

July 2014



A PRESUMPTION AGAINST IMPRISONMENT

Social Order and Social Values



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Foreword

by the Rt Hon. the Lord Woolf

The publication of this Report is to be warmly welcomed. It should be read by anyone interested in the well-being of our criminal justice system. Its short length belies the importance of its contents. This importance is demonstrated by events over the last quarter century.

It was just over 24 years ago that a series of riots of unprecedented gravity erupted in English and Welsh prisons. They started on 1 April 1990. On 6 April 1990 I was appointed by the then Home Secretary, now Lord Waddington, to report on what happened during the six most serious riots, their causes and what should be done to prevent their repetition. Nine months later (in conjunction with Judge Stephen Tumim, the Chief Inspector of Prisons, for the second part) I delivered my report to the then Home Secretary, now Lord Baker.¹

I have had a deep interest in what is happening in our prison system ever since writing my report. Like many others, I have discovered that the effect of being totally immersed in what is happening within our prisons system, even for a limited period of time, is that you became addicted to what is happening in our prisons.

Today I am still addicted, notwithstanding that, periodically, I find that this addiction causes me acute exasperation. My exasperation arises because, since I delivered my report, there have been very promising developments from time to time within the prison system. They suggested that the system could be about to fulfil its long-standing potential to make a substantial contribution to achieving progress in the criminal justice system. Such developments could have assisted the system to

¹ Prison Disturbances April 1990 (Cm 1456; London: HMSO, 1991).

achieve its objective of protecting the public and to fulfil its role, which it summarised in its mission statement (in words that I paraphrase) as:

'serving the public by keeping in custody those committed by the courts, looking after them with humanity and helping them lead law-abiding and useful lives while they are in custody and after release.'

My hopes were initially raised after the delivery of my report. In Parliament, both the government and the opposition were in favour of the recommendations that the report made. There was, however, one exception. The government rejected the admittedly contrived recommendation aimed at controlling the number of persons in custody at any particular time by requiring a report to be sent to Parliament if the size of the prison population exceeded the number of prisoners the prisons were intended to accommodate.

The recommendation was important because it was the only method I was able to devise for placing some restriction (not prohibition) on the future size of the prison population, by limiting it to the designated capacity of the prison estate. During the inquiry it was accepted on all sides that overcrowding had been a cancer destroying the ability of the prison system to give effect to its mandate. The reason for this is that overcrowding makes it extremely difficult to take the actions that ensure offenders will return to the community less, and not more, likely to commit further offences. It also interferes with providing offenders in custody with humane conditions. These problems are then exacerbated by the lack of resources caused by the rise in costs of keeping and increasing the numbers of prisoners in custody.

While there were significant improvements in many aspects of the prison system following my report, this has not been the case with prisoner numbers. After an initial lull in the growth in numbers, the numbers have steadily climbed without any benefit to the safety of the public – apart, that is, from a most welcome reduction in the imprisonment of children and young people under the age of 18. At the date of the report, the size of the prison population was about 44,000 and falling while by 7 March 2014 it had increased to 84,738.

From time to time there has been legislation which, if implemented successfully, could have at least limited the expansion or even reduced the numbers. But any progress made has been limited in its effect and short-lived.

There has been no sustained effort by either of the principal political parties to tackle the causes of this growth; rather, supported by elements of the media, they have competed to demonstrate their toughness in response to crime rather than increasing their efforts to limit the numbers undergoing custodial sentences at any one time. One of the worst examples of the sort of inactivity I have in mind concerns those sentenced to indeterminate sentences. Some of those in custody in consequence of such sentences have been in prison much longer than was intended because the machinery to demonstrate that they should be released is so overstretched that it is incapable of dealing with their assessment in adequate time. This is a grave injustice that brings discredit to the justice system of this country.

It is sometimes said by politicians, in answer to criticism of the position of judges, that it is the judges who impose the sentences, not them. As the Chief Justice from 2000 to 2005 and the then Chairman of the Sentencing Guidance Council, I emphatically reject that criticism. The judges have to sentence the individual offender in accord with the framework set by Parliament. The framework has continuously been made more punitive. It is true that often the legislation deals only with a small number of offences, but the inflationary effect of an increase in a sentence, even as to a single offence, has an effect on the length of sentencing across the board. This is because, in deciding on a sentence for one offence, the judge has the task of finding the level of sentence which is just, both having regard to the facts of a particular offence and to sentencing for other offences as well.

Under my Chairmanship, the Council did try to counter these inflationary influences in the guidance we provided, but such efforts came under intense criticism from politicians, as well as the media, endangering the public's confidence in the Council. When devising guidance this reality had to be taken into account. The Council and the judiciary recognised that the public must have confidence in the level of sentencing and that to have failed to respond to the media as opposition could have resulted in damage. Though we appreciated that, it would be wrong to assume the public is in fact as punitive as some politicians and the press think.

Fortunately – and partly, I would like to think, due to the implementations of the recommendations contained in my report for security and control – the Prison Service's ability to deal with disturbances has greatly improved since the Strangeways riots. While there have been an increasing number of recent reports of ominous situations occurring in

prisons, control has always been able to be restored without anything happening approaching the scale of the riots 24 years ago.

What I have written so far describes the unfortunate background against which the value of this report must be considered. Many voices have previously drawn attention to the failures in policy that have occurred and to what could be done to alleviate the situation. We are fortunate in this country in having bodies with the greatest expertise in penal reform of any jurisdiction of which I am aware. Examples of these bodies are the Prison Reform Trust, which I now have the privilege of chairing, and the Howard League for Penal Reform. But their influence has not been as great as it should have been. What could produce improvements in the situation has been well known for years, but, regrettably, too little attention has been paid to this, and valuable opportunities to make the fundamental changes needed have been missed.

The tragedy is that the increase in the size of the prison population has not achieved an improvement in protection of the public, although in recent times there has been a pleasing reduction in the number of certain crimes. The cost of housing a population of prisoners of the present size is enormous, but, unfortunately, this has not resulted in the reduction in the use of imprisonment, even in the present stringent current financial climate.

The present government has recently proposed placing a new and much needed emphasis on the rehabilitation of offenders. The proposals are contained in the Offender Rehabilitation Act. If this proposal were to be implemented satisfactorily it could mark a significant change of direction, which would be a departure from past failures.

Rehabilitation of prisoners is critical because of the high percentage of offenders, particularly those who have shorter sentences and who, within a very short time of their release, are again before the courts, having committed further offences which are often graver than those that caused them to be imprisoned on a previous occasion.

However, the accepted wisdom is that it is extraordinarily difficult to produce anything positive from short periods in custody, and I am not alone in being concerned as to how this new emphasis on rehabilitation can be implemented successfully in the way proposed. Using short prison sentences as a gateway to rehabilitation may prove attractive to the courts, leading to further inflation of prison numbers as well as a

surge in recalls to custody. While I applaud the motives of the Ministry of Justice in promoting their reforms, I fear the fundamental changes to probation involved could cause irretrievable damage to the Probation Service. In addition, I fear there is a danger that the benefits it could offer will be lost in the heightened political controversy, which, on previous form, will overwhelm the debate on tougher sentences in the run-up to the next general election.

Instead of that controversy, what is needed is a re-examination of our penal policies as a whole and the development of a fresh approach that is outside politics. This is an achievement that this exceptional report could promote. All too often in the past, despite the best endeavours of the bodies committed to reform, their recommendations for change have been discounted as being the usual clamouring of the 'reformers'.

The present publication is different. It follows a joint forum of the British Academy and All Souls College, Oxford, in November 2012. It reflects a review of penal policy by a remarkably distinguished group of independent academics outside politics, looking at the subject afresh under the umbrella of the British Academy. It is the first comprehensive report from an eminent, neutral, national organisation addressing the debate about why and how we imprison so many and for so long, and it highlights why it is vital in the national interest that we reduce their number.

By coincidence, it starts by re-examining the developments over the last 24 years since my report, on which I have already set out my personal reflections. It then gives its independent views, identifies where it considers we have gone wrong and proposes a possible prescription for a cure for the future. Bearing in mind the eminence of its authors, surely its findings and its conclusions should receive the respect they deserve?

The timing of its publication should be peculiarly appropriate: the next general election is approaching and the precedents set by similar periods in the past is that political debate could well descend once again into a competition of claims and counter-claims, designed to demonstrate who can be toughest on crime, irrespective of the consequences in rising costs and an increase in offending.

Anything that can reduce the risks of this happening again, as an objective reading of this Report should, deserves to be given a most sympathetic reception. While some readers may not regard all the

recommendations it makes as amounting to a perfect antidote to all the present problems, I hope it will be agreed that it does provide an intelligent and objective assessment of what has gone wrong and the possible remedies; that it at least deserves to receive the widest possible attention and discussion. We cannot afford to continue to dissipate our resources in the present unconstructive manner. If anyone has any doubt about this, then this Report should expel such doubts. The lessons it spells out have to be learnt and relearnt.

Harry Woolf FBA (Hon)

June 2014

Executive Summary

Imprisonment is a very expensive practice. The financial cost to the public purse can be easily quantified. Alongside this sits a complex mix of further interdependent costs to which it is much harder to attribute a monetary value. These are the human costs faced by those who are imprisoned during their sentence and after their release; the costs faced by their dependents, family and friends; the costs faced by those who work in an increasingly pressured prison system; and the costs to society as a whole.

Data show that, over the last two decades, the use of imprisonment as a form of criminal punishment in England, Wales and Scotland has risen sharply. What is more, our reliance on imprisonment today is acutely out of line with other comparable Western European countries. We have, in a relatively short space of time, come to rely far more heavily than do many other countries on the use of custodial sentences as a means of punishing convicted offenders for their offences.

The urgent question therefore raised by this Report is whether we need to rely so heavily on imprisonment as a form of punishment. Do we need to imprison so many people, and to do so for such long periods of time? The Report argues that the answer is no.

Instead, we should presume that in the majority of cases a custodial sentence will not be appropriate – or, in keeping with the title of the Report, that we should operate with a presumption against imprisonment. We do not deny that in *some* cases sending a person to prison will be the most appropriate response to, and punishment for, the crimes that they have committed. But we make the case throughout the Report that this is not true in the majority of cases. Imprisonment should not be the default sentence handed down. We should instead seek to develop a clear framework for identifying the kinds of case in which imprisonment will be the appropriate sentence.

The Report is divided into three parts. The first of these – **Where We Are Now and How We Got Here** – looks at how prison policies and regimes in England and Wales and in Scotland have changed in the last two decades.

Policies have moved away from a view that ‘imprisonment can be an expensive way of making bad people worse’ to a belief that ‘prison works’. The impact on prison populations has been dramatic – the numbers almost doubled between 1992 and 2011 (rising from just under 45,000 to 88,179), despite decreasing crime levels. Statistics show that:

- the total prison population in 2013 was 84,000, up from 45,000 in 1992;
- the proportion of offenders sent to prison after conviction for an indictable offence has risen from one in seven to one in four;
- of those sentenced, a greater proportion are serving long or indeterminate sentences;
- similar trends have been seen in Scotland, despite policies to reduce imprisonment and to prevent sentences of less than three months.

Part I also looks at some of the factors behind our increasing use of imprisonment. Changes to criminal law and policy have seen progressively harsher sentencing regimes, with the introduction of cumulative sentencing, mandatory minimum sentences, indeterminate sentences and automatic life sentences.

There has been a move away from sentencing based on *proportionality*. At the same time, prison regimes now see more overcrowding and emphasise austerity and cost reduction rather than decency and rehabilitation. There are serious questions about both the effectiveness and the morality of this situation, especially given that a high proportion of prisoners face disadvantage or challenges, such as mental health or learning difficulties, abuse, homelessness, drug problems and unemployment. Meanwhile, the costs of imprisonment in England and Wales have doubled from £1.5 billion to nearly £3 billion in the last 20 years. This Report argues that non-custodial sentences and ‘justice reinvestment’ usually represent a more effective and a more efficient use of resources.

Public opinion and media pressure have had a major influence on penal policy, with politicians often competing to appear tough on law and order to win votes. However, whilst opinion polls may suggest that the

public typically think sentencing is too soft – perhaps linked to a climate of perceived threat in a state where ‘security’ is becoming a dominant theme – those exposed to real cases often find sentencing levels to be appropriate or even too harsh.

Even in Scotland, the government has in recent years found it difficult to achieve its aim of reducing reliance on imprisonment. A policy to avoid sentences of less than three months appears to have contributed to a rise in slightly longer sentences.

The aim of **Part II – Why Our Imprisonment Policies Should Change** – is to set out a series of theoretical, moral and political arguments as to why we should, as a matter of urgency, reduce our reliance on imprisonment and in so doing reduce the number of people in prison. It examines arguments demonstrating how hard it is to justify the use of imprisonment as a form of punishment. It sets this in the context of a prison system under increasing strain, for example through overcrowding; changes in the demographic, socio-economic and faith profiles of the prison population; and greater private sector delivery of Prison Services. All these elements have combined to put downward pressure on quality and the ultimate delivery of successful long-term outcomes for convicted offenders, staff and society as a whole.

Part II then takes brief note of some familiar kinds of argument that aim to show that imprisonment does not return enough benefit to justify the high costs of the system—the *financial, material, social* and *psychological* costs that are imposed on prisoners, their families, those who work in the system and our whole society. Such arguments, which are grounded in detailed empirical research into the effects – both the costs and the benefits – of imprisonment, suggest that imprisonment is rarely an efficient or cost-effective means to achieving the aims of a system of criminal justice, whether those aims are understood as the imposition of ‘just deserts’ on offenders, as deterring future crime, as rehabilitation or reform, or as incapacitation: other methods of responding to crime, other non-custodial forms of punishment, can often achieve what prison is supposed to achieve more effectively and at lower cost.

However, the main aim of Part II is not to rehearse such arguments about costs and benefits but to develop a different kind of argument, one that appeals not to empirical evidence about the effects of imprisonment but to a set of fundamental social and political values – liberty, autonomy, solidarity, dignity, inclusion and security – that penal policy

should support and uphold rather than undermine. Such values should guide our treatment of all citizens, including those convicted of criminal offences: we should behave towards offenders not as outsiders who have no stake in society and its values but as citizens whose treatment must reflect the fundamental values of our society (a society in which, even if offenders have been imprisoned, they must find a meaningful life). It is, however, very hard to see how our current use of imprisonment could be said to reflect these social values, or such a recognition of those whom we imprison as fellow members of our political society who must be treated consistently with its defining values.

This line of argument about the fundamental social values that should structure our penal policies, and about the implications of those values for the use of imprisonment, should persuade us that we ought not to rely on imprisonment as a punishment as heavily as we now do; we should instead operate with a strong presumption against imprisonment. That presumption can certainly be rebutted: sometimes imprisonment is an appropriate or necessary sentence. But it should not be easily overcome: in many cases we should find other ways of responding to the criminal conduct of offenders who are currently sentenced to imprisonment.

Finally, **Part III – Strategies for Reducing the Prison Population** – explores some ways in which a presumption against imprisonment could be given practical force and could thus help to reduce our excessive reliance on imprisonment. It argues that real change will not be brought about solely by changes to the sentencing system. The appropriate social and political conditions also need to be in place, if change is not to be short-lived. Three overarching issues arise:

- policymaking needs to take place in a longer-term context, with greater separation of sentencing policy from the political process;
- respect for criminal justice expertise needs to be rebuilt, with aspects of policy assigned to representative and expert institutions; and
- changes must cover the whole criminal justice system (not only the use of imprisonment) and make links to wider areas such as health, education, employment and social services.

With these issues addressed, a range of strategies could be applied to reduce reliance on imprisonment and put a presumption against it into force. Six key strategies are discussed:

1. Using diversion from the courts more extensively
2. Promoting greater use of alternative forms of sentence
3. Prohibiting or restricting the imposition of short custodial sentences
4. Removing or restricting the sanction of imprisonment for certain offences
5. Reviewing sentence lengths
6. Removing mentally disordered and addicted persons from prisons

All six strategies address the problem directly, but each strategy raises challenges. These include tests of political resolve, tests of the authority of the legislature and the Sentencing Council, and the need to consider the criminal justice system as a whole, not just the sentencing system. However, if implemented, the strategies would strike powerful blows for justice and humanity and lead to a substantial reduction in prison numbers.

The Report makes specific proposals associated with each of the six strategies (see box below). In addition, we outline three further proposals. These relate to the situation of prisoners facing indeterminate sentences of Imprisonment for Public Protection (IPP) and to institutional developments to facilitate change, such as mechanisms for reviewing sentencing and reducing the degree of politicisation involved. One example is the creation of a Penal Policy Committee, which would combine wide representation and expertise and distance sentencing decisions from day-to-day political and media pressures.

Specific Proposals for Change

Proposals linked to the six strategies for reducing the prison population

- i) Introduce a presumption that low-level offenders be dealt with out of court.
- ii) Deal with more offenders by means of financial penalties and community-based sanctions rather than incarceration.
- iii) Prohibit courts from imposing prison sentences below a certain length; *or* Create a presumption against imposing such a sentence unless there are exceptional circumstances (instead, courts would be required to impose either a suspended custodial sentence or a community sentence).
- iv) Remove imprisonment as the maximum penalty for certain of-

fences, or whole categories of offences, altogether.

- v) Review sentence lengths in relation to those of other European countries, including maximum penalties and mandatory minimum sentences, and for murder and drug offences.
- vi) Remove mentally disordered offenders, offenders with learning difficulties and those suffering from drug or alcohol addiction from prison, through investment in and transfer to more appropriate facilities, treatment and rehabilitation.

Overarching institutional proposals

- vii) Consider the introduction of a new Penal Policy Committee.
- viii) Urgently review the case of each IPP prisoner who has served the minimum term, with a view to release.
- ix) Mandate the Sentencing Council to take a fresh look at its statutory duties and powers in relation to the costs and the effectiveness of different forms of sentence.

Implementation of these proposals would better integrate the values of liberty and public safety. It would mean that fewer people are imprisoned and that fewer people receive very lengthy sentences. The financial and human costs to individuals and wider society would be reduced both in absolute terms and in a way that that is consistent with the values of the liberal, cohesive and inclusive society in which we wish to live.

