (Ministry of Justice, 2012). For adults, community orders have lower reconviction rates than short prison sentences, which in turn have higher reconviction rates than longer sentences (Ministry of Justice, 2011). One reading of these findings is that short prison sentences are less effective than either community orders or longer spells in custody. Another reading is that the available data does not allow sufficiently precise matching of people who offend to make reliable comparisons. In the words of the MoJ 2012 Compendium,

*The true impact of offender management programmes and probation supervision cannot be reliably established using current Ministry of Justice administrative data.*

*(Ministry of Justice, 2012: 4)*

This is not to say that sentences have no effect. On the contrary, all types of penalty are likely to have a mix of good and bad effects. Different people react in different ways to different sorts of penalty. For some people, the “clang of the prison door” has precisely the impact that advocates of short prison sentences assume; for others the experience may accelerate them down a criminal pathway. Similarly, probation supervision may be a positive, even life-changing, experience for some, but for others it can be demeaning and patronising.

Part of the problem is that when we compare the outcomes of different sentences, we treat those sentences as if they were concrete ‘things’; yet much empirical

sociology of punishment makes it very clear that the same formal sentences may make for very different informal experiences of punishment, which have very different meanings and effects. To put it bluntly, when we ask the question ‘does it work?’, we assume that we know clearly what ‘it’ is. Each person’s lived reality of punishment is very different; what imprisonment or probation is depends very much on those who deliver it and on those subjected to it.

This makes it hard to say definitively what ‘works’ and what doesn’t. But, at the risk of over-generalising, some sentences work with rather few people (one of the best – and counterintuitive – examples being ‘Scared Straight’ programmes where young lawbreakers are lectured about the pointlessness of a life of crime by people who have themselves been through the punishment mill). As mentioned above, easily enforceable fines for regulatory offences tend to work well for most people. In between these two extremes, for crimes of middling to high severity most sentences work well with some people and not with others. We would agree with Pease (2010:7) that when it comes to broad categories of penalty, such as fine vs. community penalty, or community vs. prison:

*Generally, one can predict probability of reconviction at the time of sentence on the basis of criminal history. There is no evidence that choice of sentence adds predictive power. The reconviction figures for both community sentences and custody are almost exactly as would be predicted beforehand.*  
(Pease, 2010: 7)

To stress the point again, this is not to say that nothing works; some things, and some people, are particularly good at helping those with a history of offending to stop – but it is too crude and simplistic to argue that sentences delivered by probation staff are in aggregate more effective at stopping reoffending than prison sentences or vice-versa. Advocates of community sentences and those who are more sceptical have common ground in their misguided attempts to over-generalise about what works, although there has been a tendency for the former to oversell the benefits of community sentences, and for the latter to ignore the counterproductive consequences of imprisonment, both on people who offend and on others whose lives are affected.

### *Keeping people who offend out of circulation: incapacitation*

There is much less agreement about the amount of crime that can be prevented simply by keeping people who offend locked up in prison, out of circulation. No-one can argue with the proposition that so long as someone is in prison, it is impossible for them to commit crimes against anyone but staff and fellow inmates. So if everyone convicted of burglary were given, say, a 25 year sentence, there would almost certainly be a significant fall in numbers of burglaries (as well as an unsustainable hike in prison budgets and widespread public unease). Most people

would also agree that the incapacitative effect of very short sentences is marginal. The issue is thus about the costs or benefits of incapacitation strategies in the middle range.

Calculating numbers of crimes prevented by imprisoning a group convicted of crimes for a given length of time turns out to be remarkably complex. The simplest approach is to calculate the group's offending rate for periods when at liberty, and to calculate from this the number of prevented offences. So, let us take a group of 100 convicted burglars, whose conviction rate is two offences per person per year. Let us assume that they commit four crimes for every one that is detected. The group thus commits over a 12 month period 1,000 crimes – which for the sake of argument are split four ways between offences of theft/handling, burglary, drugs offences and violence. It is tempting to think that if they were each imprisoned for a year, 1,000 crimes would be prevented, at a cost of £4,000,000, or £4,000 per crime – but we shall return to issues of cost below.

