

Sentencing & Penal Policy: **Ending Prison as the Default**

Cyrus Tata, University of Strathclyde, offers some timely insights from the Scottish experience of the presumption against short prison sentences.

Prison populations in both England and Wales as well as in Scotland have more than doubled over the last two decades. However, the ambitions of the two jurisdictions appear to be very different. In its aim that Scotland has “the most progressive justice system in Europe” (Matheson 2015), the Scottish Government is committed to a radical reduction in the prison population, and in particular what it deems the unnecessary use of short prison sentences. In recent months, Scotland’s presumption against short custodial sentences has attracted the attention of reformers south of the border. The presumption against prison sentences of three months or less was introduced in 2011 and the Scottish Government has committed itself to extending the presumption to 12 months. Should England and Wales follow the lead of Scotland?

What difference will extending the presumption make?

According to the Government’s own commissioned research, the three month presumption “has had little impact on sentencing decisions” (Scottish Government 2015a:1). One reason is sentence inflation. Rather than passing sentences of say three months, some sentencers, appear to have passed slightly longer sentences (Scottish Government 2015b:116-7). This phenomenon, predicted at the time of the passage of the legislation, has been found in other countries (Tata 2013).

To understand the problem, let us examine the relevant legislation. Section 17 of the Criminal Justice and Licensing (S) Act 2010 states:

“A court must not pass a sentence of imprisonment for a term of 3 months or less on a person unless the court considers that no other method of dealing with the person is appropriate.”

Section 17 could hardly be more permissive: the sentencer must not impose a sentence of x months or less unless s/he considers it appropriate. Does any sentencer, (or for that matter anyone), make a decision which she or he considers inappropriate?

To put it crudely, the legislation states: don’t do something unless you consider that you should. Little wonder then that “there was little sign of [the presumption] figuring prominently or explicitly in decision-making” (Scottish Government 2015b: paras 52, 63, 7.25, 7.64, 8.25).

It should be recognised that section 17 includes a requirement that where a court passes a sentence in excess of the presumption limit,

“the court must: (a) state its reasons for the opinion that no other method of dealing with the person is appropriate, and (b) have those reasons entered in the record of the proceedings.”

However, this is hardly a challenging requirement. Compliance can be fulfilled simply by noting a non-custodial sentence was ‘not appropriate’.

So we should expect that the extension to 12 months is unlikely to have much effect on sentencing practice: at best it is a reminder to sentencers of the existing injunction that imprisonment should be ‘a last resort’. Yet ironically, entrenching prison as ‘the last resort’ is the problem. Let me explain.

'Imprisonment as the last resort' embeds imprisonment as the default

For decades we have imagined that if only community alternatives to imprisonment could be sold as more credible than the use of imprisonment will fall (Tata 2018). It is a seductive logic. Yet instead what we have seen is increases in both community 'alternatives' and imprisonment, while the use of the fine has plummeted (Abei et al. 2015; Phelps 2013).

Although it sounds progressive, the prevailing approach that 'custody is a last resort' ends up meaning in practice that imprisonment becomes the default. When 'alternatives to prison' don't seem to work or seem credible, there is always prison. All other options have to prove themselves. Prison never has to prove itself. While non-custodial sentences and social services seem so stretched, imprisonment, on the other hand, appears as the credible fail-safe. As one judicial sentencer put it:

"really when I'm imposing short [prison] sentences, that's when we've run out of ideas!" (Scottish Government 2015b:128)

The language and mentality of imprisonment as 'the last resort' is a central problem. We need to relinquish it. Little will change unless and until we invert that thinking by beginning to specify certain circumstances and purposes as normally non-imprisonable.

Imprisonment and personal needs

Although it is uncomfortable for us to admit it, as a society prison continues to be used not because the seriousness of offending demands it, but because nothing else seems to be appropriate. We are using the expensive and harmful resource

of imprisonment in part to access welfare services. Many people end up in prison not because their offending demands imprisonment. They end up in prison because there does not appear to be anywhere else that can address their chronic physical, mental health, addiction, homelessness and other personal and social needs. The result is self-perpetuating: resources are sucked into the seemingly credible, robust and reliable option of imprisonment at the expense of community-based programmes which are made to appear as weak, unreliable and poorly explained.

One cannot blame individual judicial decision-makers for coming to the sincerely-held judgement that because the community-based services are so stretched the only way to address the needs of some individuals is to impose custody.

We need a public principle about what prison is not for.

My proposal is aimed at focusing our energies as a society on ending the use of imprisonment as the default option. We need a way to end the daily reality of people ending up in prison not because their offending requires it, but because there is nowhere else that seems able to take them.

'Last resort' has let successive governments off-the-hook: they are not required to provide the community justice and community services that are necessary, while prison numbers have continued to rise partly as a consequence. Instead, responsibility for the consequences of chronic needs and relatively minor offending is delegated to individual professionals who are presented with impossible choices. It is not their fault that they feel obliged to resort to prison when nothing else seems to be adequately resourced.

We need a change of discourse, a clear plan and target to get there. This of course requires radical change in our use of resources. To help focus ambition, I propose a two-part public principle to act as a target for a fundamental change of resourcing so that by (for example) 2040:

1. Imprisonment should be used specifically only where warranted by the seriousness of offending; and
2. Rehabilitation, self-improvement and other forms of personal help intended to address an individual's personal and social needs should be expressly excluded as grounds for recommending, suggesting and passing a custodial sentence. This allows prisons to do serious rehabilitative work with those whose offending demands they are there.

'Last resort' sounds progressive, but in fact it perpetuates the idea that prison is the back-up for community-based welfare services. We need to drop it and take prison off the table altogether for any citizen whose offending does not require it. Only then do we have a chance of seeing reinvestment in community justice and community services.

References

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