Introduction

A Presumption Against Imprisonment

Imprisonment is a very expensive practice. Its financial costs are enormous: England and Wales spent just under £3 billion on prisons in the financial year 2012–13, Scotland just over £350 million. The cost per prison place per year (depending on what is included in the calculation) is between £35,000 and £40,000.¹ Its human costs, although not quantifiable in this way, are also enormous: they include the costs imposed on those who are imprisoned, both while they serve their sentences and as they try to rebuild their lives after release; the costs imposed on the dependants, families and friends of those imprisoned; and the costs to those who administer and work in the system, facing increasing challenges and pressures. Costs also extend to society as a whole, arising from the effects of imprisonment on the future welfare and conduct of those who have been imprisoned.

Yet imprisonment is a practice of which we have been making increasing use during the last two decades. In England and Wales, the prison population of over 83,500 in 2013 was nearly double that of 1992. Scotland has also seen a similar, if less steep, rise. The details of this growth are included in Part I of this Report. Our present reliance on imprisonment is thus sharply out of line not only with other, apparently comparable, countries in Western Europe (Germany and Sweden, to name just two),² but with our own practice only two decades ago.

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- 1 Recent figures can be found in *National Offender Management Service Annual Report and Accounts 2012–13* (HC 265; London: HMSO, 2013) and the *Scottish Prison Service Annual Report and Accounts 2012–13* (SG/2013/102; Edinburgh: Scottish Prison Service, 2013). Further details of all the statistics in the Introduction are given in Part I of this Report.
 - 2 See e.g. comparative table in R. Allen, *Reducing the Use of Imprisonment: What Can We Learn from Europe?* (London: Criminal Justice Alliance, 2012), 5.

These bare figures, considered in the light of the human and financial costs of imprisonment, raise an urgent question: do we need to rely so heavily – so much more heavily than we used to, so much more heavily than our European neighbours – on imprisonment as a punishment? Do we need to imprison so many people, and to imprison some of them for such long periods of time? This Report argues that we do not need to and should not do so. We should, instead, operate with a presumption against imprisonment as a sentence, and work to develop a clear account of the limited range of cases in which it is appropriate. By making such a presumption effective, we will reduce the prison population significantly. Fewer people will be imprisoned, and fewer will receive very lengthy prison sentences.

This argument is, of course, far from new. It is one that some government ministers have seemed ready to accept. In just one recent instance, when Kenneth Clarke became Justice Minister in the new Coalition Government in 2010, he asked ‘why is the prison population twice what it was when I was the home secretary not so very long ago?’ (in 1992), and committed the government to a serious review of sentencing policies. He noted ‘[i]t’s not to be soft on sentencing, it’s to be sensible on sentencing, and bear in mind everybody who is sent to prison costs more than it costs to send a boy to Eton’.³

There have been several papers and reports in the last few years that have made very persuasive cases, backed by a wealth of evidence, for just that conclusion. They include, to mention a few: *Scotland’s Choice, the Report of the Scottish Prisons Commission*;⁴ *Do Better Do Less: Report of the Commission on English Prisons Today*;⁵ *Reducing the Numbers in Custody: Looking Beyond Criminal Justice Solutions*, by Helen Mills and Rebecca Roberts for the Centre for Crime and Justice Studies;⁶ and *Intelligent Justice*, from the Howard League.⁷ So why are

3 In an interview with Sky News in June 2010, reported at <http://www.theguardian.com/society/2010/jun/14/ken-clarke-prison-sentencing>.

4 Edinburgh: Scottish Prisons Commission, 2008.

5 London: Howard League for Penal Reform, 2009.

6 London: Centre for Crime and Justice Studies, 2012.

7 M. Hough, S. Farrall and F. McNeill, *Intelligent Justice: Balancing the Effects of Community Sentences and Custody* (London: Howard League for Penal Reform, 2013). There have also been significant reports on conditions within prisons, especially for women prisoners: see Baroness Corston, *Review of Women with Particular Vulnerabilities in the Criminal Justice System* (London: Home Office, 2007); Dame E. Angiolini, *Commission on Women Offenders* (Scottish Government, 2012).

we adding yet another report to this list, arguing yet again, as so many have argued before, that we should find ways of reducing our prison population?

Part of the answer to this question is simply that, on an issue of such importance, it is worth adding one more voice to the debate, in the hope that it will add further weight to the argument and so help in the inevitably slow and arduous process of changing public and political thinking about the use of imprisonment. But the Report also offers something new: a combination of statistical and contextual analysis, reasoned argument based on societal values and practical strategies and measures to bring about change. It is arranged in three parts.

Part I provides a concise summary of the relevant statistics and an overview of developments in prison policy and practice over the last two decades. It traces the rise in the prison population, in England and Wales, and in Scotland; identifies key features of that rise and the various changes in political policy (and some wider social factors) that help to explain it; and notes the ways in which conditions within our prisons have deteriorated during that time. This part of the Report thus offers an overview of where we are now in our use of imprisonment and of how we got here.

Part II outlines a social, moral and political argument to show why this is not a position in which we should be willing to remain – why we should, as a matter of urgency, try to reduce our reliance on imprisonment and thus reduce the numbers in our prisons. Arguments about the use of imprisonment are often grounded in empirical research into its effects – its costs and benefits: the most familiar arguments against relying on imprisonment as heavily as we now do are to the effect that imprisonment cannot be shown to bring benefits (most obviously by way of crime prevention) that are sufficient to outweigh its undoubted costs; or that it is not, when compared with other available ways of responding to or preventing crime, a cost-effective way of pursuing the aims of a system of criminal justice. The Report takes note of such arguments and provides references to some of the empirical research in which they are grounded, but it does not discuss them in any detail; they have already been developed in plausible depth and detail by others – in some of the other reports noted above and in the research cited in Part II.2 of this Report. Instead, Part II goes on to develop a different kind of argument, which does not depend on the quantifiable costs and benefits of imprisonment or on empirical evidence about its efficiency as a means of preventing crime.

The central argument of Part II rests instead on an appeal to a set of political values that already claim widespread acceptance in a liberal democracy of the kind that Britain aspires to be, values such as *liberty, autonomy, solidarity, dignity, inclusion and security*. If we think about the implications of such values in relation to the ways in which we treat those who commit criminal offences, we argue, we will see that they render imprisonment morally and socially problematic as a way of responding to crime and should lead us to operate with a presumption against the use of imprisonment. This presumption can of course be rebutted. Imprisonment is appropriate, and necessary, as a punishment for some kinds of crime. Sometimes it is the only way in which the wrong done to the crime's victim, and to our society as a whole, can be adequately addressed. But it should not be easily or quickly rebutted – and certainly not as quickly and easily as it seems to be in our existing system of criminal justice.

Part III discusses six strategies that, if applied, would allow us to make a presumption against imprisonment effective and in so doing help to constrain our use of imprisonment. The strategies are of three types:

- i) those that involve *identifying the kinds of case in which the presumption is not rebutted* and should remain operative – in other words identifying those cases in which imprisonment should be deemed an inappropriate form of punishment;
- ii) those that involve *identifying the kinds of case in which the presumption against imprisonment has not been taken seriously enough*, in particular in relation to sentence lengths;
- iii) those that will help us to *avoid being led to premature decisions that the presumption is rebutted* – in other words, too quickly assuming that imprisonment is the necessary punishment for the crime that has been committed.

Part III sets out specific proposals associated with these six strategies and also in relation to overcoming some of the wider obstacles that stand in the way of change. It does not offer a detailed blueprint for penal reform – that task lies well beyond the scope of this brief Report. But it does show how we can begin to give some concrete effect to the argument of Part II—how we can begin on the urgent task of reducing our reliance on imprisonment as a mode of punishment and thus reduce the various harms which flow from that reliance.

A brief word should be said about the scope of the Report. It deals, in Part I, with changes in the use of imprisonment in England and Wales,

and in Scotland, over the last 20 years (it does not deal with Northern Ireland, whose recent history gave prison policy and practice a distinctive character), and the arguments offered in Part II apply equally to both systems. Given the differences between the systems, however, it would have been difficult to formulate determinate strategies that could be equally applied to both systems: some of the proposals in Part III are, accordingly, more directly appropriate for England and Wales than they are for Scotland; it will be a further task to translate them into the Scottish context.

Part I

Where We Are Now and How We Got Here

Part I: Summary

Imprisonment regimes in England and Wales, and in Scotland, have changed considerably since 1992. Policies have moved away from a view that 'imprisonment can be an expensive way of making bad people worse' to a belief that 'prison works'. The impact on prison populations has been dramatic: the numbers doubled between 1992 and 2011, despite decreasing crime levels.

Section 1 charts statistical trends in imprisonment. Those include:

- An increase in the total prison population from 45,000 in 1992 to 84,000 in 2013
- A rise in the proportion of offenders sent to prison after conviction for an indictable offence from one in seven to one in four
- An increase among those sentenced to serving long or indeterminate sentences

Similar, if less steep, trends have taken place in Scotland, despite policies to reduce imprisonment and sentences of less than three months.

Sections 2 to 7 examine those changes and factors associated with these increasing rates of imprisonment.

Section 2 looks at key changes to criminal law and policy and the shift of focus from *proportionate* sentencing to *public safety*. In practice that has meant harsher sentences and the introduction of cumulative sentencing, mandatory minimum sentences, indeterminate sentences and automatic life sentences.

Section 3 focuses on conditions within prisons. The prison population is highly skewed towards those who face disadvantage or challenges,

such as mental health or learning difficulties, abuse, homelessness, drug problems and unemployment. However, prison regimes now see more overcrowding and emphasise austerity and cost rather than decency and rehabilitation.

Section 4 analyses financial costs. Over the last 20 years, the sums spent on imprisonment in England and Wales have almost doubled from £1.5 billion to nearly £3 billion. Non-custodial sentences and ‘justice reinvestment’ may be a more efficient use of resources.

Section 5 attends to the role of public opinion and media pressure in penal policy. Whilst opinion polls suggest that the public think that sentencing is too soft, those exposed to real cases often find sentencing levels to be appropriate or even too harsh.

Section 6 notes wider social factors that may have had an impact on changing trends, such as a shift of focus from *rights* in a ‘constitutional state’ to perceived *threats* under a ‘security state’.

Section 7 covers distinctive developments in Scotland. The *Scotland’s Choice* report sought to reduce reliance on imprisonment; it remains to be seen whether this will be achieved.

Introduction

1. Part I of the Report analyses changes in the use and practice of imprisonment in England and Wales, and in Scotland, since 1992.¹ That year is a convenient starting point, since it saw the implementation of the Criminal Justice Act 1991, which marked the high point of an approach that sought to limit the use of imprisonment as a sentence. The White Paper which preceded the legislation famously claimed that ‘imprisonment can be an expensive way of making bad people worse’,² and the Act aimed to create a framework for sentencing based on proportionality.

2. The early 1990s saw grounds for optimism in relation to the practice and use of imprisonment. Lord Woolf’s report on the 1990 disturbances at Strangeways Prison contained a raft of recommendations for reforming the prison system, all but one of which were accepted by the

1 Responsibility for Welsh policing and criminal justice still lies with the Westminster government. Scotland took responsibility for its own criminal policy after devolution in 1998.

2 Home Office, *Crime, Justice and Protecting the Public: The Government’s Proposals for Legislation* (Cmd 965; London: HMSO, 1990), para. 2.7.

government.³ However, expectations that the numbers of people sent to prison would fall and that conditions in prison would be transformed were disappointed.

3. The use of imprisonment, far from falling, increased dramatically. The average prison population in England and Wales almost doubled from just under 45,000 in 1992,⁴ to a peak of 88,179 in December 2011,⁵ before falling back to around 84,000 in June 2013.⁶ In Scotland the prison population rose from around 5,250 in 1992,⁷ to nearly 8,200 in 2011–12⁸ – a rise of 56%. At the beginning of 2014, it had fallen back slightly to 7,800.⁹ We will present more detailed figures on the changing prison population later in this Part of the Report.

4. This increase in numbers reflected changes in penal policy that began in 1993, expressed in the often repeated mantra of the then Home Secretary, Michael Howard, that: ‘prison works’ in preventing crime.¹⁰ That philosophy continued to shape policy under the Labour governments that held power from 1997 to 2010. The Coalition Government formed in 2010 promised a more measured approach to penal policy, and the prison population in England and Wales fell between 2011 and 2013. But some of the policies that the government initially proposed to reduce the use of imprisonment have since been watered down or abandoned.¹¹ Thus in a speech in October 2012, the Prime Minister insisted that:

3 Lord Justice Woolf, *Prison Disturbances April 1990* (Cmd 1456; London: HMSO, 1991); Home Office, *Custody, Care and Justice: The Way Ahead for the Prison Service in England and Wales* (Cmd 1647; London: HMSO, 1991).

4 Home Office, *Prison Statistics: England and Wales 2002* (Cm. 5996; London: HMSO, 2003), 16; <http://www.archive2.official-documents.co.uk/document/cm59/5996/5996.pdf>.

5 Ministry of Justice, *Prison Population Bulletin 09 December 2011*; <https://www.gov.uk/government/publications/prison-population-2011>.

6 G. Berman and A. Dar, *Prison Population Statistics* (SN/SG/4334; London: House of Commons Library, 2013); <http://www.parliament.uk/briefing-papers/SN04334>, 3.

7 *World Prison Brief*, <http://www.prisonstudies.org/country/united-kingdom-scotland>.

8 <http://www.scotland.gov.uk/Topics/statistics/Browse/Crime-Justice/Trend/Pris>.

9 *World Prison Brief*, <http://www.prisonstudies.org/country/united-kingdom-scotland>. For more details, see paras 17–20 below.

10 See e.g. the comment in 2010 by Theresa May, the Home Secretary, that ‘prison works, but it must be made to work better’: <http://www.telegraph.co.uk/news/uknews/law-and-order/8201914/Prison-works-says-Home-Secretary.html>.

11 For just one instance, the proposal to increase the sentencing discount for early guilty pleas: *Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders* (Cm 7972; London: HMSO, 2010), para. 216.

*'For anyone sentenced to a spell in prison, there will be space in prison. There will be no arbitrary targets for our prison population. The number of people behind bars will not be about bunks available, it will be about how many people have committed serious crimes.'*¹²

5. Change in what happens inside prisons is less easy to measure than the use of imprisonment: we cannot easily assess whether prisons have become more or less punitive institutions over the last 20 years. The Woolf agenda played second fiddle to a renewed emphasis on security following serious incidents in the mid-1990s and to a political desire to create decent but austere conditions. Despite recent rhetoric about rehabilitation, future developments are likely to comprise sharp reductions in resources, greater privatisation and untested funding methods. Chris Grayling, the current Justice Secretary, has talked of creating prisons that are 'spartan but humane'.¹³

6. The remainder of this Part of the Report is divided into seven sections, as detailed in the summary above.

Section 1: Statistical Overview

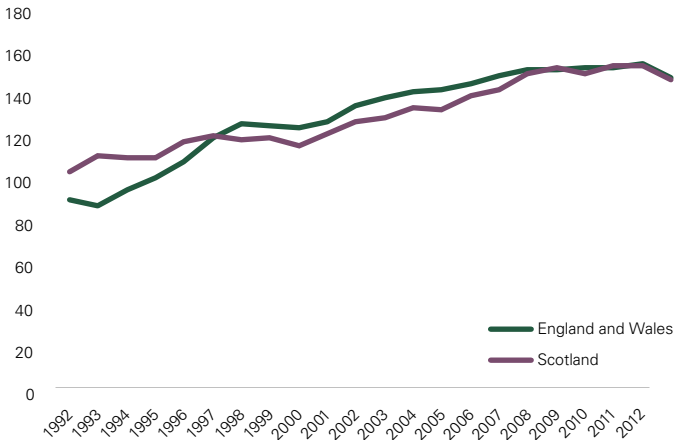
7. *Chart 1* shows how the overall rate of imprisonment in England and Wales rose from 90 prisoners per 100,000 population in 1992, to 148 per 100,000 in 2013.¹⁴ The rate was very similar in Scotland by 2013, but the rise less steep as Scotland started from a higher 1992 baseline (see further para. 17 below).

12 22 October 2012; <https://www.gov.uk/government/speeches/crime-and-justice-speech>.

13 *Mail on Sunday*, 2nd February 2013: 'Criminals face new "spartan prisons" Justice Secretary plans tough regime with uniforms, no Sky TV and less pocket money'.

14 International Centre for Prison Studies, *World Prison Brief*. <http://www.prisonstudies.org/world-prison-brief>.

Chart 1: Proportion of population in prison (prisoners per 100,000) in England and Wales and in Scotland, 1992–2013



(Source: International Centre for Prison Studies)

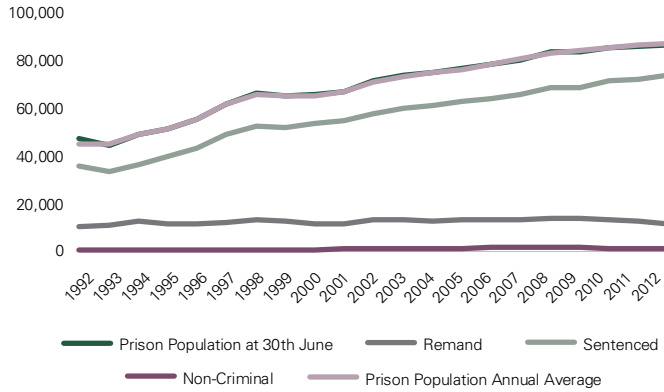
In the following paragraphs, we deal separately with developments in England and Wales, and in Scotland.

a) England and Wales

8. *Chart 2* illustrates how the rise has been driven in large part by the number of sentenced prisoners. The numbers in prison on remand have risen by less than 10% since 1992 (from 10,404 to 11,324), while the number of sentenced prisoners has more than doubled (from 35,564 to 73,562). Non-criminal prisoners have shown an even greater proportionate increase, but the numbers are very small, rising from 363 to 1,162.¹⁵

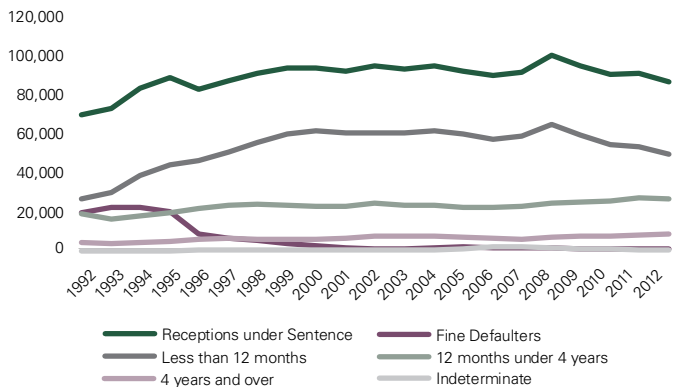
15 All Statistics from Ministry of Justice and Home Office Statistical Publications: data for 1992–2002 in Home Office, *Prison Statistics: England and Wales 2002* (Cm. 5996; London: HMSO, 2003), <http://www.archive2.official-documents.co.uk/document/cm59/5996/5996.pdf>; data for 2002–2012 in Offender Management Caseload Statistics 2012 Tables, <https://www.gov.uk/government/publications/offender-management-statistics-quarterly-2>.