However, this calculation is actually misleading, for several quite complicated reasons. First, most people who offend persistently have criminal careers that start in their teens, peak in their mid twenties and then fall away. If this group is imprisoned for a long period towards the end of their criminal career, when they are in any case approaching 'retirement', there are much smaller returns. If they are imprisoned at the peak of their career, we simply do not know whether the prevented offences are simply deferred or actually prevented. In other words, one possibility is that the individual's career after release will continue on its previous trajectory, and thus genuinely prevent crimes; but equally it might be extended, in which case there are no preventive gains.

Secondly, there are substitution effects. To pursue the career metaphor, imprisoning one person sometimes create 'job vacancies' that are filled by other people. The most obvious example is in illicit drug markets, where the imprisonment of a low- or middle-level drug dealer is, in effect, a job opportunity or a promotion opportunity for someone else. But even in less structured group-offending, similar substitution may also occur: much offending is done in groups or networks, and we simply do not know what the impact is of removing a single member of the group. Pease's (2010) estimate of the number of crimes prevented by extending short-sentence prisoners' sentences by one month assumed that each and every crime committed by short sentence prisoners in the first month of their release would be prevented. It takes no account of deferred offending, or of substitution effects.<sup>1</sup>

Thirdly, there is a real risk of amplification of offending. Prison can 'train' people for a criminal career, and simultaneously disqualify them from entry into the conventional job market. In part this is the well-known argument that prison can serve as a

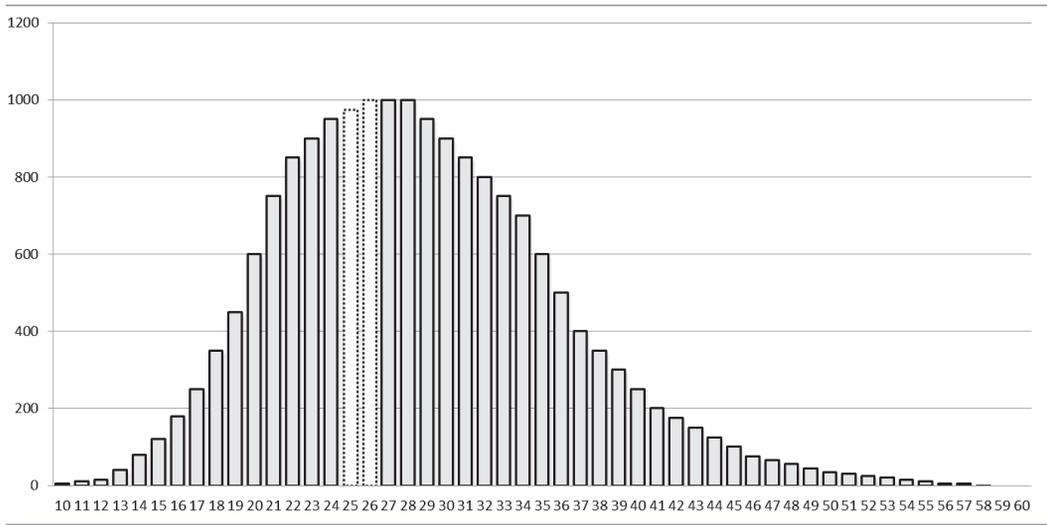
<sup>1</sup> However, in Pease's methodology, there is no case for proposing amplification effects, as these are probably no greater for a seven month sentence than for a six month one.

'school for criminals', allowing people in prison to diversify their skills on the one hand, and on the other be immersed in a world where persistent offending is regarded as the norm. But imprisonment also blocks opportunities for moves into legitimate work; and by its nature, it is a form of dispossession that eventually gives people the freedom of those who have nothing more to lose – or the 'freedom of the dispossessed'. Recent research (Joliffe and Hedderman, 2012) lends support to the thesis that prison sentences can lead to more offending on release - or serve as schools for criminals.

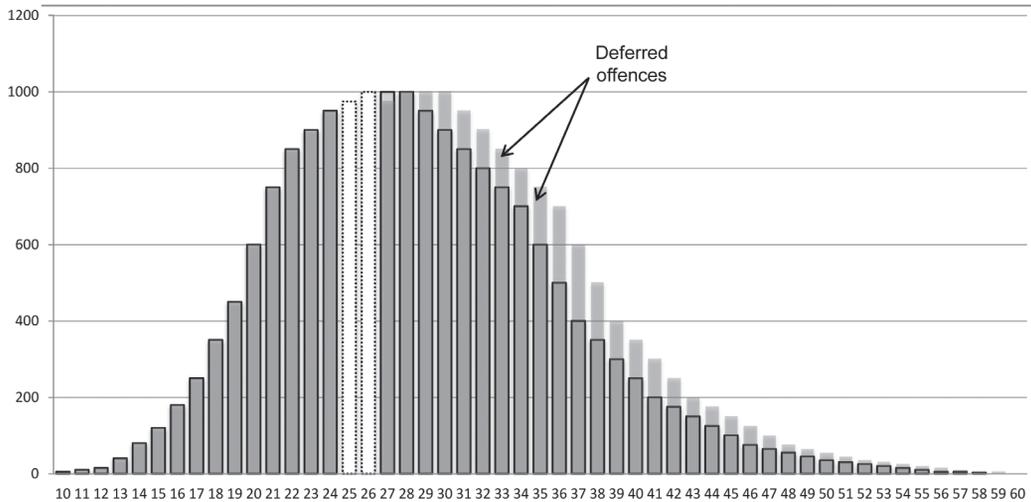
Fourthly, there are problems of diminishing returns. Our original estimate was of the total number of crimes prevented, rather than the gains at the margin in increasing imprisonment rates from the current levels – which is the real question for which policy needs answers. On the one hand, people who offend at a high rate would already spend quite a proportion of their life in prison, and the change in sentencing policy for burglary would not actually take them off the streets for a much larger proportion of their lives. On the other hand, if imprisonment criteria were widened to include people who offend at a low rate – and who are currently less at risk of imprisonment – the preventative impact would be less, because there would be fewer preventable crimes.

Finally, there is an open question about the incapacitative effects of some community sentences, which also need to be added into the equation. Although in a less complete way than imprisonment, some intensive community sentences do actually keep people who offend off the streets. The clearest example is electronic monitoring, but any order that requires people to spend a large amount of time out of circulation will have preventive benefits derived from incapacitation.

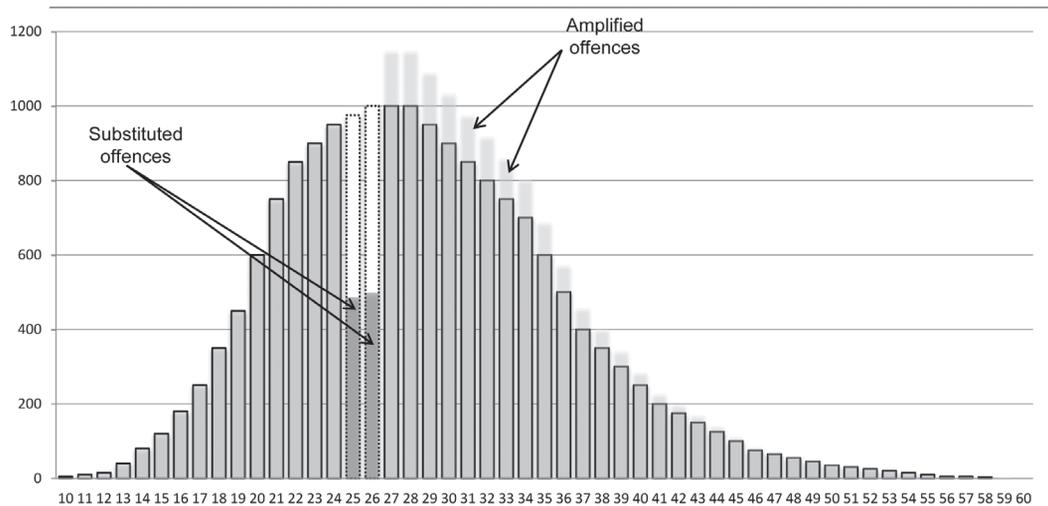
These points are intended simply to illustrate the complexity of calculating incapacitation. We are not arguing that the effects are non-existent, just that they are much more complicated to calculate than some have suggested. Figures 1 to 3 are an attempt to illustrate graphically how some of these 'perverse effects' would work to reduce incapacitation effects. Figure 1 takes a hypothetical group of 100 people who offend persistently, and charts the number of offences they commit per year over the life of their criminal careers. At their peak in their mid-twenties the group is committing 1,000 offences per year. The dotted bars in the figure show the incapacitative effects of the group serving two years in prison in their mid-twenties – assuming that there is no deferral of offending, no substitution and no amplification. It implies that around 2,000 offences would be prevented. However, Figure 2 shows patterns of offending if the offences prevented during imprisonment were actually deferred, and committed subsequently. Figure 3 shows the combined effects of substitution and amplification – assuming on the one hand that imprisonment creates 'job opportunities' for others, and at the same time uplifts offending by serving as 'school for criminals'.