Chart 2: Changes in the composition of the prison population in England and Wales 1992–2012



9. *Chart 3* shows that the number of people entering prison each year has also risen over this period, but less sharply than the population in prison on any one day. 86,479 people were received into prison under sentence in 2012 – almost 25% more than in 1992. The peak year for sentenced receptions was 2008, when more than 100,000 people were sentenced to prison – 44% more than in 1992. The higher increase in the prison population as a whole reflects the greater numbers serving long or indeterminate prison sentences (see para. 12 below).

Chart 3: Numbers of receptions into prison by types and lengths of sentence, 1992–2012



10. The increase in prison sentences does not reflect in any direct way an increase either in crime or in the numbers of offenders being sentenced by the courts. Crimes recorded by the police and measured by the *Crime Survey for England and Wales* (CSEW) peaked in 1995, and have fallen since then – the total of 8.9 million incidents estimated by the CSEW to have taken place in 2012 is less than 50% of the number in 1995.¹⁶ The sharpest fall has been in the number of property offences, but violent offences have also decreased significantly.

11. The number of offenders sentenced by the courts has actually fallen in the last 20 years – 1.52 million were sentenced in 1992, and 1.23 million in 2012.¹⁷ However, one of the main reasons for the increase in imprisonment is that courts are now much more likely to sentence offenders to prison. In 1992 just under one in seven offenders convicted of indictable offences went to prison. In 2012 it was more than one in four. The main change occurred between 1992 and 2002, when the custodial sentencing rate leapt from 5% to 15% in the magistrates' courts, and from 44% to 63% in the Crown Court. Since 2002 the rate has been fairly stable.¹⁸

12. Another reason for the increased prison population is that prison sentences have been getting longer. The average length of determinate sentences increased from 12.6 months in 2002 to 14.8 months in 2013.¹⁹ There has also been a steady increase in the number of prisoners serving life or indeterminate sentences. Indeterminate sentences of Imprisonment for Public Protection (IPPs) were introduced in 2005 and could be imposed on those who had committed serious offences if the court judged that there was 'a significant risk to members of the public of serious harm occasioned by the commission by [them] of

16 Office for National Statistics, *Statistical Bulletin: Crime in England and Wales, Year Ending December 2012*; <http://www.ons.gov.uk/ons/rel/crime-stats/crime-statistics/period-ending-december-2012/stb-crime-in-england-and-wales-year-ending-december-2012.html>.

17 For 1992, see <http://www.official-documents.gov.uk/document/cm24/2410/2410.pdf>; for 2012, see <https://www.gov.uk/government/publications/criminal-justice-statistics-quarterly-update-to-december-2012>.

18 See Criminal Justice Alliance, *Crowded Out? The Impact of Prison Overcrowding on Rehabilitation*, 2012; Ministry of Justice, *Story of the Prison Population: 1993-2012 England and Wales* (2013); https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/163144/story-prison-population.pdf.pdf.

19 Ministry of Justice, Criminal Justice Statistics, June 2013, Sentencing Tables, Table Q1.2; <https://www.gov.uk/government/publications/criminal-justice-statistics-quarterly-june-2013>

further specified offences'.²⁰ Following this change the proportion of the sentenced prison population serving indeterminate sentences rose from 8% in 1992 to almost 19% in 2012,²¹ an increase from 3,000 to nearly 14,000. The number serving life sentences increased from 3,000 to 7,576 over the same period.²²

13. According to the Ministry of Justice, these increases in the number and length of prison sentences are explained partly by the fact that 'cases coming before the courts are becoming more serious', especially offences of violence, drug offences and sexual offences; and partly by 'tougher sentencing and enforcement outcomes'.²³ Given the wide range of offences that fall into these three categories, more detailed analysis than is currently available would be needed before the first claim could be assessed. As for 'enforcement outcomes', the number of those recalled to prison for breaking the conditions of their release increased by 5,300 (5,400%) between 1993 and 2012,²⁴ and the number of people received into custody for failing to comply with the terms of a community sentence ('breaches') grew by 800 (470%) between 1995 and 2009.²⁵

14. It is also possible that some of the increase in the number of prison sentences is due to the increasing number of criminal offences. A frequently cited newspaper report alleged that the Labour Governments created 3,000 new offences, half of them imprisonable, between 1997 and 2007.²⁶ More recent research by Chalmers and Leverick suggests that this may have been a significant underestimate: they identified 1,235 offences applicable to England created in the first year of the Labour Government elected in 1997, and 634 such offences created in

20 Criminal Justice Act 2003, ch. 5. Under the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (ss. 122-8), IPPs were replaced by new life or extended sentences for 'dangerous' offenders.

21 Ministry of Justice, *Offender Management Statistics Quarterly Bulletin January to March 2012, England and Wales*, (2012); *Story of the Prison Population: 1993-2012 England and Wales* (n. 18 above).

22 Ministry of Justice and Home Office Statistical Publications (see n. 15 above): Prison Statistics 2002, Table 5.2; Ministry of Justice, *Offender Management Statistics Quarterly Bulletin January to March 2012, England and Wales*, (2012), 9.

23 *Story of the Prison Population: 1993-2012 England and Wales* (n. 18 above).

24 *Ibid.*

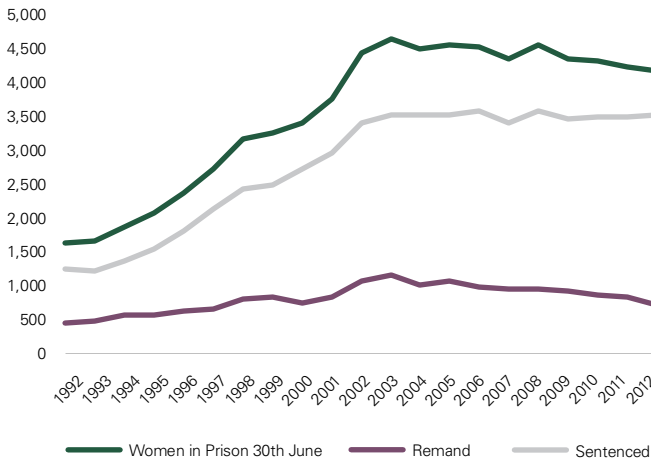
25 *Story of the Prison Population: 1995- 2009* http://www.insidetime.org/resources/Prison_Population/story-prison-population_moj-2009.pdf (separate numbers are not available after 2009).

26 N. Morris, 'Blair's "Frenzied Law Making": A New Offence for Every Day Spent in Office', *The Independent*, 16 August 2006.

the first year of the Coalition Government.²⁷ However, further research would be needed to find out how many convictions there have been for these new offences and how many convictions have led to imprisonment.

15. *Chart 4* shows that the number of women in prison rose particularly sharply after 1992, from just over 1,500 to over 4,500 in 2003. Since then the population has fallen slightly, to level off at just under 4,000.²⁸ A 2007 review by Baroness Corston concluded that there were many women in prison for whom prison is both disproportionate and inappropriate and argued that it was time 'to bring about a radical change in the way we treat women throughout the whole of the criminal justice system.'²⁹

Chart 4: Women in prison 1992–2012



27 J. Chalmers and F. Leverick, 'Tracking the Creation of Criminal Offences', *Criminal Law Review* (2013), 543; see also J. Chalmers, ' "Frenzied Law Making": Overcriminalization by Numbers', *Current Legal Problems* 67 (2014), 1.

28 Some 3,853 at the end of June 2013: Berman and Dar, n. 6 above, 8.

29 Baroness Jean Corston, *A Review of Women with Particular Vulnerabilities in the Criminal Justice System* (Home Office, 2007).

16. The number of juveniles under the age of 18 in custody rose sharply in the 1990s — from less than 1,500 in 1992 to more than 2,500 five years later.³⁰ This followed a decade of diversion that saw the juvenile custodial population halve in the 1980s.³¹ Following Labour's reforms in the late 1990s, numbers stabilised, then rose to over 3,000 during the street crime initiative in 2002.³² Numbers then fell rapidly from 2008 onwards, thanks to a large fall in the number of Detention and Training Orders being imposed. The reduction in the custodial population exceeded reductions in the numbers appearing before the courts. The custodial sentencing rate declined even when courts were dealing with a smaller quantum of more serious and persistent offenders who had not been diverted from prosecution.³³

b) Scotland

17. *Chart 5* shows that, as in England and Wales, the use of imprisonment has risen more or less continuously in Scotland since 1992, but less sharply. The average prison population in Scotland increased by 55% from 5,257 in 1992,³⁴ to 8,178 in 2011–12,³⁵ with a peak of 8,420 on 8 March 2012.³⁶ In 1992, the prison population rate was 103 per 100,000; by 2013 this had risen to 146 per 100,000.³⁷ As of 14 March 2014 there were 6,173 sentenced prisoners in Scottish prisons, 285 prisoners awaiting sentence or deportation, 81 recalled life prisoners and 1,281 prisoners on remand pending their trials: a total of 7,820.³⁸

30 R. Allen, *From Punishment to Problem Solving* (London: Centre for Crime and Justice Studies, 2006).

31 R. Allen, 'Out of Jail: The Reduction in the Use of Penal Custody for Male Juveniles 1981-88', *Howard Journal* 30 (1991), 30.

32 R. Allen, *From Punishment to Problem Solving* (London: Centre for Crime and Justice Studies, 2006).

33 R. Allen, *Last Resort? Exploring the Reduction in Child Imprisonment 2008-11* (London: Prison Reform Trust, 2011).

34 International Centre for Prison Studies, *World Prison Brief* (2013); <http://www.prisonstudies.org/country/united-kingdom-scotland>.

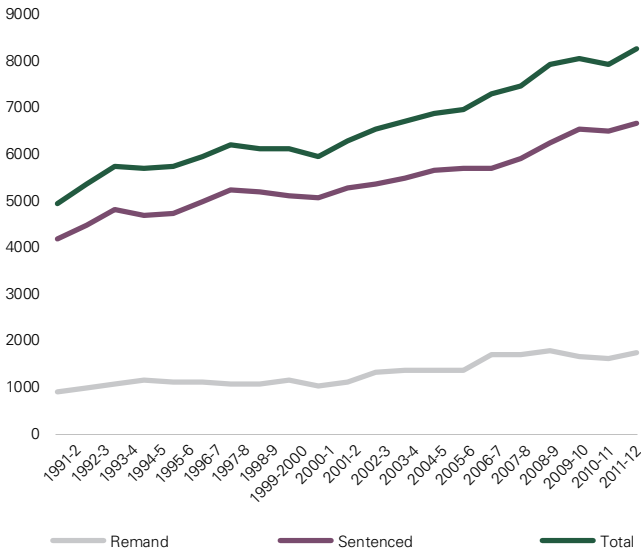
35 <http://www.scotland.gov.uk/Topics/Statistics/Browse/Crime-Justice/TrendPris>.

36 Berman and Dar, n. 6 above, 13.

37 *World Prison Brief*, n. 34 above.

38 <http://www.sps.gov.uk/Publications/ScottishPrisonPopulation.aspx>. Source of data in Chart 5 for 199–2000: Prison Statistics Scotland, CrJ/2001/10, <http://www.scotland.gov.uk/Publications/2001/11/10355/File-1>; for 2002–12: Prison statistics and population projections Scotland: 2011–12, Table A.1, <http://www.scotland.gov.uk/Publications/2012/06/6972/7>.

Chart 5: Average prison population in Scotland 1991/2–2011/12



18. As a proportion of all sentences, the use of custody increased from 8% in 1991 to 15% in 2011–12. The average length of determinate custodial sentences rose from 210 days in 1992 to 284 days in 2011–12.³⁹

19. Scotland makes less use of long sentences than do England and Wales: of the 13,677 direct receptions into Scottish prisons under sentence in 2011–12, fewer than 5% involved sentences of four years or more as compared with 10% in England and Wales.⁴⁰ The SNP Government that came into power in 2007 has a policy of reducing the number of very short prison sentences, and in 2010 created a statutory presumption against prison sentences of up to three months.⁴¹ This produced a marked drop in such sentences, from 3,019 in 2010–11 (23% of all custodial sentences) to 2,311 in 2011–12 (17%).⁴² However,

39 <http://www.scotland.gov.uk/Resource/Doc/933/0104324.pdf>; <http://www.scotland.gov.uk/Resource/0043/00434185.pdf>; <http://www.scotland.gov.uk/Resource/Doc/933/0113787.pdf>.

40 <http://www.scotland.gov.uk/Resource/0039/00396363.pdf>; <https://www.gov.uk/government/publications/offender-management-statistics-quarterly-2> Table A2.1a: Receptions into prison establishments (1) by type of custody, sentence length, age group, 2003–2012.

41 Criminal Justice and Licensing (Scotland) Act 2010, s. 17.

42 Scottish Government, Prison Statistics 2011–12, Table A.13 (<http://www.scotland.gov.uk/Publications/2012/06/6972/downloads>).

the number of sentences of between three and six months also rose, from 2,909 (22%) to 3,307 (24%), as did the number of sentences of between six months and two years, from 5,519 (42%) to 6,209 (45%).⁴³ This suggests that courts may sometimes have imposed longer prison sentences rather than non-custodial sentences.⁴⁴

20. Trends in crime have been slightly different in the two jurisdictions. Police recorded that crime figures fell in Scotland during the 1990s and then rose in the mid-2000s, before falling again.⁴⁵ The proportion of Scottish Crime Survey respondents who were victims of one or more crimes has fallen steadily over the period.⁴⁶ The total number of offenders sentenced by the courts in Scotland fell during the 1990s from 176,000 in 1992 to 120,000 in 2000, but rose again to peak at 136,000 in 2006, before falling to 101,000 in 2012–13.⁴⁷ Convictions for violence, indecency and drug offences increased as a proportion of those convicted, but those for dishonesty and vandalism fell. Drugs convictions continued to rise.⁴⁸ There is some evidence that the increased use of prison reflects a greater number of more violent and drug-related offences coming before the courts.⁴⁹

Section 2: Key Changes in Criminal Law and Policy (England and Wales)⁵⁰

21. Our starting point for the story of changes to criminal justice policy is the Criminal Justice Act 1991 (the Annex chronologically lists key policy

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- 43 Ibid. The Scottish government has not released figures on the relevant sentencing trends since June 2012.
- 44 See Scottish Parliament, Question S4W-13083, answered 7th March 2013. However, a similar pattern was seen in 2004–5 and again in 2008–9; if there has been some displacement, its causes will need careful examination.
- 45 <http://www.scotland.gov.uk/Topics/Statistics/Browse/Crime-Justice/PubRecordedCrime>.
- 46 <http://www.scotland.gov.uk/Topics/Statistics/Browse/Crime-Justice/crime-and-justice-survey/publications>.
- 47 <http://www.scotland.gov.uk/Topics/Statistics/Browse/Crime-Justice/PubCriminalProceedings>.
- 48 <http://www.scotland.gov.uk/Publications/2013/11/2711/4#table4b>.
- 49 A. Millie, J. Tombs and M. Hough, 'Borderline Sentencing: A Comparison of Sentencers' Decision Making in England and Wales, and Scotland', *Criminology and Criminal Justice* 7 (2007), 243.
- 50 See generally, A. J. Ashworth, *Sentencing and Criminal Justice* (5th edn; Cambridge: Cambridge University Press, 2010), ch. 9; D. Downes and R. Morgan, 'Overtaking on the Left: The Politics of Law and Order in the "Big Society"', in M. Maguire, R. Morgan and R. Reiner (eds.), *The Oxford Handbook of Criminology* (5th edn; Oxford: Oxford University Press, 2012), 182; A. Liebling and B. Crewe, 'Prison Life, Penal Power, and Prison Effects', in *ibid.*, 895; M. Cavadinio, J. Dignan and G. Mair, *The Penal System: An Introduction* (5th edn; London: Sage, 2013), ch. 6.

changes since then). The Act adopted proportionality as the key principle of sentencing. That meant that custodial sentences should be imposed only for offences 'so serious that only such a sentence can be justified for the offence' and should be 'commensurate with the seriousness of the offence'.⁵¹ However, the seriousness threshold for custodial sentences was never high,⁵² and the Act's provisions on previous convictions were short-lived.

22. The provisions of the 1991 Act were replaced by those of the Criminal Justice Act 1993. This promoted cumulative sentencing rather than progressive loss of mitigation, which was likely to increase both custody rates and sentence lengths for repeat offenders. The then government pressed ahead with the 'prison works' agenda, and the Crime (Sentences) Act 1997 led to the enactment of two mandatory minimum sentences, for burglary and for drug trafficking, and an automatic life sentence for a 'second serious offence'.⁵³ The Offensive Weapons Act 1996 had previously increased the maximum penalties for weapons offences.

23. The change of government in 1997 did not lead to a significant change of policy. The Crime (Sentences) Act was implemented, and in the Criminal Justice Act 2003 the new Labour Government introduced various policies designed to toughen the sentencing system. The dangerousness provisions in the Criminal Justice Act 2003 represent the high watermark of an approach to imprisonment based on keeping the public safe as 'the **first** duty of the criminal justice system, and the overriding priority of those working with offenders'.⁵⁴ Such an approach threatens to further undermine proportionality as a determinant of, or constraint on, sentencing.⁵⁵

24. The 1997 Act introduced the indeterminate sentence of Imprisonment for Public Protection (IPP), which in practice extended to a much larger group

51 Ss. 1–2; see also Criminal Justice Act 2003, ss. 152–3.

52 See N. Padfield, 'Time to Bury the Custody Threshold?', *Criminal Law Review* (2011), 593.

53 A White Paper, *Protecting the Public Protecting the Public – The Government's Strategy on Crime in England and Wales* (Cm 3190; London: HMSO, 1996) had proposed such mandatory sentences.