**Figure 1:** Offences per year for a group of 100 persistent offenders, showing 100% incapacitation effects of two years' imprisonment at the age of 25



**Figure 2:** Offences per year for a group of 100 persistent offenders, with 100% incapacitation but deferred offending following two years' imprisonment at age of 25



**Figure 3:** Offences per year for a group of 100 persistent offenders, with 50% incapacitation effects from two years’ imprisonment at age of 25 offset by substitution (with no deferred offending), and with 15% amplification of offending thereafter

So far, we have discussed ‘bottom up’ ways of calculating incapacitation which rely on estimates of crimes that would have occurred had it not been for the act of imprisonment. There are, however, alternative ‘top down’ ways of estimating incapacitation effects which observe variations in the use of imprisonment over place or time, and examine what relationships there are, if any, with crime rates – and infer incapacitation effects from these. These methods effectively side-step issues of deferred offending, substitution, amplification and so on. However, they are reliable only insofar as the econometric models on which they are based include all the relevant variables, and also specify the right forms of relationship between all relevant variables.<sup>2</sup>

The Home Office updated some statistical modelling of incapacitation effects as part of its 2001 (Halliday) review of sentencing. This estimated that around a 15 per cent rise in the prison population would yield a 1 per cent reduction in recorded crime. A more focussed incapacitation strategy targeted at those who offend persistently might require a 7 per cent increase to achieve the same reduction (Home Office, 2001). The implication of this is that around seven percentage points of the fall in crime since 1995 can be attributed to the doubling of the prison population over this time. (In explaining the drop in crime, cross-national explanations are needed, as most industrialised countries have seen crime falling. Improved design and security is likely to have been a significant factor.)

<sup>2</sup> With analysis of time-series data, the time-lags that are specified between variables such as imprisonment rates and crime rates are critical – and different assumptions about lag effects often determine whether an effect exists or not.

### *Cost-benefit analysis*

What we have suggested so far is (a) that the deterrent or rehabilitative effects of community sentences and imprisonment are quite similar, measured through reconviction, and (b) that the preventive benefits of keeping people who offend out of circulation are easy to overestimate. This might suggest that the arguments are best resolved by cost-benefit analysis. However, as we argue below, we think that penal policy needs first and foremost to be value-based; although the accountant's perspective remains a factor. The closer that the crime-preventive returns of any two penal policies are, the more scope there is to accommodate hard-to-cost benefits associated with values (since there is little else to choose between them).

There has been some argument about the costs of imprisonment, some arguing that a prison place costs under £30,000 per place,<sup>3</sup> and others putting it at around £40,000. This is a simple matter to resolve. The lower figure (£28,728 per place in 2010/11 in England and Wales) reflects running costs only, and the higher figure (£39,573) is a full cost, including capital costs. There may be a case for using the lower figure for very short-run policy changes, but in assessing any long-run policy changes there is no good reason to ignore capital costs.

In any cost-benefit analysis of incapacitation policies, one would in any case expect to see in the 'credit' column:

- the money saved by the criminal justice system through incapacitation
- the full costs of crimes to victims, had the crimes occurred

On the debit side, one would expect to see the full cost of the additional imprisonment under consideration (including post release supervision and recalls), as well as the costs incurred by other government agencies in terms of additional welfare expenditure. In an ideal world economists might also try to 'monetise' the broader social costs of the damage that is done to communities' capacity to regulate themselves when large proportions of their young male population are prisoners or ex-prisoners – but that is probably unrealistic. However these social costs are real, even if they are not monetised.

When costing community sentences, it is equally important to cost criminal justice costs fully. Intensive supervision is expensive, but also tends to have higher than normal breach rates (because more is asked of those who serve these sentences), and a higher rate of imprisonment following breach. All these costs need to be accounted for.