54 Home Office, *A Five Year Strategy for Protecting the Public and Reducing Re-Offending* (Cm 6717; London: HMSO, 2006), 11; see also the Green Paper, *Justice for All* (Cm 5563; London: HMSO, 2002); P. Carter, *Managing Offenders, Reducing Crime: A New Approach* (London: Home Office Strategy Unit, 2003). (The Carter Report also recommended the creation of a unified National Offender Management Service; this was created in 2004.)

55 See G. Dingwall, 'Deserting Desert? Locating the Present Role of Retributivism in the Sentencing of Adult Offenders', *Howard Journal of Criminal Justice* 47 (2008), 400; J. Roberts and A. von Hirsch, 'Legislating Sentencing Principles: the Provisions of the Criminal Justice Act 2003 Relating to Sentencing Purposes and the Role of Previous Convictions', *Criminal Law Review* (2004), 639.

of offenders than had been provided for. The IPP sentence was amended by the Criminal Justice and Immigration Act 2008 to eliminate the mandatory element and to significantly reduce the number of offenders to which it applied. IPPs have now been replaced by new life or extended sentences for 'dangerous' offenders.⁵⁶ It remains to be seen what effect this will have on prison numbers or on the number of offenders serving very long sentences. We will comment in Part III on the need to make some provision for those still serving IPP sentences.

25. Another major policy in the Criminal Justice Act 2003 was the introduction of statutory starting points for the minimum term for life imprisonment for offenders sentenced for murder. These statutory starting points were considerably higher than previous practice, being set at 15 years, 30 years and whole life for different groups of murders. They have also been applied by the courts to increase starting points for manslaughter and for causing grievous bodily harm with intent.⁵⁷

26. The bodies that have produced sentencing guidelines – currently the Sentencing Council⁵⁸ – have generally sought to enshrine existing practice in their guidance rather than to change it. Some have argued that these guidelines might have had an inflationary impact because of their introduction in a climate of penal populism.⁵⁹ It remains unclear how much effect the guidelines have on sentencing practice, but the Sentencing Council is committed to monitoring this.⁶⁰

27. Sentencers sometimes suggest that harsher sentencing reflects the increasing seriousness of crimes coming before the courts; but the evidence is inconclusive.⁶¹ It is plausible that courts are seeing more offenders with long records, which in part reflects the growing number of offenders with drug and alcohol problems, which in turn might lead to

56 Legal Aid, Sentencing and Punishment of Offenders Act 2012, ss. 122–8.

57 See *Wood* [2010] 1 Cr. App. R. (S.) 6; *Attorney General's Reference No. 60 of 2009 (Appleby)* [2010] 2 Cr. App. R. (S.) 311; D. Jeremy, 'Sentencing Policy or Short-Term Expediency?', *Criminal Law Review* (2010), 593.

58 Historically this was the Sentencing Advisory Panel (which gave advice to the Court of Appeal from 1998 to 2003, and thereafter to the Sentencing Guidelines Council); the Sentencing Guidelines Council from 2003 to 2009; and the Sentencing Council from 2009.

59 Millie, Tombs and Hough, n. 49 above).

60 See Coroners and Justice Act 2009, s. 128; <http://sentencingcouncil.judiciary.gov.uk/research-and-analysis.htm>.

61 See M. Hough, J. Jacobson and A. Millie, *The Decision to Imprison* (London: Prison Reform Trust, 2003).

an increase in the number of more serious crimes. But the worsening nature of offending is likely to be 'at best a secondary explanation for the growth in the prison population'.⁶²

28. There have also been developments in non-custodial sentences. The use of fines has declined significantly in recent years, and community sentences were reorganised by the Criminal Justice Act 2003. There is now a single community order – the community sentence – and the court has a choice among 12 different requirements that it can impose. Curfews are among those requirements, and electronic monitoring is widely used to enforce them.⁶³ The suspended sentence of imprisonment was confined to exceptional cases by the Criminal Justice Act 1991, but it was reinstated by the Criminal Justice Act 2003 as a sentence with conditions. It is now very much more widely used,⁶⁴ and most breaches of suspended sentences lead to imprisonment.

Youth Justice

29. By contrast with the trend in imprisonment for adults, the number of juveniles under the age of 18 in custody has fallen dramatically, halving from 2,832 in January 2008 to 1,374 in January 2013. This is largely because of a reduction in the number of Detention and Training Orders (DTOs), the main custodial sentence for juveniles.⁶⁵ Several factors help to explain this reduction, including the removal of incentives for the police to bring minor cases into the formal youth justice system and the development of more informal responses to delinquency away from the courts. This has led to a marked fall in the number of first-time entrants to the youth justice system, although it is difficult to disentangle the extent to which this represents change in levels of crime or in the way children are dealt with, in particular by the police.⁶⁶

62 A. Millie, J. Jacobson and M. Hough, 'Understanding the Growth in the Prison Population in England and Wales', *Criminal Justice* 3 (2003), 369.

63 Since 1999, Home Detention Curfews have also been available to allow for the early release of short-term prisoners (the provisions are now governed by Criminal Justice Act 2003, s. 246).

64 In the 12 months ending June 2003, 2,040 (0.6%) of the 336,581 people sentenced for indictable offences received suspended sentences; in the 12 months ending June 2013, the figure was 30,420 (10.5%) out of 288,772: Sentencing Tables – June 2013, Table Q5b; <https://www.gov.uk/government/publications/criminal-justice-statistics-quarterly-june-2013>.

65 See Allen, n. 33 above; T. Bateman, 'Who Pulled the Plug?', *Youth Justice* 12 (2012), 136.

66 See R. Morgan and T. Newburn, 'Youth Crime and Justice: Rediscovering Devolution, Discretion, and Diversion?', in *The Oxford Handbook of Criminology* (n. 44 above), 490; also N. Padfield, R. Morgan and M. Maguire, 'Out of Court, Out of Sight? Criminal Sanctions and Non-judicial Decision-making', in *The Oxford Handbook of Criminology*, 955.

30. Courts have also been sentencing a smaller proportion of the juveniles who do appear before them to custody – 6.6% in 2011–12 compared with 7.9% in 2001–2.⁶⁷ This may have been due in part to legislative changes in the Criminal Justice and Immigration Act 2008 and a constructive guideline published by the Sentencing Guidelines Council in 2009.⁶⁸ But it also reflects a closer engagement between the Youth Justice Board and Youth Offending Teams and the courts, and the development of a shared view that custody should be used as a last resort. A variety of civil society initiatives, such as the Prison Reform Trust's *Out of Trouble* campaign, has also helped to instigate change. These initiatives have developed innovative ways of raising awareness of the problems involved in the use of custody for children nationally and locally and have provided technical assistance in areas with high rates of custodial sentencing.

Section 3: Inside Prison

31. The prison estate has expanded considerably over the last 20 years, and prisons have grown in size. The largest prison currently houses some 1,600 prisoners, and the Coalition Government has announced plans to build a new 'super-prison' in North Wales to house 2,000 prisoners. By 2013, some 15% of prisoners in England and Wales were held in 14 private prisons.⁶⁹ Privatisation has continued, with Sodexo taking over the running of HMP Northumberland in December 2013 (although plans to award a contract to Serco for the running of a cluster of prisons in South Yorkshire were called off in November 2013).

32. Overcrowding, described by Lord Woolf as the cancer of the system,⁷⁰ continues to affect many prisons. At the end of June 2013, more than half the prisons in England and Wales (69 out of 124) held numbers of prisoners in excess of their 'Certified Normal Accommodation' (CNA), the Prison Service's measure of 'the good, decent standard of accommodation that the Service aspires to provide all prisoners'.⁷¹

67 Youth Justice Statistics 2011-12. <https://www.gov.uk/government/publications/youth-justice-statistics-2011-12>

68 Sentencing Guidelines Council, *Overarching Principles – Sentencing Youths* (2009).

69 National Offender Management Service, Annual Report and Accounts 2012-13; <http://www.justice.gov.uk/downloads/publications/corporate-reports/noms/2013/noms-annual-report-accounts-2012-13.pdf>.

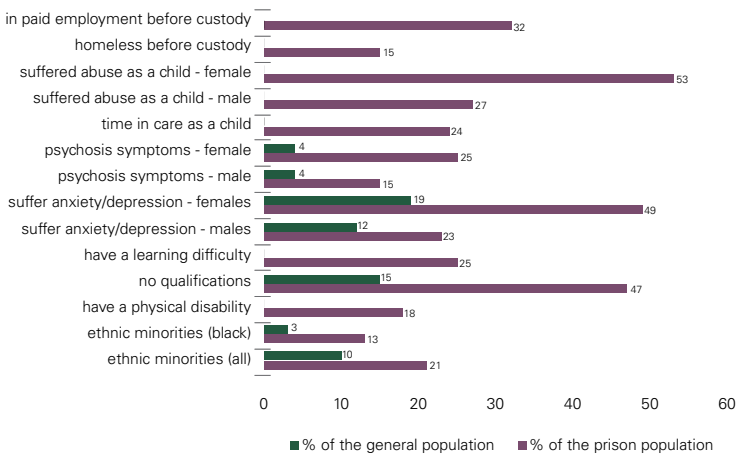
70 'Top Judge Attacks Prison Cancer', *Guardian*, 28 December 2000.

71 Ministry of Justice, *Prison Population Bulletin June 2013*; <https://www.gov.uk/government/publications/prison-population-figures>

During the financial year 2012–13, an average of around 19,000 prisoners were forced to share cells designed for one person. A further 777 prisoners were made to sleep three to a cell, when the cells were designed to accommodate only two.⁷²

33. The demographics of the prison population have changed little in the last 20 years, except for a growing proportion of prisoners over the age of 60 (the number more than doubled in the last ten years, to 3,471).⁷³ *Chart 6* shows how the prison population is skewed towards people from certain groups of the population and towards those who face disadvantage or challenges.⁷⁴ It shows comparisons with the general population where data are available.

Chart 6: Proportion of the prison population by group, conditions and characteristics



72 Howard League for Penal Reform, 'Revealed: The True Scale of Overcrowding in Prisons in England and Wales'; press release, 2 September 2013; <http://www.howardleague.org/true-scale-of-overcrowding/>.

73 Figures from Prison Reform Trust, *Prison: the Facts* (Bromley Briefings, Summer 2013; London: Prison Reform Trust, 2013; <http://www.prisonreformtrust.org.uk/Portals/0/Documents/Prisonthefacts.pdf>) and Berman and Dar, n. 6 above.

74 Notes on *Chart 6* terminology: Time in care as a child includes time with a foster parent or institution. Abuse as a child includes experience of emotional, physical or sexual abuse. Learning difficulties figure is for difficulties that interfere with their ability to cope with the criminal justice system, and the figure shown is the midpoint of an estimated range of 20–30%.

34. It is clear is that the prison population is not a typical cross-section of society. A very high proportion of prisoners face challenges or disadvantages of one form or another or have suffered a troubled upbringing. These challenges and disadvantages include learning difficulties, mental health conditions and abuse. For instance, 23% of young offenders have learning difficulties (IQs of below 70), and a further 36% have borderline learning difficulties (IQs of between 70 and 80). Almost a half of prisoners have no qualifications; 21% reported needing help with literacy or numeracy; and only about 5% of prisoners have been educated beyond A level. Some 41% of male prisoners and 30% of female prisoners have been permanently excluded from school, and 13% report never having had a job. Many prisoners have problems related to drug use. About 14% are in prison for drug offences, but a much higher proportion (55%) report committing offences connected to their drug taking. Of those who reported using heroin, 19% said that they had first used it in prison.

35. Successive governments have declared their intention to reform the internal organisation and operation of prisons in order to achieve decency and to improve the chances of rehabilitation. Following Lord Woolf's report into the 1990 disturbances, and the reforms proposed in the 1991 White Paper *Custody, Care and Justice*,⁷⁵ the 1992 Conservative manifesto proposed that:

'Prisons should be places which are austere but decent, providing a busy and positive regime which prepares prisoners for their ultimate release.'

36. In 1994, the post of Prison Ombudsman was created, and 2002 saw the launch of the 'decency agenda', whose principles included that promised standards must be delivered; that clean, properly equipped and properly maintained facilities must be provided; and that prisoners must be provided with a regime that gives them enough variety and choice to make prison bearable. The decency agenda also set an 'overall test' based on the question: 'If my son or daughter were ever sent to prison, would I be content for them to be treated in the way that prisoners are treated in this prison?'⁷⁶

75 See n. 3 above, and the second paragraph of Lord Woolf's Foreword to this Report.

76 HM Prison Service, *Annual Report and Accounts 2007-2008* (London: The Stationery Office, 2008), 22.

37. In 2010, the then Justice Secretary Kenneth Clarke announced a ‘rehabilitation revolution’ aimed both at diverting more offenders from prison and at reducing re-offending by those who had been imprisoned.⁷⁷ However, such ambitions towards decency and rehabilitation were always constrained by the perceived demands of security and penal austerity.⁷⁸ Since 2008, those pressures have been compounded by financial stringency. The response to tightening budgets has been to aim to make the prison system ‘cheaper not smaller’.⁷⁹ A series of critical reports by the Prisons Inspectorate attest to the degree to which ambitions towards decency and rehabilitation remain unfulfilled.⁸⁰

38. In 2001, Martin Narey, the head of the Prison Service, told his annual conference that he was not prepared to apologise for failing prison after failing prison: he had had enough of having to explain the immorality of the treatment of some prisoners and the degradation of some establishments.⁸¹ In 2013, the Public Accounts Committee expressed concern about safety and decency, the institutionalisation of overcrowding, and the risk that, as a result of cost reductions, prison staff were having to focus solely on security at the expense of offender management, training and rehabilitation.⁸² In Part II, we offer a detailed description of some

77 <http://www.theguardian.com/politics/2010/dec/07/prison-failing-tackle-reoffending-ken-clarke>.

78 Especially in the aftermath of well publicised escapes, such as those from Whitemoor Prison in 1994 and from Parkhurst Prison in 1995. It is instructive to contrast Kenneth Clarke’s description of the ‘rehabilitation revolution’ to which he aspired with the contents of the following Green Paper, *Breaking the Cycle* (n. 11 above), and with the way in which his successor as Justice Secretary, Chris Grayling, described the ‘next steps’ in the ‘rehabilitation revolution’ in 2012: <https://www.gov.uk/government/news/rehabilitation-revolution-next-steps-announced>.

79 Chris Grayling, the Justice Secretary, in ‘Rehabilitation: the Next Steps’, a speech given on 20 November 2012; <https://www.gov.uk/government/speeches/rehabilitation-revolution-the-next-steps>.

80 The reports can be found through the Inspectorate’s website: <http://www.justice.gov.uk/about/hmi-prisons>. For just three recent examples, see <http://www.justice.gov.uk/downloads/publications/inspectorate-reports/hmipris/prison-and-yoi-inspections/bristol/bristol-2013.pdf> (Report on an Unannounced Inspection of HMP Bristol); The Guardian, 18 September 2013 (<http://www.theguardian.com/society/2013/sep/18/wormwood-scrubs-knife-edge-staff-cuts>), an independent monitoring board’s report on Wormwood Scrubs; and <http://www.justice.gov.uk/downloads/publications/inspectorate-reports/hmipris/prison-and-yoi-inspections/oakwood/oakwood-2013.pdf> (Report on an Unannounced Inspection of Oakwood Prison).

81 ‘Help me clean up hell hole jails or I will quit, says prisons chief’, *Daily Telegraph*, 6 February 2001. One case that had highlighted some of the problems within prisons was the murder of Zahid Mubarek by his racist cellmate in Feltham Young Offender Institution in 2000.

82 Public Accounts Committee, *Restructuring the National Offender Management Service* (HC 717; London: HMSO, 2013; <http://www.publications.parliament.uk/pa/cm201213/cmselect/cmpubacc/717/717.pdf>).

of the ways in which conditions in our prisons are deteriorating rather than improving.

Section 4: Costs and Benefits

39. Over the last 20 years, the sums spent on imprisonment have grown substantially. In England and Wales they doubled from £1.5 billion in 1993–4 to just under £3 billion in 2012–13.⁸³ In Scotland the rise was from £137 million in 1991–2 to £353 million.⁸⁴ The average annual cost of a prison place has also risen steeply. It is now between £35,000 and £40,000, depending on what is included in the calculation, compared with £23,000 in England and Wales (in 1992–3) and £28,000 in Scotland (in 1993–4).⁸⁵

40. We will have more to say about the costs (financial and non-financial) and benefits of using imprisonment as a punishment in Part II. Here we need simply note that even if we attend only to the direct financial costs and to the benefits in reducing crime there is considerable doubt about whether such expenditure on prisons is cost-effective. There is controversy about the extent to which imprisonment is an efficient means of incapacitation,⁸⁶ about its impact on the future conduct of individual offenders after their release,⁸⁷ and about the efficiency of the threat of imprisonment as a deterrent.

41. The question to be asked is not only whether or how far imprisonment is an *effective* means to the goals that the criminal justice system should serve, but whether it is an *efficient* means. To answer that ques-

83 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/251272/prison-costs-summary-12-13.pdf; HC Debates 03 December 1993, vol. 233, col. 772W.

84 HC Debates, 20 February 1995, vol. 255, cols. 61–2W.

85 For the recent figures, see National Offender Management Service *Annual Report and Accounts 2012–13* (HC 265; London: HMSO 2013); Scottish Prison Service *Annual Report and Accounts 2012–13* (SG/2013/102; Edinburgh: Scottish Prison Service, 2013). For the earlier figures, see HC Debates, 4 March 1994, vol. 238, cols. 928–9W; HC Debates, 26 May 1993, vol. 225, col. 589W.

86 See e.g. Ministry of Justice, *Green Paper Evidence Report - Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders* (London: Ministry of Justice, 2010), para. 5.64: ‘to date there has been no clear consensus from criminologists and commentators about whether there is an incapacitation effect at all, and if so, its scale’.

87 See e.g. Make Justice Work, *Are Short Term Prison Sentences an Efficient and Effective Use of Public Resources?* (London: Matrix Evidence, 2009); <http://www.ohrn.nhs.uk/resource/policy/MakeJusticeWork2009.pdf>

tion we need to attend both to the costs and benefits of other modes of punishment and to the possible crime prevention and social benefits of diverting some of the public spending on prisons to more productive alternatives. These could include other kinds of non-custodial, and indeed non-punitive, programmes that aim to address more effectively the conditions from which crime and re-offending emerge. This is the aim of 'Justice Reinvestment', a movement that received backing in a report from the House of Commons Justice Committee.⁸⁸ The report argued that the prison population in England and Wales should be reduced by one-third and that the resources thus released should be invested in the most deprived communities from which the majority of imprisoned offenders come.

Section 5: Public, Media and Political Attitudes to Offenders and Imprisonment

42. It is hard to assess the exact impact that the popular media, and media campaigns, have on policymaking and sentencing.⁸⁹ However, it is highly plausible that perceptions of public demands for harsh punishments are one factor in the increasing use of imprisonment as a punishment. Politicians and sentencers are likely to be sensitive to these perceptions, which have been reinforced by popular press campaigns against what are portrayed as over-lenient policies and sentencing practices.

43. One paradox here is captured by a comment in 2002 from Lord Bingham, then the senior Law Lord and formerly the Lord Chief Justice, who told *The Spectator*:

*'Everybody thinks our system is becoming soft and wimpish. In point of fact it's one of the most punitive systems in the world.'*⁹⁰

44. Opinion polls and surveys have consistently shown that the public considers sentencing policy too soft. But a careful reading of the

88 Parliamentary Select Committee on Justice, *Cutting Crime: The Case for Justice Reinvestment* (HC 94-I; London: HMSO, 2010). See also R. Allen and V. Stern (eds.), *Justice Reinvestment: A New Approach to Crime and Justice* (London: International Centre for Prison Studies, 2007).

89 But see C. Greer and R. Reiner, 'Mediated Mayhem: Media, Crime, Criminal Justice', in *Oxford Handbook of Criminology* (n. 50 above), 245; M. Hough and J. V. Roberts, 'Public Opinion, Crime, and Criminal Justice', in *Oxford Handbook of Criminology*, 279.

90 B. Johnson, 'Top Judge', *The Spectator*, 25 May 2002, p. 16.

evidence shows that public attitudes on the use, aims and practice of imprisonment, while complex and contradictory, are not as punitive as is usually supposed. As John Halliday's report on sentencing put it in 2001:

*'tough talk does not necessarily mean a more punitive attitude to sentencing.'*⁹¹

45. People who support greater use of prison often considerably underestimate how much it is already used and the length of current jail sentences. When confronted with real cases, most people find current sentencing levels appropriate or even too harsh. In a recent representative survey, significant proportions of respondents found alternatives to prison acceptable, even for relatively serious offences.⁹²

46. In 1998, when he was Lord Chief Justice, Lord Bingham listed 'intense media pressure' as one of the reasons for increases in the use of custody alongside 'certain highly publicised crimes, legislation [and] ministerial speeches'.⁹³ Media pressure has certainly been, at least intermittently, intense, sometimes sparked by increased or specific violent crimes. Examples include the murders of James Bulger in 1993, of Lin and Megan Russell in 1996, of Sarah Payne in 2000, and of Holly Wells and Jessica Chapman in 2002. The media pressure has included campaigns on specific cases (such as *The Sun's* petition to Michael Howard in 1994 to increase the tariff for the two boys who killed James Bulger), types of offender (the *News of the World's* campaign on paedophiles in 2001), or types of crime (the same paper's 'Save our Streets' campaign in 2008 for mandatory imprisonment for carrying a knife). Lenient judges have also come under fire, notably in 2006 when *The Sun* launched a vitriolic campaign demanding 'harsh punishment for judges who favour thugs and their own liberal consciences – while failing our society'.⁹⁴

47. Politicians are certainly prone to appeal to public sentiment in justifying harsh penal policies. For instance, former Home Secretary Jack Straw described the Crime and Disorder Act 1998 as the 'triumph of community poli-

91 J. Halliday, *Making Punishments Work* (London: Home Office, 2001), p. 118.

92 See J. Roberts and M. Hough, 'Custody or Community? Exploring the Boundaries of Public Punitiveness in England and Wales', *Criminology and Criminal Justice* 11 (2011), 181.

93 *Brewster* [1998] 1 Cr App R (S) 181, at 184.

94 *The Sun*, Monday, 12 June 2006.

tics over detached metropolitan elites'.⁹⁵ His successor as Home Secretary, David Blunkett, responded to criticisms of the stricter murder tariffs that he introduced by saying that 'everybody I've spoken too in the real world is up for it'.⁹⁶ The current Justice Secretary, Chris Grayling, confirmed to the Conservative Party Conference in 2013 that 'prison does work. It takes the most difficult and prolific offenders off our streets and protects our hard working, law abiding citizens. It sends a strong message about what our society is willing to accept, and what it is not willing to accept'.⁹⁷

Section 6: Wider Social Factors

48. A range of recent work has set the rising use of imprisonment in the context of broader changes in political and economic structures. David Garland has argued that in the US and the UK a new 'iron cage' has been created in response to the structures that characterise contemporary capitalist societies.⁹⁸ Others have argued that the growing concern about risk in criminal justice reflects deeper and broader aspects of contemporary society.⁹⁹ It is in this context that we can see the 'constitutional state', with its emphasis on rights and due process, giving way to the 'security state', whose dominating concern is with security against a range of perceived threats.

49. However, we need to account for variations in the extent and depth of imprisonment. Studies have suggested that moderate penal policies have their roots in a consensual and corporatist political culture, in high levels of social trust and political legitimacy and in a strong welfare state. More punitive policies that make greater use of imprisonment are to be found in countries where these characteristics are less in evidence.¹⁰⁰ Various explanations of these differences are offered relating

95 http://www.publications.parliament.uk/pa/cm/199798/cmhansrd/vo980408/debtext/80408-26.htm#80408-26_spm0; Hansard, *House of Commons Debates 8 April 1998, Volume 310, Column 370*.

96 D. Blunkett, *The Blunkett Tapes: My Life in the Bear Pit* (London: Bloomsbury, 2006), 493.

97 See http://www.conservativepartyconference.org.uk/Speeches/2013_Chris_Grayling.aspx.

98 D. Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Oxford: Oxford University Press, 2001).

99 See e.g. Cavadino, Dignan and Mair, n. 50 above; and see further below, Part II.

100 See e.g. N. Lacey, *The Prisoners' Dilemma: Political Economy and Punishment in Contemporary Democracies* (Cambridge: Cambridge University Press, 2008); J. Pratt and A. Eriksson, *Contrasts in Punishment: An Explanation of Anglophone Excess and Nordic Exceptionalism* (London: Routledge, 2012).

to the levels and nature of crime, the extent to which more generous welfare provision may prevent crime, and the ways in which neo-liberal political economies tend to produce excluding rather than inclusive approaches to deviant individuals.

50. A key question is whether it is possible to reduce the use of imprisonment and make prisons less punitive without at the same time introducing fundamental changes to political economy. The way in which the Coalition Government's initial progressive policy has been hardened, and the lack of substantial progress in Scotland in reducing prison numbers, despite a policy goal of doing so, suggest that this challenge is formidable.

Section 7: Scottish Trends and Developments

51. As noted above (para. 17), the prison population has risen significantly in Scotland over the last 20 years. However, its trajectory has been somewhat different from, and less steep than, that in England and Wales. The new Scottish National Party Government that was elected in 2007 established an Independent Prisons Commission to examine the use of imprisonment. Its report, *Scotland's Choice*, strongly advocated a reduced reliance on imprisonment. It argued that increasing rates of imprisonment resulted from using prison for those who are troubled and troubling, rather than dangerous; that prisons draw their inmates from the least well-off communities; and that high prison populations do not reduce crime but are more likely to create pressures that drive re-offending.

52. The Commission recommended that the government pursue a target of reducing the prison population to an average daily population of 5,000 (as compared with over 7,000 in 2006–7). It made a series of proposals as to how this could be achieved, based on two principles. First, that 'imprisonment should be reserved for people whose offences are so serious that no other form of punishment will do, and for those who pose a threat of serious harm to the public'. And secondly, that 'paying back in the community should become the default position in dealing with less serious offenders'.¹⁰¹

101 *Scotland's Choice: Report of the Scottish Prisons Commission* (Edinburgh: Scottish Prisons Commission, 2008); the quotations are from p. 3.

53. One of the Commission's recommendations on which the government took action was the creation of a statutory presumption against very short prison sentences. However, as noted previously (para. 19), while this led to a sharp reduction in the number of sentences of up to three months, the numbers of sentences of between three and six months, and between six months and two years, rose quite sharply. Those increases suggest that courts may sometimes be imposing longer prison sentences rather than non-custodial sentences.

54. Nonetheless, the SNP Government has declared a continuing commitment to:

*'replace ineffective short-term sentences with tough and effective community punishments that force petty offenders to repay their debt to society through hard work in the community that they have wronged ... The evidence shows that low level criminals who are punished in the community are far less likely to re-offend, so community punishment makes our society safer. Prison is to be used 'for keeping dangerous criminals off our streets.'*¹⁰²

55. Sentencers are typically less constrained in Scotland than in England and Wales, faced with little in the way of statutory principles or guidelines. The Scottish Prisons Commission recommended the creation of a sentencing council in Scotland that would bring Scotland closer to England and Wales. In 2010, the Scottish Parliament passed legislation to create a Scottish Sentencing Council;¹⁰³ but this has not yet been brought into force. In March 2013, the Cabinet Secretary for Justice stated that he expected the council to be established before the current Parliamentary session ends in 2016.¹⁰⁴

56. Since devolution, Scottish governments have insisted that they give recognised expertise and wider consultation a greater role in policy development than they have in England and Wales. It remains to be seen how far this attitude, along with the declared commitment to reducing the use of imprisonment for less serious crimes, will make it possible to fulfil the aspirations expressed in *Scotland's Choice*.

102 SNP 2011 Election Manifesto; <http://www.comparetheparties.co.uk/policy.php?category=Crime%20and%20Justice>

103 Criminal Justice and Licensing (Scotland) Act 2010, ss. 1-13.

104 Scottish Parliament Official Report 13 March 2013 col 17653.

Part I Concluding Comments

57. Part I of this Report has sketched the main changes in our use of imprisonment during the last two decades, some of the key aspects of those changes, and the various changes in political policy and in society that help to explain them. It is clear from this brief sketch that the radical increase in our use of imprisonment since 1992 was not inevitable, but resulted from a number of contingent policy choices.

58. The result of those choices is a prison population that is now more than 90% larger than it was in 1992 in England and Wales, and more than 50% larger in Scotland. Additionally, as noted in paras. 31–38 above, and to be discussed further in Part II, Section 1, there has been a progressive deterioration in the conditions of life in many prisons and in the legitimacy (as perceived by prisoners) of prison regimes. The central claim of this Report is that we should seek to turn the tide of prison policy and reduce quite drastically our reliance on imprisonment as a standard mode of punishment. In Part II we further develop the arguments for that claim, and in Part III we suggest some ways in which we could effect change.

Part II

Why Our Imprisonment Policies Should Change

Part II: Summary

Part II of this Report sets out a series of theoretical, moral and political arguments that, when combined, present a compelling case that we should seek as a matter of urgency to reduce our reliance on imprisonment as a form of criminal punishment.

Section 1 reminds us just how challenging the task of justifying the use of imprisonment as a punishment is, by taking note of recent research findings on the quality and the perceived legitimacy of our prison regimes, especially for those serving long sentences and in the context of a system under extreme pressure. It also looks at the rising trend of in-prison conversion to Islam and the complexities this brings to an already fragile system.

Section 2 looks briefly at the costs and benefits of imprisonment. Does imprisonment produce enough benefits to outweigh the high costs of the system—not only the *financial* costs but the *material, social and psychological* costs that are imposed on prisoners, their families, those who work in the system, and society as a whole? The section also challenges the notion that prison is typically necessary for imposing ‘just deserts’ on offenders or providing an adequate deterrent to future crime. It asks whether the aims of rehabilitation and reform can be met through imprisonment and whether the aim of incapacitating potential re-offenders (an aim that prisons certainly can serve) is enough to justify the current heavy use of imprisonment. It asks how we can justify frequent use of imprisonment as a default sentence when other forms of non-custodial punishment can so often deliver the goods that prison is supposed to achieve more effectively and at lower cost to individuals and society.

Section 3 develops a new line of argument, which does not depend on the quantifiable costs and benefits of imprisonment, or on empirical evidence about its efficiency as a means of preventing crime. Instead, it connects the practice of imprisonment to some fundamental social values on which a complex and diverse contemporary society, such as that of Britain today, depends for its social integration and cohesiveness, and which penal policy should support and uphold rather than undermine. These are *liberty, autonomy, dignity and solidarity, inclusion, security and moderation or modesty*. Such values should guide our treatment of all members of the political society, including those convicted of criminal offences: we should behave towards them not as outsiders who have no stake in society and its values, but as fellow members whose treatment must reflect the fundamental values of our society (a society in which, even if offenders have been imprisoned, they must find a meaningful life). It is, however, very hard to see how our current use of imprisonment can be said to reflect these social values, or a recognition of those whom we imprison as fellow members of our political society – how imprisonment could be claimed to respect, let alone to foster, those fundamental values.

Finally, **Section 4** considers features of contemporary society – including seismic changes in economic and social structures – that can help us to understand how current ideas about the role of imprisonment in penal policy have developed; and accordingly how this has encouraged such an extensive use of the prison system. It also considers how the values identified in Section 3 Part II can best be promoted through penal policy.

This line of argument about the fundamental social values that should structure our penal policies, and about the implications of those values for the use of imprisonment, should persuade us that we ought not to rely on imprisonment as a punishment as heavily as we now do; we should instead operate with a strong presumption against imprisonment. That presumption can certainly be rebutted: sometimes imprisonment is an appropriate or necessary sentence. But it should not be easily overcome: in many cases in which offenders are currently sentenced to imprisonment we should find other ways of responding to their criminal conduct.

1. Part I of this Report summarised changes over the last two decades that have led to current practices of imprisonment in this country, and gave an overview of the current situation. Part III will offer suggestions about how we could come to rely less on imprisonment in constructive responses to criminal offending. Part II discusses reasons why, in our view, it is necessary as a matter of urgency to embark on such

a move—why radical change is needed in the policy and practice of imprisonment. Before we embark on that discussion, however, it will be useful to remind ourselves of just how challenging the task of justifying the use of imprisonment as a punishment is, by taking note of some recent research findings on the quality and the perceived legitimacy of our prison regimes, especially those for people serving long sentences.

Section 1: Quality and Legitimacy under Pressure in Contemporary Prisons

*2. 'Prisons are special, place-based communities whose form is shaped by social and political ideas held about crime, punishment, social order and human nature. They suffer from an 'inherent legitimacy deficit' and are susceptible to brutality, indifference to human needs, abuses of power and breakdowns in order ... Prisons pose daily moral and management problems, and getting thorough the day peacefully is a difficult and contingent task which has to be continually worked at.'*¹

3. As already noted in Part I, various features of imprisonment present significant challenges to the humane and effective management of prison life. Even leaving aside the fact that those in prison are there by coercion – a fact which itself entails real complexities – a number of other factors combine to increase the difficulty of running prisons in a way that can command legitimacy. These include the rapid growth of the prison population in recent years, bringing with it significant problems of overcrowding, particularly in certain kinds of prisons; and the demographic profile of the prison population. As identified in Part I, the latter includes a disproportionate number of those who have experienced social, economic and educational disadvantage, various forms of abuse and mental health problems.²

4. These challenges have been exacerbated by the fact that we are choosing more and cheaper imprisonment in larger establishments, over adequately funded and more sparing use of imprisonment.³ What is

1 A. Liebling, 'Perrie Lecture: The Cost to Prison Legitimacy of Cuts', *Prison Service Journal* 198 (2011), 3.

2 See Part I, para. 33.

3 See C. Booth et al., *Do Better, Do Less: The Report of the Commission on English Prisons Today* (London: The Howard League for Penal Reform, 2009); I. Loader, 'For Penal Moderation: Notes towards a Public Philosophy of Punishment', *Theoretical Criminology* 14 (2010), 349.

more, we are doing this at a time of increasing complexity and challenge in the organisation and management of prisons. Whilst private sector competition has clearly stimulated cost reduction and some innovation, the evidence suggests that private sector contracting is a high risk strategy, with mixed impact on quality.⁴ Managing prisons is an increasingly complex and demanding task. Attention should be paid to the empirical evidence available on quality and outcomes in private sector prisons. A more evidence-led, contextual approach to policy in general is needed.

5. Attempts to measure the quality of prison regimes and relationships have improved significantly in recent years. There are now highly informative measures available for all prisons in England and Wales, including a measure of the moral or relational quality of life in all prisons known as Measuring the Quality of Prison Life, or MQPL.⁵

6. When these measures are examined we see that prisons do not score well, on the whole, on important dimensions of prison life. These include humanity, help and assistance, clarity and consistency, staff professionalism and personal development. There is significant variation between prisons, linked to important outcomes, including suicide and disorder. It has been found that where dimensions such as fairness and staff professionalism are lowest, outcomes tend to be poorer. On the other hand, formal performance measures show much improvement in security. In recent years there has been tighter managerial and financial control in prisons and fewer escapes. Targeted investment in education, health, drug treatment and offender management and interventions has been linked to improved performance against 'healthy prison' tests between 2006 and 2011.⁶

7. Several recent developments are presenting unprecedented difficulties and challenges to already crowded and pressured establishments. These include:

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- 4 See A. Liebling, B. Crewe and S. Hulley, 'Values and Practices in Public and Private Sector Prisons: A Summary of Key Findings from an Evaluation', *Prison Service Journal* 196 (2011), 55; B. Crewe, A. Liebling and S. Hulley, 'Staff Culture, Use of Authority and Prisoner Quality of Life in Public and Private Sector Prisons', *Australian and New Zealand Journal of Criminology* 44 (2011), 94.
- 5 See A. Liebling and H. Arnold, *Prisons and their Moral Performance: A Study of Values, Quality and Prison Life* (Oxford: Clarendon Press, 2011).
- 6 See M. Spurr, 'Perrie Lecture: Reducing Costs and Maintaining Values', *Prison Service Journal* 198 (2011), 12.