<sup>3</sup> Costs per prisoner are marginally higher, in essence reflecting the financial 'benefit' of overcrowding.<sup>14</sup>

When costs and benefits of custody and community sentences are compared, decisions have to be made about when to ‘start the clock running’ in calculating reconviction rates. Traditionally, this has been done at the point of sentence for community sentences and fines, and at the (real or estimated) point of release from custody for imprisonment. The reason for this is that the primary aim of reconviction studies, at least over the last two decades, has been to compare the deterrent/rehabilitative effects of the two sentences. In our view, a full cost benefit comparison ought to take account of the effects both of incapacitation and of deterrence/rehabilitation – but it would be best to estimate these separately, rather than in a single measure of reconviction that started at the point of sentence and thus underestimated deterrent and rehabilitative benefits of imprisonment.

Todd Clear (2007) has demonstrated that imprisoning a large number of people for longer periods of time results in short-run declines in crime but long-run increases in crime when they are eventually released. Clear is able to show that high rates of incarceration (which are frequently concentrated in areas with higher than average levels of poverty), are associated with a range of negative consequences on those places subsequently. These outcomes include (but are presumably not limited to) increased rates of: sexually transmitted diseases, teenage births, and serious juvenile delinquency. Clear concludes that the growing reliance upon imprisonment as a policy solution creates a system “that feeds upon itself” exacerbating the very social problems that led to the increases in crime in the first place. In other words, we imprison people today, crime goes down tomorrow, but other social problems arise, only to cause increases in crime in the future. So cost-benefit analyses need to consider ‘spill-over effects’ into other policy arena and long-term effects as well.

Finally, when cost-benefit analysis is done to examine the relative merits of prison and community sentences, it is important to remember that money can be directed to functions other than punishment. A useful reminder of this comes from an analysis by Bill Spelman of the impact of the massive expansion of imprisonment in Texas. His measured analysis concluded that the extra use of imprisonment had indeed had a marked impact on crime, but that the state’s investment in incarceration had reached a point of diminishing returns, making investment in job creation a better crime reduction option. The lesson is that even if jurisdictions with very deep pockets can reduce crime by building prisons, this may not be the best route to crime reduction.

## *Community or Custodial Sentences: What's the purpose?*

The Spelman research neatly leads into our concluding section, in which we argue that penal policy – and more generally, criminal policy – needs a broader foundation than crime control alone. We hope we have shown that comparing the crime reduction benefits of prisons and community sentences is genuinely complex. There are quite clearly gains to be had in strategies of incapacitation, but these can easily be overestimated and under-costed. Partly, but not only, because of the difficulties in estimating the crime preventive returns from investment in different crime control strategies, we would argue that a wider range of criteria should inform justice policy.

A starting point in deriving these criteria is to ask the fundamental question of what criminal justice is for. As Tonry argues:

*'The overriding normative function of a sentencing system in a society committed to individual liberty, procedural fairness, and limited powers of government is to assure that individuals convicted of crimes receive the sentences that, in principle, they should.'*  
(Tonry, 2006: 16)

At first sight, this statement seems a little vacuous or circular – the point of doing justice is to do justice – but, at least in liberal democracies, it is vital to surface this assumption, which is too easily taken-for-granted. If punishment involves the state in imposing harms on its citizens, then the process by which this is done must be carefully bounded and governed by law.

Of course, what is 'in' and 'out of bounds' in sentencing depends to some extent on the normative principles that govern it. Without entering into the complex debates about these principles, perhaps a practical first step would be to ensure that any court sentence should observe a principle analogous to the Hippocratic one; that first and foremost, it should operate to minimise harms. We know that prison is a damaging experience, not only for prisoners, but for their families and the communities they live in – and to this extent high rates of imprisonment can damage the whole polity. This is, perhaps, the conundrum at the heart of retributivism. A 'just measure of pain' may be deserved. More controversially, it may even be necessary to express our revulsion, to denounce crime, to communicate censure. But if it merely harms, without also restoring, it leaves the whole polity weakened.

The short and 'common sense' response to the fact that prison is a damaging experience is, of course, that 'offenders' should have thought of that before doing the crime, but brevity doesn't mean accuracy. We suggest that much more attention is needed to the costs of punishment not just on people who have themselves offended, but on their families and on wider communities. The further that we remove people from the ways and means and reasons to live as we want them to live, the harder we make it for people to avoid reoffending. This is clearly

true for imprisonment – but community sentences also have unintended pains and create collateral damage; they may be less likely to damage the social ties and new identities that desistance from crime often requires, but it is not inevitable that they enhance them.

As this last point suggests, more ambitiously, we might also question exactly what are the positive goods that court sentences exist to produce? The safety of the community (which of course includes the perpetrators of crime) may be one such good, but might we also reasonably measure sentences by their capacity, for example, to support the development of constructive citizenship and to build community capacity and cohesion. Aspirational as these goals may seem, they lie at the heart of a more reparative or restorative vision of justice; one in which debts are settled not in pain but by positive contributions to the wellbeing of others. To elicit such contributions from people who may lack the skill (or the will) to do so might require a genuine commitment to rehabilitation and reintegration – without which the motivation, capacity and opportunity to contribute may not be engendered.

If it is accepted that it makes sense – both for principled and for pragmatic reasons - to be parsimonious in our approaches to punishment, to punish (if we must) in ways that support change, and to accept our duty (having punished) to play our various parts in supporting reintegration – in part giving people a chance to give something back - then we must judge sentences on these three criteria:

- on their parsimony
- on their support for positive change
- on their effects on reintegration.

The final criterion – about the effects on reintegration – needs to be emphasised. Reintegration is a wider concept than rehabilitation, and much broader than the prevention of reoffending. The competing alternatives need to be judged not simply according to their ability to deter or obstruct further offending, but also according to their ability to secure normative compliance with the law, and more broadly to represent, reflect and reinforce the legitimacy of criminal justice itself. Normative compliance involves something rather more subtle than “reprogramming”. It means buying into being law-abiding, not being compelled or cajoled or supervised into doing so. Though it may sound like a softer or more subjective aspect of being law-abiding, this is the kind of compliance on which the habits of being law-abiding may be most securely founded. When normative compliance is secured, external constraint is rarely required. And that, we suggest, in the long run provides the most cost-effective path to crime control – especially where it also involves the development of positive citizenship.

This objective of securing normative compliance can be framed in a language that despite its religious overtones can still have relevance in a more secular age. We need to punish in a way that keeps alive the possibility of 'redemption', by emphasising redemptive narratives. One possible way forward is for those who have successfully completed intervention programmes (such as drug treatment) to return to the court which sentenced them in order for the magistrates to formally recognise the changes made and to congratulate them. This could become all the more powerful if those awaiting sentence saw these 'de-labelling' ceremonies in order to affirm on their minds the idea that change is possible. In short, punishment needs to have broader ambitions than simply to contain risk by warehousing those whose offending is serious and persistent. Undoubtedly these people strain the tolerance of all those who are affected by their offending. But to respond to them in a way that shuts off the possibility of a change of heart and a new start could actually make these things – which happen less often than we would like – even less likely to happen.

## Bibliography

- Blumstein, A., and Nakamura, K. (May 2009). 'Redemption in the Presence of Widespread Criminal Background Checks'. *Criminology* 47 (2), pp. 327–359.
- Bottoms, A., Rex, S. and Robinson, G. (2004) *Alternatives to Prison: Options for an insecure society*. Cullompton: Willan.
- Clear, Todd (2007) *Incarcerating Communities: How Mass Incarceration Makes Disadvantaged Communities Worse*. London: Oxford University Press.
- Farrall, S., Hough, M., Maruna, S. and Sparks, R. (eds) (2011) *Escape Routes: Contemporary Perspectives on Life After Punishment*. London: Routledge.
- Home Office (2001) *Making Punishment Work: Report of a review of the sentencing framework for England and Wales. (The Halliday Report)*. London: Home Office.
- Hough, M., Jacobson, J. and Millie, A. (2003) *The Decision to Imprison: Sentencing & The Prison Population*. London: Prison Reform Trust.
- Jolliffe, D. and Hedderman, C. (2012) 'Investigating the Impact of Custody on Reoffending Using Propensity Score Matching'. *Crime and Delinquency*.  
<http://intl-cad.sagepub.com/content/early/2012/12/05/0011128712466007.abstract>
- Ministry of Justice (2011) *2011 Compendium of Reoffending Statistics and Analysis*. Ministry of Justice Statistics Bulletin. London: Ministry of Justice.
- Ministry of Justice (2012) *2012 Compendium of Reoffending Statistics and Analysis*. Ministry of Justice Statistics Bulletin. London: Ministry of Justice.
- Pease, K. (2010) *Prison, Community Sentencing and Crime*. Civitas online report available at: <http://www.civitas.org.uk/crime/CommunitySentencingAug2010.pdf>. Accessed 13 August, 2012.
- Pease, K. (1994) 'Cross national imprisonment rates: Limitations of method and possible conclusions'. *British Journal of Criminology* 34 (special issue) pp. 116–130.
- Spelman, W. (2005) 'Jobs or Jails: The crime drop in Texas'. *Journal of Policy Analysis and Management* 24 (1) pp. 133–165.
- Tonry, M. (2006) 'Purposes and Functions of Sentencing' in Tonry, M. (ed.) *Crime and Justice: a Review of Research*. pp.1–52 Chicago: The University of Chicago Press.
- Tonry, M. (ed.) (2007) 'Crime, Punishment, and Politics in Comparative Perspective'. *Crime and Justice: a Review of Research*. Chicago: The University of Chicago Press.
- von Hirsch, A., Bottoms, A., Burney, E., and Wikstrom, P-O. (1999) *Criminal Deterrence and Sentence Severity*. Oxford: Hart Publishing.