- intense financial pressures;
- a benchmarking and specification process;
- new terms and conditions for prison officers, including a reduction in the number of both officer and manager grades;
- the contracting out of ancillary services;
- the closure of smaller prisons;
- lengthening sentences; and
- diversifying populations.

8. The Chief Executive of the National Offender Management Service has argued that even before these changes to budgets and staffing arrangements take place:

- prisons are insufficiently purposeful, with too many prisoners still having too little to do;
- drugs and mobile phones are too freely available;
- re-offending rates in general, and for short sentenced prisoners in particular, remain unacceptably high; and
- conditions in some of the older/ageing parts of the estate are unsuitable for a modern Prison Service.⁷

9. MQPL survey results, together with Inspectorate Reports, show that there is considerable variation in quality between prisons, with most falling below an 'acceptable' threshold (although there has never been a direct discussion of where this threshold might lie).⁸

10. In less organised and 'professional' prisons, preoccupations with safety and survival dominate; opportunities are few and negative emotional states among prisoners are common. Safety and perceptions of safety are reduced. Prisoners retreat into their cells and avoid risk.⁹ In better, more legitimate, ordered and respectful prisons, prisoners describe having the psychological and emotional resources to think about the future and more help or support is available. Furthermore, in

7 Spurr, n. 6 above, 14.

8 For some discussion of this question, see Liebling and Hulley, n. 4 above; C. Haney, *Reforming Punishment: Psychological Limits to the Pains of Imprisonment* (Washington, DC: American Psychological Association Books, 2006); A. Liebling, 'Moral Performance, Inhuman and Degrading Treatment, and Prison Pain', *Punishment and Society* 13 (2011), 530.

9 See A. Liebling, L. Durie, A. Stiles and S. Tait, 'Revisiting Prison Suicide: The Role of Fairness and Distress', in A. Liebling and S. Maruna (eds.), *The Effects of Imprisonment* (Cullompton, Devon: Willan Publishing, 2005), 209.

these environments, a feeling of positive change is possible, and prisoners describe making plans for and preparing for their future. These more legitimate prisons are also more ordered and safer, prisoner well-being is higher, and outcomes tend to be better. A fine balance can be struck between relationships and security.¹⁰

11. Challenges to the perceived legitimacy of prison regimes include:

- the increasing proportion of the prison population serving long or indeterminate sentences;¹¹
- a political climate requiring no ‘pampering’ of prisoners;¹²
- greater diversity in the prison population;
- an increasing emphasis on risk; and
- less confident staff, who are themselves facing a radical transformation in their working lives and conditions.¹³

12. Prisoners describe low levels of trust, and a feeling of being ‘unrecognised’ by staff:

‘I [feel like] a casualty of politics.’

‘They don’t see you as a person.’¹⁴

13. Prisoners’ lives ‘on the street’ have often been violent and turbulent, sentences are often unexpected or unexpectedly long, and the route out of prison is increasingly difficult to navigate, as risk assessments depend heavily on the successful completion of scarce programmes.

10 See B. Crewe, A. Liebling and S. Hulley, ‘Heavy/Light, Absent-Present: Re-Thinking the “Weight” of Imprisonment’, *British Journal of Sociology*, in press; A. Liebling, ‘What Makes Prisons Survivable? Towards a Theory of Human Flourishing in Prison’, *SCCJR 7th Annual Lecture, University of Edinburgh*, 23 May 2013.

11 See Part I, para. 12.

12 A Prison Service Order placing new restrictions on the types of activity allowed in prisons was issued in 2009 following a series of media-driven inquiries into apparently unacceptable activities in prison (such as a comedy workshop, aimed at building self-esteem): ‘Acceptable Activities in Prisons’ (PSO 0050, issued 6 January 2009). These instructions were brought together in *Activities in Prisons* (PSI 38/2010; London: National Offender Management Service, July 2010) and its accompanying guidance.

13 On the many related destructive effects of the over use of imprisonment in the USA, see Haney, n. 8 above.

14 Prisoners quoted in A. Liebling, H. Arnold and C. Straub, *An Exploration of Staff-Prisoner Relationships at HMP Whitemoor: Twelve Years On* (London: National Offender Management Service, 2011), 21.

'Expertise' on prisoners, and the flow of relevant information about them, have been reorganised away from prison officers: off the landings onto computers and into the offices of psychologists and other specialists, in a new form of soft, or 'biro-power'.¹⁵ Routes into prison feel less legitimate to prisoners. This has been brought about by changes in the criminal process, a changing political climate and the disadvantages that many offenders suffer outside prison. This has made the prospects of proportionate sentencing, access to courses and timely release less likely for serious offenders and those charged with serious offences.

14. A study of prisoners in one high security prison, precipitated by official concern about deteriorating relationships in the prison, has explored these issues. It found that, once in prison, and through the extended period of 'shell shock' brought about by their extremely long tariffs or sentences, prisoners found it hard to establish their own identity and meaning in an environment in which creative activities were regarded as 'pampering' and relationships were fractured.¹⁶ This showed a marked deterioration in conditions since the previous study 12 years ago – a deterioration that has been reported, for different reasons, in many other prisons.¹⁷

15. In long-term and high security prisons in particular, the important distinction between activities providing opportunities for meaning and development and activities regarded as hedonistic and pleasurable or self-indulgent has been lost by officials concerned about negative media headlines. Prisoners said:

*'You still feel you want to express yourself, but you can't in prison ... so you don't know where you are. I have no idea any more where I am. I'm a totally different person from when I first came to prison ... I've lost my identity I think.'*¹⁸

15 See B. Crewe, *The Prisoner Society: Power, Adaptation and Resistance in an English Prison* (Oxford: Clarendon Press, 2009).

16 See A. Liebling and H. Arnold, 'Social Relationships between Prisoners in a Maximum Security Prison: Violence, Faith, and the Declining Nature of Trust', *Journal of Criminal Justice* 40 (2012), 413; Liebling et al., n. 14 above; A. Liebling and C. Straub, 'Identity Challenges and the Risks of Radicalisation in High Security Prisons', *Prison Service Journal* 203 (2012) (Special Edition, Combating Extremism and Terrorism), 15.

17 For some recent examples, in Prison Inspectorate reports on Bristol, Wormwood Scrubs, and Oakwood, see Part I, n. 69. For the previous study of Whitemoor, see A. Liebling and D. Price, *An Exploration of Staff-Prisoner Relationships at HMP Whitemoor* (Prison Service Research Report, No. 6; London: HMPS, 1999).

18 Liebling et al., n. 14 above, 25.

16. In-prison conversion to Islam has also become a new and highly complicated feature of life in prison. Of 52 interviewees in one study undertaken in a high security prison, 12 of the 23 prisoners who described themselves as Muslim were in-prison converts. This level of interest in Islam fuelled fears among staff about the impact of housing convicted terrorist offenders holding extreme ideological views among impressionable and alienated young street fighters or drugs traders with little sense of belonging or identity and few constructive avenues for self-development in prison.¹⁹

17. Whilst 35% of the population at this high security prison were identified as Muslim, the authors discovered during the project that the use of such categories was unreliable, and that some prisoners were identified as Muslim because they had been 'exploring' Islam or attending Friday prayers. Alongside prisoner interest in Islam there was also some evidence of coerced conversions, and some major incidents in the prison that appeared to be related to conflicts over faith. There was considerable fear and violence in the prison, and some new rivalries between a changing hierarchy of prisoners, as well as mutual distancing from staff, which made the prison feel much less safe. Staff were culturally alienated by prisoners campaigning for pork-free kitchens, mid-regime prayer time and foreign language literature.²⁰ They were nervous about accusations of racism and discrimination, following a high-profile inquiry into the death of a young Asian prisoner at the hands of his white, racist cell-mate at another prison in 2000.²¹ They also had new demands to manage, with prisoners sometimes using concerns about faith discrimination to achieve these demands. Staff were professionally anxious, which led to retreat.

18. Three main problems arose from this new environment:

- i) a young and somewhat disaffected prisoner population, shell-shocked by long sentences and unable to find a direction or meaningful way through their sentence;

19 On the real risks of this dynamic, see M. Hamm, 'Prison Islam in the Age of Sacred Terror', *British Journal of Criminology* 49 (2009), 667; 'Prisoner Radicalization and Sacred Terrorism: A Life Course Perspective', in R. Rosenfeld, K. Quinet and C. Garcia (eds.), *Contemporary Issues in Criminological Theory and Research: The Role of Social Institutions* (Wadsworth: Cengage Learning, USA, 2011), 173; 'Prisoner Radicalisation in the United States', *Prison Service Journal* 203 (2012) (*Special Edition, Combating Extremism and Terrorism*), 4; *The Spectacular Few: Prisoner Radicalization and the Evolving Terrorist Threat* (New York: New York University Press, 2013).

20 A situation reminiscent of Jacobs' American study of Stateville in the 1960s and 1970s: see J. B. Jacobs, *Stateville: The Penitentiary in Mass Society* (Chicago: University of Chicago Press, 1977).

21 B. Keith, *The Zahid Mubarek Inquiry* (London: House of Commons/The Stationery Office, 2006).

- ii) a complex and differentiated Muslim population, feeling poorly treated and regarded despite good faith-related provision;
- iii) some new prisoner dynamics in which changing faith identities and practices had become a new 'no go area' in the prison – an opportunity for powerful leaders to push staff back, wield power in the prison and challenge or unsettle staff authority.

19. All this led to fear among staff and prisoners and some violence. Staff were unsure about and insufficiently supported in navigating their way through these new dynamics. Muslim prisoners felt particularly aggrieved, a finding related to their distant and strained relationships with staff and their heightened 'risk status' in the new political climate. But *all* prisoners were critical of their treatment and of the state of relationships in the prison.

20. Prisoners were asked about their perceptions of prison conditions on various dimensions:

- *'Harmony' dimensions*: support on entry into prison; respect/courtesy; staff-prisoner relationships; humanity; decency; care for the vulnerable; help and assistance;
 - *'Professionalism' dimensions*: staff professionalism; bureaucratic legitimacy; organisation and consistency; fairness;
 - *'Security' dimensions*: policing and security; prisoner safety; drugs and exploitation;
4. *'Well-being and Development' dimensions*: personal development; personal autonomy; well-being.

21. On all dimensions except security, prisoners' perceptions were, on balance, negative. On eight dimensions (respect/courtesy, staff-prisoner relationships, humanity, decency, staff professionalism, fairness, organisation and consistency), Muslim prisoners' perceptions were significantly more negative than those of other groups.²²

22. A philosophical (or moral) language of communion, dignity, dialogue and love was spoken by prisoners throughout this study. However, this was expressed in private, and without much confidence that others were receptive to or understood it. In general, prisoners describe an increase in the depth, weight and tightness of imprisonment.²³

22 For details, see Liebling et al., n. 14 above.

23 See Crewe, n. 15 above.

23. It is beyond the scope of this Report to make concrete recommendations about prison conditions and prison regimes; but our arguments for reducing the use of imprisonment must be read against the background of these accelerating concerns about the quality of prison life.

Section 2: Reconsidering Familiar Arguments

24. We have reviewed some of the facts which make imprisonment undoubtedly problematic. It is now time to turn to a more direct discussion of the arguments for reducing our reliance on this mode of punishment. Many of those arguments are by now well known, and we do not propose to spend much time rehearsing them here. However, a brief commentary on some salient arguments that figure in the penal debate may be useful.²⁴

(a) Costs and Benefits

25. One familiar set of arguments concerns the costs of imprisonment, and the question of whether current penal practices can be said to bring sufficient benefits to justify those costs. By 'costs' here we do not mean simply the financial costs of operating the prison system, and the further financial costs that may flow from current practices of imprisonment. Those include, for instance, the costs that fall on the families of those who are imprisoned; the costs that fall on or are generated by those released from prison; and the costs to the taxpayer of supporting an expanding prison system. Those costs are certainly very substantial, as compared to those generated by other modes of punishment,²⁵ but it is important also to attend carefully to other, less readily quantified, kinds of cost that imprisonment brings. These include, most obviously, the *material, social and psychological costs* that imprisonment imposes on those who are imprisoned – costs that typically continue long after their release. But we also see impact in two other critical areas.

26. Firstly, the similar costs imposed on their families and dependants, and on others who suffer separation from them whilst they are incarcerated, or who may have difficult dealings with them as they try to rebuild

24 See also B. Western, *Punishment and Inequality in America* (New York: Russell Sage Foundation, 2006) for a thorough and illuminating discussion of the scope, causes and effects of the prison boom in the USA, and its relationship to the crime rate; and R. Lippke, *Rethinking Imprisonment* (Oxford: Oxford University Press, 2007).

25 Between £35,000 and £40,000 per prisoner per year; see Part I, paras. 39–41.

their lives after release. Secondly, the costs to all in society of the high levels of re-offending and continuing criminal justice and welfare costs occasioned by those whose imprisonment has fractured their family, employment and housing ties.

27. To this we should add the *moral* costs of inflicting on people (directly on those whom we imprison, indirectly on others who suffer the consequences as a result) not only a serious infringement of their fundamental right of liberty, but also subjection to conditions that are all too likely to be in various ways seriously damaging both to those imprisoned and to society as a whole.

28. This is not to deny that there can be justifications for incurring and imposing such costs, or that at least sometimes they are imposed on those who deserve to be punished in this way. These are both issues that will be discussed further below. It is simply to remember that what needs to be justified is a penal system that is in these various ways enormously costly. And we shall argue later that there are indeed very important kinds of general social cost to be considered. These are *costs to society at large*.

29. What could justify the various costs of imprisonment? One kind of answer looks to the *consequential* benefits that a system of criminal punishment can bring; another looks to the demands of *justice or penal desert*. Any plausible justification of a practice of penal imprisonment will need to include both of these dimensions. It will need to show both how the imposition of such punishments is consistent with, or even demanded by, justice; and how a penal system of this kind can produce consequential benefits that are substantial enough to justify the costs that it entails.

30. Any discussion of costs and benefits must of course attend to the costs of crime. These include the *material* costs both of the harms that crime can cause and of the precautions that we need to take against crime; the *human* costs that fall most obviously on the direct victims of crime and those close to them; and the *psychological* costs that fall on those whose sense of security is undermined by the fear of crime.

31. The state undoubtedly has a powerful duty to protect its citizens against the costs of crime – to reduce the incidence of crime, and to provide support and assistance to its victims. Criminal punishment, as part of a system of criminal justice, has a significant role to play in discharging that duty. The consequential benefits of a system of punish-

ment depend on how effective it is in preventing future crime and in so doing averting the costs of crime. Insofar as punishment is a matter of justice or penal desert, it can be said to discharge the state's duty towards victims of crime by showing that it takes seriously the wrongs they have suffered. The costs that punishment imposes on those who are subjected to it, and more widely, must therefore be set against the costs that crime imposes on those who are its direct or indirect victims.

32. However, first, we must always bear in mind that criminal punishment, and the use of criminal law, is only one of the ways in which we can try to reduce crime, or show support for victims of crime; and (as we note in Section 3(e) below) it is not the most important or productive means to such ends. Second, to say that criminal punishment plays an important role in the state's discharge of its duties is not yet to say what role imprisonment should play as a particular (and particularly burdensome) mode of punishment, or whether it should play as large a role as it now plays in our penal system. It is the latter issue that concerns us in this Report.

33. This leads to another set of familiar arguments about the use of imprisonment – arguments that begin with an account of the proper aims of criminal punishment and ask whether, or under what conditions, imprisonment can efficiently serve those aims. A potential problem with such arguments is that it is notoriously difficult, if not impossible, to reach any clear agreement about what those aims should be, or about how (assuming that there is more than one) they should be ranked against each other. However, such agreement is unnecessary here, since we will argue that on any plausible account of the proper aims of criminal punishment, we need not, and should not, rely so heavily on imprisonment.

(b) Purposes of Punishment

34. The infliction of *just deserts*, or the *public censure of wrongdoing*, is often asserted as a central purpose of criminal punishment. The idea that punishment should serve the purpose of imposing on those who commit criminal wrongs the penal burdens that they deserve for their wrongdoing – their just deserts – commands widespread intuitive support, yet its moral and rational basis remains obscure and contested.²⁶

26 It is common to talk in this context of 'retribution', but we have chosen to avoid that term, since it has come to be used in so many different ways that it now lacks any clear meaning, and is all too easily confused with ideas of retaliation or revenge that have no proper role in a contemporary system of criminal law.

35. One way to explain its meaning is to talk of the demand that criminal wrongdoing be publicly censured or condemned, and to portray punishment as a forcible way of communicating that censure.²⁷ But, however we explain the idea of just deserts, it does not require us to rely as heavily as we currently do on imprisonment as a mode of punishment. Punishment as just deserts or as public censure must indeed be burdensome, but other modes of punishment are burdensome. These can take the form of monetary deprivation or constraining the person's liberty, as with probation and community payback. To justify imprisonment, we would therefore need to show that just deserts or public censure demand this particular kind of burden for certain types of crime.

36. What matters here is not just how burdensome imprisonment is, as compared with other modes of punishment, but what it means. In considering the appropriateness of any kind of sentence, it is important to attend not merely to its penal weight but also to its social meaning: what does the imposition of such a punishment say to the offender or to others? The message of imprisonment is exclusionary. Those who are imprisoned are thereby excluded from their ordinary lives and relationships, and from ordinary civic life. They cannot live with their families or friends, or move around the civic realm in the ways that structure our ordinary lives. To imprison people is therefore to say that we are not prepared to live with them as fellow citizens or to allow them to live among us, at least for the specified period of their imprisonment. We do not deny that some crimes, or some criminal careers, are serious enough to warrant such a response. But we would argue that that is not true of all the crimes for which prison sentences are currently imposed. Imprisonment, from this perspective, could be appropriate only for the most serious kinds of crime.

37. *Crime prevention* is the other salient purpose of punishment – prevention, or reduction, to be achieved through *deterrence*, *rehabilitation* (or *reform*), or *incapacitation*.

38. There are familiar problems in establishing reliable conclusions about the *deterrent effects* of different modes of punishment; and even greater problems in trying to determine whether and when punishment

27 See R. A. Duff, 'Legal Punishment', in E. Zalta (ed.), *The Stanford Encyclopedia of Philosophy* (Summer 2013 edition; (<http://plato.stanford.edu/archives/sum2013/entries/legal-punishment>) ss. 5–6.

is a cost-effective means of crime reduction.²⁸ There is no reason to doubt that imprisonment has some deterrent effect on some potential offenders. This includes some who have been imprisoned and are deterred from reoffending; and some who are deterred from offending without themselves having been imprisoned. But to justify imprisonment for particular types of offence or offender we would need to show that it is more effective, or more efficient, as a means of crime reduction than other less damaging and less costly alternative types of punishment. It is here that the evidence is far more problematic.

39. What evidence there is does not suggest that imprisonment – for many types of offence – is notably more effective in deterring offending than other non-custodial modes of punishment. If the aim is to increase the extent to which criminal punishment acts as a deterrent, better results will be achieved by trying to increase the probability of detection, conviction and punishment than by increasing the severity of the punishment itself.²⁹ The aim of deterring crime can help to justify a system of punishment; but it does not seem to justify one that relies as heavily as ours does on imprisonment.

40. *Rehabilitation* and *reform* are ends that might be pursued whilst a person is in prison (in part, in the case of rehabilitation, to remedy the effects of imprisonment itself),³⁰ but are not plausible as justifications for the use of imprisonment.

41. *Reform* can be understood as a moral process through which those who have committed crimes come to realise the error of their previous ways and to commit themselves to a future life of non-offending. Whilst such a process can begin during imprisonment, and can (albeit in rare cases) be sparked by imprisonment, the prospect of such moral reawak-

28 See recently, D. S. Nagin, F.T. Cullen and C. L. Jonson, 'Imprisonment and Reoffending', in M. Tonry (ed.), *Crime and Justice: An Annual Review of Research*, vol. 38 (Chicago: University of Chicago Press, 2009), 115; C. M. Webster and A. N. Doob, 'Searching for Sasquatch: Deterrence of Crime Through Sentence Severity', in J. Petersilia and K. Reitz (eds.), *The Oxford Handbook of Sentencing and Corrections* (Oxford: Oxford University Press, 2012) 173; D. S. Nagin, 'Deterrence in the 21st Century: A Review of the Evidence', in M. Tonry (ed.), *Crime and Justice: An Annual Review of Research*, vol. 42 (Chicago: University of Chicago Press, 2013), 199; Western, n. 24 above, ch. 7. The re-offending data provided by the Ministry of Justice are also revealing here: <https://www.gov.uk/government/publications/2013-compendium-of-re-offending-statistics-and-analysis>.

29 See A. von Hirsch et al., *Criminal Deterrence and Sentencing Severity: An Analysis of Recent Research* (Oxford: Hart, 1999).

30 On contemporary prison conditions and their destructive effects, see section 1 above.

ening is too remote from the actualities of prison life to make it plausible as a justifying aim of the system.³¹

42. *Rehabilitation* is, given adequate resources, an appropriate aim, but the question is why it should require incarceration? Why could not the kinds of programme that rehabilitation can involve be organised outside the prison? The obvious answer is that at least some offenders would not then continue their programmes; the only way to ensure attendance and completion is to keep them in custody. But that is also likely to make them less willing participants in such programmes; and a range of sanctions and incentives has already been developed to maximise compliance with community-based programmes for offenders. So unless imprisonment can be justified on other grounds, the need for rehabilitation is in itself an inadequate reason to deprive a person of liberty.

43. *Incapacitation* is perhaps the only crime-reductive aim that is clearly and effectively served by imprisonment. Whilst people are securely imprisoned, they cannot commit crimes against others (except against fellow prisoners and prison officers).³² This is, however, a very limited aim, since it does not involve the prevention of future crimes by the person serving a prison term (as both deterrence and rehabilitation aim to do), or by others. It is also a despairing aim. It gives up the hope of influencing the person's conduct by rational persuasion or by rehabilitative efforts, and treats him or her simply as a dangerous threat to be confined. And it is a dangerous aim. Given the well-known difficulties of predicting future conduct,³³ it is all too likely that many who are detained for incapacitative reasons would not have committed serious offences had they been released. Even if it is sometimes necessary to resort to temporary incapacitation to deal with those who persist in committing really serious offences, it cannot plausibly be argued that this aim warrants the imprisonment of many of those who are currently imprisoned for relatively low-level offences.

44. Furthermore, the very significant increase in the numbers of long-term prisoners serving incapacitative sentences has caused some of

31 See J. Jacobs, 'Character, Punishment, and the Liberal Order' (paper presented to 2013 meeting of American Society of Criminology).

32 Though they can still organise or be involved in the commission of crimes outside the prison.

33 See for example S. Brody and R. Tarling, *Taking Offenders Out of Circulation, Home Office Research Study 64* (1980); R. Tarling and J. A. Parry, 'Statistical Methods in Criminological Prediction', in D. P. Farrington and Roger Tarling (eds.), *Prediction in Criminology* (New York: SUNY Press 1985), 210.

the most acute problems of the current system. Such sentences include the sentence of Imprisonment for Public Protection, which imposed an indeterminate sentence on many whose offences would otherwise have merited significantly shorter custodial sentences.³⁴ For most of these prisoners, uncertainty about their release date, combined with inadequate provision for their management through a system giving some hope of progress towards release, has fundamentally undermined such modest training and rehabilitative capacity as imprisonment affords.³⁵ Estimates of the contribution of incapacitation to the decline in many forms of crime since the 1990s vary, but suggest at most a modest impact – and one which must in any case be discounted by the economic and social costs of imprisonment.³⁶

45. We have not tried here to argue for or against any of these familiar suggested purposes of criminal punishment – that task lies well beyond the aims of this Report. The goal has simply been to note for each of these aims that – even if it is an aim that a penal system should serve (whether alone or in combination with other aims), and even if its pursuit can justify using imprisonment as an appropriate mode of punishment for some offences – strong arguments can be made to the effect that the purposes currently put forward as the aims of criminal punishment *cannot justify as extensive a use of imprisonment as we currently make*. These aims cannot justify using imprisonment as the default sentence for so wide a range of offences, or the length of prison terms that are often imposed.

46. Rather than pursue these familiar arguments in more detail, however, we want to suggest a different way of arguing against such an extensive reliance on imprisonment. In the following section, we argue that by attending to a range of broader values to which a society such as Britain is and must be committed, it is possible to see why an effective and legitimate system of criminal punishment should be based on a defeasible but strong presumption against imprisonment – a presumption that that *can* be rebutted, but *not*

34 See Part I, para. 12.

35 See Liebling, n. 5 above; H. Annison, *Dangerous Politics: An Interpretive Political Analysis of the Imprisonment for Public Protection Sentence, 2003-2008* (Oxford University D. Phil. thesis, 2013); and section 1 above.

36 See A. Blumstein, J. Cohen and D. Nagin, *Deterrence and Incapacitation: Estimating the Effects of Criminal Sanctions on Crime Rates* (Washington DC: National Academy of Sciences, 1978); M. Hough, S. Farrall and F. McNeill, *Intelligent Justice: Balancing the Effects of Community Sentences and Custody* (Howard League for Penal Reform, 2013), esp. 9–15.

easily. This argument is not about the costs and benefits of imprisonment, and does not depend on empirical research into its effects. Rather, it is an argument about the meaning and the implications of certain fundamental social values.

Section 3: Imprisonment and Social Values

47. In the previous paragraph we used the word ‘legitimate’. We mean by legitimacy the moral acceptability of the system or regime of imprisonment as a whole, rather than of any particular decisions taken within it. This acceptability is intimately linked to the system of values assumed in society. The legitimacy of imprisonment has to be judged, in large part, in relation to those values.³⁷ So it is important to identify social values that are widely accepted as fundamental, and to work out how the practice of imprisonment bears on them. The values that we discuss in what follows play a central role in the way in which contemporary democracies understand themselves (as evidenced by the ways in which aspects of them figure in international human rights conventions).

(a) Liberty

48. Individual liberty is widely accepted as a basic value in modern Western societies. It is, indeed, often seen as the supreme social value, the very basis of civilised social life. But imprisonment is the deliberate deprivation of liberty. Therefore, a starting presumption surely has to be that *special and exceptional justification* is needed to use state power to deprive a person of liberty in a society that takes the liberty of the individual as a foundational value. From this point of view, it seems that the imprisonment of offenders cannot be, in itself, an expression of society’s fundamental value of liberty. It is, at best, a necessary, pragmatic response to the impossibility of realising that value fully.

49. One way to avoid this conclusion is to see the liberty as a value to be protected only for the law-abiding. Society is thus divided into law-abiding persons and law-breakers. The liberty of the former is preserved by protecting them (for example, by incarcerating law-breakers); the latter have forfeited their claim to liberty by their criminal conduct. Thus, on this view, punishment (including imprisonment) does indeed affirm

37 On the general importance of linking decisions about punishment with social values see e.g. R. Henham, *Sentencing and the Legitimacy of Trial Justice* (London: Routledge, 2012).

vital social values against those who threaten those values, and is an essential means of doing so.³⁸ In fact, from this perspective, imprisonment is a potentially legitimate means of defence of all fundamental social values – not only the value of individual liberty – against those who transgress them. The easiest (if unsatisfactory) way to sustain this argument is to separate rigidly into different moral categories those on whose behalf punishment is administered and those against whom it is administered.

50. This idea of moral separation has frequently been used as a way of justifying the severest punishments of offenders. In modern society, the wall of the prison can be regarded as both a symbolic and a material separation of those seen as lawful from those seen as lawless. Historically, walls have long served this dual purpose. Whereas now their purpose is to enclose the lawless, leaving the lawful free outside, in earlier times walled villages, towns and cities enclosed the lawful, protecting them from the lawless beyond the walls. 'When civilisation grew in the western world, it grew behind walls – in castles and monasteries and small crowded cities; and the outcasts lived in forests – madmen and idiots, lepers and escaped slaves, outlaws and felons, some victims and predators. The gate and the drawbridge were signs of safety, because freedom was dangerous.'³⁹

51. In this broad perspective, the ultimate divide is not just between those inside and those outside prison, but between those in society and those outside it. Generally, however, justifying incarceration (in prisons or secure hospitals) by assuming a *total* separation of those inside from those outside works well only in the case of those who, it is thought, can never be accepted as part of society – those who are too socially dangerous to be considered redeemable or those too damaged mentally to be freed into ordinary social interaction. In other cases – in fact the overwhelming majority – where the prisoner is expected to find a place in society after release, it is neither appropriate nor possible to treat those convicted of criminal offences as wholly different moral beings

38 This is the central thesis of Émile Durkheim's influential sociological study of crime and punishment. See R. Cotterrell, *Émile Durkheim: Law in a Moral Domain* (Edinburgh: Edinburgh University Press, 1999), ch. 5; D. Garland, *Punishment and Modern Society* (Oxford: Clarendon Press, 1990), ch. 2; D. Garland, 'Punishment and Social Solidarity', in J. Simon and R. Sparks (eds.), *The Sage Handbook of Punishment and Society* (London: Sage, 2013), 23.

39 K. Jones and A. J. Fowles, *Ideas on Institutions: Analysing the Literature on Long-term Care and Custody* (London: Routledge & Kegan Paul, 1984), vii.

from the citizens outside the prison walls. Offenders and non-offenders alike have to be seen as protected by certain values that recognise their common humanity and their common membership in society.

(b) Autonomy, Dignity, Solidarity

52. In complex modern Western societies, these values form a system sometimes called *moral individualism*, the conditions and necessity for which have been explained most fully in the social theory of Émile Durkheim.⁴⁰ The essence of moral individualism is respect for the autonomy and dignity of every human individual in society. This goes far beyond the individual's personal desire to assert his/her rights in pursuit of self-interest. It stresses the importance of protecting the individual rights of *others* and asserts that autonomy and dignity are to be protected for *all* individuals in a society if that society is to achieve a significant degree of overall cohesion, widespread cooperation and social integration (the conditions that Durkheim refers to as solidarity).

53. However, as Durkheim ultimately recognised, the use of punishment as a means of asserting and defending the social values of autonomy and dignity values is seriously undermined if punishment denies those same values to the punished.

54. Imprisonment almost always infringes the prisoner's *autonomy* (by deprivation of liberty) and *dignity* (by total everyday control). Thus the use of imprisonment transgresses the value system of moral individualism as it applies to offenders. It excludes them from the reach of this value system. One might defend it by saying that imprisonment is only a temporary exclusion; a holding in abeyance of these values to some – often considerable – degree, but only for a limited time. Yet this argument would still render whole life sentences highly problematic, as well as indefinite sentences which leave the duration of the exclusion unspecified.

55. On this view, imprisonment is a compromise – a sacrifice of values in relation to the offender for a time in order to preserve those same values in society as a whole. But, if this value system is to unite society, no individual is expendable or simply a means to an end. This makes general deterrence as a main aim of imprisonment suspect, since it

40 See e.g. M. S. Cladis, *A Communitarian Defence of Liberalism: Emile Durkheim and Contemporary Social Theory* (Stanford: Stanford University Press, 1992); R. Cotterrell, n. 38 above, ch. 7.

treats those who are imprisoned a means to deter others. We must try to sustain a view of all individuals as ends in themselves.

56. It is important to emphasise that these arguments are sociological rather than philosophical. They are grounded in the conditions of complex, increasingly diverse modern societies and proceed from the claim that a way of coordinating such societies must somehow be constructed out of ever-increasing social complexity. A moral system is necessary to provide some kind of integration of society in the face of this complexity. But, in a society of, for example, many different cultural groups, social classes, belief systems, professions, occupations and life conditions, what unifying moral system is possible? The only possible overarching value system is one that emphasises respect for the equal human dignity and autonomy of all individuals whatever their differences in life circumstances or outlook.⁴¹ The strength of such a value system as a means of uniting society depends completely on the insistence that it applies to everyone in society.

57. Modern complex societies do not automatically produce moral individualism as their 'official' or widely recognised ultimate value system. And, in practice, these values are regularly transgressed. But they can be seen as *appropriate* to complex modern societies; they tend to assert themselves because they encourage social conditions that are valued. They underpin the prospects for a reasonable degree of social integration across and between social groups. To this extent they contribute to the reduction of social friction and the integration of differentiated social functions. It might be said that this value system *appreciates difference* between individuals yet *stresses similarity* between them by affirming their equal human worth. It contributes towards binding society together in networks of mutual respect.

58. In practice, how far does temporary imprisonment allow offenders to maintain autonomy and dignity? What citizen rights does it, in practice, leave them during their prison term? What effects does it have on their ability to exercise citizen rights after their release? The experience of imprisonment, with its inevitable disruption of family, social and working relations, hardly contributes to enabling offenders to take a productive place in the networks of interdependence of social life.

41 R. Cotterrell, 'Justice, Dignity, Torture, Headscarves: Can Durkheim's Sociology Clarify Legal Values?', *Social & Legal Studies* 20 (2011), 3.

⁴²The research summarised in Section I also shows how hard it is for these values to be sustained inside prisons. A society that continues to expand the institution of imprisonment diminishes to that extent the power of moral individualism to unify and integrate society.

59. Even more fundamentally, it does so not merely as regards prisoners, physically and symbolically excluded from the reach of this unifying value system, but also as regards *citizens at large*, who learn to ignore whole sections of the population as outside society's networks of solidarity. The precedent, which the institution of imprisonment currently provides in Britain, of large-scale exclusion of whole sections of the national population (incarcerated offenders),⁴³ facilitates other attitudes that favour exclusion or marginalisation of sections of society – of those who are not citizens, of those seen as 'deviants' in any of a number of ways, who appear as strangers in cultural terms. The excessive use of prison fosters, and indeed institutionalises, *social fragmentation*, notably along the lines of age, race, disability and gender – in vivid contrast to our public aspirations to human rights and civic equality.

(c) Inclusion

60. The recognition of the autonomy and human dignity of every individual – however different in lifestyle, experience, culture and economic position – is a way of morally bridging the diversity and fragmentation of modern society. Solidarity involves recognising ourselves and others as members of an integrated society. A key initial question concerns the scope of that solidarity. Who is included as a member of the community, and who is excluded?

61. One answer is that citizens form the core membership of any political society. Yet this can only be an initial answer, since any decent society will treat non-citizens who live in the country for shorter or longer periods (as visitors, as workers, as immigrants, as refugees) as guests

42 See A. Liebling and S. Maruna (eds.), *The Effects of Imprisonment* (Cullompton, Devon: Willan Publishing, 2005); C. Muller and C. Wildeman, 'Punishment and Inequality', in J. Simon and R. Sparks (eds.), *The Sage Handbook of Punishment and Society* (London: Sage, 2013), 169.

43 A group itself characterised by stark over-representation of young men, those from certain ethnic groups, and those with mental disorders and multiple forms of social deprivation.

who acquire many of the rights and duties that go with membership.⁴⁴ This answer is enough for the moment, however, since it is a reminder that those who commit criminal offences are citizens – members of the polity. It is all too tempting to treat those who commit crimes (or those who commit certain kinds of crime) as outsiders and to subject them not only to punishments commensurate with their offences but also to longer-term stigma and exclusion.⁴⁵

62. Imprisonment gives dramatic material form to such a perspective, since it excludes the prisoner from the ordinary life of society. It is an exclusion that can easily be administered and understood as complete. However, in a complex modern society, the temptation to see those whom we imprison as outsiders must be resisted, for it is only as members of society that they are bound by society's laws and subject to its punishments. It is important to maintain, rather than to abandon, the bonds of community.

63. Imprisonment necessarily excludes individuals from these bonds, at least to some degree. But if we take the promotion of solidarity seriously, as being important to the kind of society in which we hope to live, we must be very slow to inflict such exclusion and do as much as we can to minimise its destructive impact. Indeed, we would argue that the ability of the criminal justice system to respond effectively and even-handedly to the harms and rights violations represented by criminal conduct, without resorting to measures which in effect negate the democratic membership and entitlements of offenders, is central to its democratic legitimacy. In other words, criminal justice in a country such as Britain ought to aspire to be reintegrative and inclusionary rather than stigmatising and exclusionary. Means can and should be found to strengthen society's fundamental values against those who would threaten them, but, as far as possible, these means should not themselves undermine this value system by rationing autonomy and dignity only to those thought to 'deserve' them and excluding others from their reach.