## *About the authors*

### **Professor Stephen Farrall**

Stephen Farrall is Professor of Criminology and Director of the Centre for Criminological Research in the School of Law at the University of Sheffield. He has held research grants from the Economic & Social Research Council, the Ministry of Justice and various charities. Since 1996 he has been charting the progress away from offending of almost 200 men and women given probation orders in 1997 and 1998, publishing two books on this sample. A third book on this sample is due to be published by Oxford University Press in 2014.

He is a member of the Howard League's Research Advisory Group.

### **Professor Mike Hough**

Mike Hough is Co-Director of the Institute for Criminal Policy Research at Birkbeck, University of London. He started his research career in the Home Office, and was a member of the team that started the British Crime Survey. Leaving in 1994, he set up an academic policy research centre. This was originally based at London South Bank University; it moved to King's College London in 2003, and to Birkbeck, University of London, in 2010. His current research interests include: procedural justice theory and public trust in justice; public perceptions of crime and justice; policing and police legitimacy; sentencing and sentencing guidelines; offender rehabilitation and desistance (and its evaluation).

### **Professor Fergus McNeill**

Fergus McNeill is Professor of Criminology and Social Work at the University of Glasgow. Prior to becoming an academic in 1998, Fergus worked for a number of years in residential drug rehabilitation and as a criminal justice social worker. He teaches on undergraduate and postgraduate courses in criminology, social work and sociology. His main interests lie in the fields of sentencing, community sanctions, ex-offender reintegration and youth justice. Most of his recent research projects and publications have explored cultures and practices of punishment (particularly in the community) and the implications of criminological evidence (particularly about desistance from crime) for the reform and development of these cultures and practices. In recent years, he has provided advice and consultancy to a range of governments, institutions and organisations on these topics.

He is a member of the Howard League's Research Advisory Group.

## *About the Howard League for Penal Reform*

The Howard League for Penal Reform is a national charity working for less crime, safer communities and fewer people in prison. It is the oldest penal reform charity in the UK. It was established in 1866 and is named after John Howard, one of the first prison reformers.

We work with parliament and the media, with criminal justice professionals, students and members of the public, influencing debate and forcing through meaningful change to create safer communities.

We campaign on a wide range of issues including short term prison sentences, real work in prison, community sentences and youth justice.

Our legal team provides free, independent and confidential advice, assistance and representation on a wide range of issues to young people under 21 who are in prisons or secure children's homes and centres.

By becoming a member you will give us a bigger voice and give vital financial support to our work. We cannot achieve real and lasting change without your help. Please visit [www.howardleague.org](http://www.howardleague.org) and join today.

---

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

1 Ardleigh Road  
London  
N1 4HS

**t**  
**e**  
**w**

020 7249 7373  
info@howardleague.org  
www.howardleague.org

Registered charity  
No. 251926

Company limited by  
guarantee No. 898514

ISBN 978-1-905994-60-1



9 781905 994601 >

ISBN 978-1-905994-60-1

**2013**