44 Indeed, it could be argued that the greater mobility between states that is fostered within such structures as the EU requires us to look further beyond any simple notion of citizenship of a nation state, perhaps towards notions of reciprocity between fellow members of such larger political communities.

45 Compare Jakobs' distinction between Citizen Criminal Law and Enemy Criminal Law: see G.-J. Diez, 'Enemy Combatants Versus Enemy Criminal Law', *New Criminal Law Review* 11 (2008), 529.

64. As part of the 'decency agenda' for prisons, prison officers were asked 'whether they would be happy for a member of their family to be in the prison'.⁴⁶ We should all ask ourselves a similar question: 'Would I be happy for a member of my family, or a friend or colleague, to be imprisoned?'. The point of this is to emphasise that the values on which social cohesion and flourishing depend do not permit us to treat those who are imprisoned as outsiders or enemies. Imprisonment is something that we do to each other as fellow members of society. Given its exclusionary character and meaning, it is therefore something that we should be slow to impose. Penal practice ought, as far as possible, to be organised both to minimise tendencies among the public at large to see offenders as excluded from society and to minimise the extent to which offenders see themselves as excluded.

65. Promoting solidarity and social inclusion is a policy choice that we could collectively avoid; but, in a society as diverse, complex and potentially fragmented as contemporary Britain, it would be dangerous to do so. The problems that cultural, religious and moral diversity pose should not be underestimated.

66. One response to diversity is to emphasise the importance of allowing different people as far as possible to lead their lives as they see fit and to treat them with the dignity appropriate to their status as moral agents. A familiar way of capturing this is to say that the members of a political community owe each other 'equal concern and respect'.⁴⁷ They owe each other concern for the basic conditions of well-being that is given institutional form in the welfare state and respect for each other as agents who are capable of choosing their own lives and their own goods. Such respect marks a recognition of the dignity of the individual as an autonomous agent. This is a way of philosophically expressing values that, we have already suggested, can be interpreted through social theory, as appropriate to addressing the conditions of complex contemporary societies. But it is necessary then to ask how the penal use of imprisonment could be consistent with this agenda.

67. Prison regimes can be more or less destructive, or more or less respectful, of the dignity of those who are imprisoned. They can do

46 See Part I, paras. 35–37.

47 See R. M. Dworkin, 'Liberal Community', *California Law Review* 77 (1989), 479.

more, or less, to protect some degree of autonomy.⁴⁸ Nonetheless, those who are imprisoned inevitably lose control over central aspects of their lives –the kind of control that adults normally expect to be able to exercise. They are not free to go where they will or to decide with whom to associate. They are subject to disciplinary regimes that determine what they must do and when. This is not to deny that imprisonment can be justified. It is simply to emphasise ways in which imprisonment impinges on core values of our society.

68. We should, therefore, operate with a presumption against its use as a punishment and in favour of modes of punishment that do not in the same way or to the same degree threaten these values and the possibilities of solidarity. Another way to express this is to say that adverse effects on social solidarity are very important *costs to society* which, even if they cannot be quantified in any precise way, must be carefully considered when the complete tally of costs of the use of imprisonment is being drawn up as a factor in penal policy.

(d) Security

69. Certainly a central responsibility of the state is to enhance and protect its citizens' security.⁴⁹ Security, the guarantee of peace or order, is a social value. Insofar as the use of imprisonment as punishment is recognised as promoting this value, its legitimacy or acceptance must surely be enhanced.

70. Security has two related but distinct dimensions. First, there is the objective matter of how far people are in fact at risk of suffering various kinds of harm or attack and of how those risks are distributed among different groups or areas. Second, there is the subjective matter of how far people feel secure against harms or attacks and of how that subjective sense of security varies between different groups or areas.⁵⁰

71. The imprisonment of offenders who are judged to be dangerous can be seen as serving the aims of security in both these dimensions. It pro-

48 See J. Whitman, *Harsh Justice: Criminal Punishment and the Widening Divide between America and Europe* (Oxford: Oxford University Press, 2003).

49 See generally L. Zedner, *Security* (London: Routledge, 2009); B. Goolod and L. Zedner (eds.), *Crime and Security* (Farnham: Ashgate, 2006).

50 See e.g. P. Ramsay, *The Insecurity State: Vulnerable Autonomy and the Right to Security in the Criminal Law* (Oxford: Oxford University Press, 2012); also J. Braithwaite and P. Pettit, *Not Just Deserts* (Oxford: Oxford University Press, 1990) on the importance of 'dominion'.

fects others against victimisation by those who are imprisoned (others except fellow prisoners and prison officers); and it reassures members of the public that effective steps are being taken to protect them.

72. The most immediate way in which imprisonment serves security is through *incapacitation* (although deterrence, rehabilitation and reform will also, insofar as they are effective, promote future security by preventing future crimes). However, we have already noted the problem incapacitative imprisonment raises. How confident or accurately can we predict that those imprisoned would have committed further serious offences had they been left at liberty in society, subject only to non-custodial sentences and supervision? There is also a deeper problem, to do with how the idea of security should be understood. It has become common to talk of the need to 'balance' liberty and security; but we should think more critically about that way of putting the matter, which treats liberty and security as quite separate, conflicting values.⁵¹

73. The security that imprisonment provides can be called a security of despair. Furthermore, it is only a partial security: it protects merely those outside the prison; it does so for no longer than the person deemed to be dangerous is imprisoned; and risks being counter-productive to security to the extent that it entails damage to the capacities of ex-prisoners for social reintegration. It is a security that is essentially adversarial. 'We' secure ourselves against 'them' by locking them up. It thus gives up, at least for the time being, the attempt to achieve a more inclusive or cooperative mode of security whereby society protects itself through measures that include offenders among the 'us' whose security is to be protected.

74. Non-custodial modes of punishment, notably *probation* and various kinds of *community payback*, can be seen as aiming for that more inclusive idea of security. Those who have committed offences are punished in ways that are intended to reduce future re-offending, but at the same time they are kept firmly within the communities whose collective safety and security are to be assured. If security is understood in this more inclusive way, it need not be opposed radically to liberty.

75. Both morality and prudence suggest that, as far as possible, this more inclusive kind of security should be sought. As a matter of morality,

51 See L. Zedner, 'Securing Liberty in the Face of Terror: Reflections from Criminal Justice', *Journal of Law and Society* 32 (2005), 507.

it does more to treat those who commit crimes as fellow citizens who share in the need for, and the value of, security, and in the value of liberty. As a matter of prudence, it is more likely to be lasting and effective than exclusive kinds of security measure that merely detain those who are seen as threatening – unless they are to be detained permanently.

76. This more inclusive view of security should also lead to a recasting of arguments about *deterrence*. To focus on the importance, for crime preventive purposes, of severe criminal punishment, such as imprisonment, may be to mistake the causes of much offending. These may be not so much to do with faulty reasoning on the part of offenders – which might be adjusted by a system of (penal) sticks and (entitlement) carrots. They may be much more to do with the *general social climate* in which individual lives are lived. This is in large part a matter of the sense of freedom or constraint which people have in their everyday lives; of the conditions of solidarity that prevail in their society; and of the educational, employment and social opportunities that their society affords them.⁵² These are, as noted earlier, matters that the value system of moral individualism encapsulates. Thus, the primary issue in promoting general security may be how far policies can be developed constructively (in some part through criminal justice, but also and more significantly independently of it) to reinforce the values of moral individualism in social life.

77. The arguments developed here do not lead to a conclusion that imprisonment can never be justified on grounds of security. Nor are they intended to deny that much can be done within prisons to make them something other and more than mere places of secure detention. But, consideration of what is necessary for security, and of how this value is best understood, should lead to a presumption against imprisonment as a means of safeguarding and promoting security. Furthermore, this presumption should only be rebutted by persuasive evidence that the offender would present a serious danger to others if left free.⁵³

52 A related emphasis on the need to reconsider penal strategies in a wider perspective of social conditions underlies recent calls for a new focus on Justice Reinvestment approaches. See Part I, para. 41. Also relevant here is evidence about the relationship between levels of welfare spending and levels of both crime and punishment: see e.g. D. Downes and K. Hansen, 'Welfare and Punishment in Comparative Perspective', in S. Armstrong and L. McAra (eds.), *Perspectives on Punishment: the Contours of Control* (Oxford: Oxford University Press, 2006), 133; K. Beckett and B. Western, 'Governing Social Marginality', in D. Garland (ed.), *Mass Imprisonment: Social Causes and Consequences* (London: Sage, 2001), 35.

53 A further question, which cannot be pursued here, concerns the kinds of risk of re-offending that society should be willing to accept as the price for reducing its use of imprisonment.

(e) Moderation or Modesty

78. Finally, we would urge the importance of moderation or modesty in penal ambitions and aims.⁵⁴ There are two dimensions to this modesty.

79. One concerns *aims or ambitions*. It is necessary to recognise the very limited role that criminal law and criminal punishment can play in a) resolving social problems; b) preventing various kinds of harm; c) building a better society; and d) preventing the kinds of harm that directly concern criminal law.

80. Criminal law and punishment are blunt and burdensome instruments. Many other kinds of measure, including education, social welfare, public health, employment and other efforts to remedy social disadvantage and injustice are likely to be more effective in preventing the harms and wrongs that crime causes. What is more, they are likely to cause far less harm themselves than criminal punishment can cause. That is one good reason why many systems of law include the principle that criminal law should be a last resort or *ultima ratio*. Given its blunt and burdensome nature, criminal law should not be looked to as the first resort in trying to deal with social problems, even those that consist in or involve the kind of conduct that is criminalised. It should be a last resort when all else fails. The *ultima ratio* principle might be overstated, but it contains an important truth. The truth is that not too much should be expected of the criminal law or of criminal punishment, and that it should always be asked whether there are other less costly and more promising methods for trying to achieve the social ends that criminal law is often ill-equipped to serve.

81. The other dimension of penal moderation or modesty concerns *means*. Jeremy Bentham famously urged the principle of parsimony – that efforts should be made to ensure that the legal and penal measures that are imposed are the least costly, least damaging, means of achieving desired ends.⁵⁵ A principle of penal moderation goes further and expresses a suitable modesty about how far it is possible to be confident about the efficacy or efficiency of the means used. The more burdensome or costly the measures imposed, the more confidence is needed that they are necessary and will be effective. But, given the difficulty of achieving any such well-grounded confidence, there should be much hesitation before imposing the more onerous kinds of measure.

54 See especially Loader, n. 3 above; also Booth et al., n. 3 above.

55 J. Bentham, *The Rationale of Punishment* (London: Heward, 1830).

82. Imprisonment is the most onerous kind of penal measure available to the courts. A suitable modesty about how much good we can be confident of achieving through such measures, and an appropriate recognition of how much harm they can do, should motivate a penal moderation that, once again, operates with a strong (although defeasible) presumption against imprisonment.

Section 4: Imprisonment in Contemporary Society

83. The arguments made above about the appropriate use of imprisonment have suggested that practices and policies of imprisonment should be understood and evaluated in relation to the wider conditions of the society in which they exist. Before concluding this Part, we offer some comments on recent literature that is relevant to an exploration of that relationship.

84. Several social theorists have argued that distinctive aspects of complex, fragile and diverse 'late modern' societies explain both widespread offending *and* increased fear of crime, as well as levels of punitiveness and intolerance. On this view, a number of factors have combined to sever the links to values that might restrain both crime and punitiveness, including:

- cultural unease;
- growing social divisions and exclusions;
- significant increases in economic inequality;
- the increasing speed of social and technological change;
- population movements and migration; and
- an unbridled consumerist ideology.

85. A combined desire for both maximum vitality and maximum safety, in the context of new risks and freedoms, has brought about a change in the role of criminal justice as a technique of social governance. This change can be characterised as a shift in criminal justice from a peripheral position in smoothly functioning democratic societies, to centre stage in fractured democracies (a position which, we argue, it should not retain).⁵⁶

86. Seen from this perspective, liberal freedom requires extensive police protection. The emotional tone of criminal justice has changed because

56 H. Boutellier, *The Safety Utopia* (Berlin: Springer Verlag, 2004).

people are uncomfortable and afraid. These fears are often, understandably, focused on the risk of being a victim of crime, which disproportionately affects the less powerful in society. But in fact they have as much to do with changing economic and social conditions as with crime per se. Criminologists have diagnosed a 'culture of control' emerging from this complex group of factors in several advanced democracies has emerged.⁵⁷

87. Theorists describe *late modernity* (or late capitalism) as involving an extension and increasingly rapid development of many characteristics of 'modernity'.⁵⁸ This development brings with it generalised fears and anxiety, uncertainty, an erosion of trust, unfettered extension of market relations and competitive individualism.

88. Significantly, these changes – both cultural and material – have thus far been more marked in the individualistic, flexible liberal market economies of countries such as Britain and the USA than in the 'coordinated market economies' of northern Europe and the Nordic region.⁵⁹ It has been argued that six important features of recent social change are characteristic of late modernity in liberal market countries such as Britain:

- i) changes in economic structures – leading to greater inequality and to changes in conditions of work and consumption;
- ii) tendencies towards globalisation and localisation – leading to a loss of social embedding;

57 D. Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Oxford: Clarendon Press).

58 *Modernity* (to be distinguished from the *pre-modern* period) refers to a phase in social development dating from the Enlightenment, also associated with the development of industrial society in the 19th century. It is characterised as emphasising bureaucracy, rationality and science, and a notion of social progress, via planned intervention (see P. L. Berger, B. Berger and H. Kellner, *The Homeless Mind: Modernisation and Consciousness* (Harmondsworth: Penguin, 1970, 13)). Order, clarity and economic growth are three of its key values. Despite the apparently 'civilising' aspirations of modernisation, it brings risks of depersonalisation and indifference to human suffering, or the 'effective administration of cruelties' (Z. Bauman, *Modernity and the Holocaust* (Cambridge: Polity Press, 1989), 9). It can be alienating, mechanical, 'disenchanting' and individualistic (see K. Kumar, *Prophecy and Progress: the Sociology of Industrial and Post-industrial Society* (London: Allan Lane, 1989); Berger et al., *The Homeless Mind* (see above in this note)).

59 P. A. Hall and D. Soskice, 'An Introduction to the Varieties of Capitalism', in Hall and Soskice (eds.), *Varieties of Capitalism* (Oxford: Oxford University Press, 2001), 1; M. Cavadino and J. Dignan, *Penal Systems: A Comparative Approach* (London: Sage, 2006); N. Lacey, *The Prisoners' Dilemma: Political Economy and Punishment in Contemporary Democracies* (Cambridge: Cambridge University Press, 2008).

- iii) technological change and its consequences – in terms both of the rapid diffusion of fears about crime and of the disappearance of many well-paid and secure semi-skilled jobs;
- iv) changes in the sources of trust – from local and kinship relationships to less stable social relations and ‘disembedded abstract systems’;
- v) changing forms of social differentiation – leading to the erosion of traditional status distinctions; and
- vi) an increasingly managerial approach to social governance.⁶⁰

89. Furthermore, the frameworks in which criminal justice systems function have altered as a consequence of the:

- increased insecurity of employment;
- wider use of information technology and electronic media;
- generalisation of expectations and fears brought about by mass media;
- ‘desubordination’ or increased assertiveness of lower socio-economic and minority groups;
- questioning of authority and tradition;
- erosion of ‘localised trust’ and ‘anchored relations’;⁶¹
- rise of managerialism (including actuarial or aggregate justice and assessments of risk).

90. Psychological conditions associated with these social changes include insecurity, resentment, powerlessness, anxiety and lack of trust. These are grounded in profound shifts, not only in the quality of social life but also in the organisation of work and the structure of the economy since the collapse of Fordist production in Britain and other developed societies in the 1970s, and with it the disappearance of many manual or low-skill jobs.

91. It has been argued that Britain has moved from an equilibrium of *cultural exclusion but economic inclusion* – class, ethnic and gender

60 A. E. Bottoms and P. Wiles, ‘Crime and Insecurity in the City’, in C. Fijnaut, J. Goethals, T. Peters and L. Walgrave (eds.), *Changes in Society, Crime and Criminal Justice in Europe*, vol. 1: *Crime and Insecurity in the City* (Antwerp: Kluwer Law International, 1996), 10. See also J. Young, *The Vertigo of Late Modernity* (London: Sage, 2007); D. Garland and R. Sparks, ‘Criminology, Social Theory and the Challenge of our Times’, *British Journal of Criminology* 40 (2000), 189.

61 See A. Giddens, *A Contemporary Critique of Historical Materialism*, vol. 1: *Power, Property and the State* (London: Macmillan, 1990); A. De Giorgi, *Rethinking the Political Economy of Punishment* (Aldershot: Ashgate, 2006).

stratification yet high rates of employment - to the opposite equilibrium of 'cultural inclusion but economic exclusion' – greater formal equality yet higher rates of long term exclusion from the labour market.⁶² For the excluded, there is humiliation and disrespect, along with the sense of alienation which comes with relative deprivation in a world that prizes material success and purports to offer equal opportunity. Identities are fragile rather than fixed or grounded. Solutions to these conditions are found in political and religious fundamentalism, racism, hyper-masculinity, the denigration of individuals and groups seen as alien or 'other', and crime.

92. In this context, the criminal justice system's focus on offending as a matter of individual responsibility divorced from social context, and the penal hard treatment that it imposes as a response to such offending, are experienced as incomprehensible and unfair by many offenders. Emphases on compassion, forgiveness, inclusion, recognition and stability are in short supply, making it difficult to garner political support for their incorporation into institutions of criminal justice.

93. Moreover, these values are hard to incorporate into the penal philosophies that, explicitly or implicitly, underpin policy. Much recent criminal justice policy in Britain has been informed by the aspiration to treat offenders and victims fairly by meting out offenders' 'just deserts'. But in the absence of any objective measure of what is deserved, the aspiration to do even-handed justice is easily subverted by political imperatives to promise deterrence, or the incapacitation of groups regarded as dangerous or troublesome. This means that rational explanations of, and responses to, crime and punishment, based on dialogue about desert, often fail. This is due in part to their inattention to the emotive aspects of punishment, and hence to their own tendency to feed into those emotional dynamics by stoking retributive emotions.

94. Such emotions may be both insatiable and damaging to the development of a rational and effective penal policy.⁶³ At the level of more serious offences, this can lead to impatience with expertise amid a volatile politicisation of criminal justice.⁶⁴ Conversely, in relation to less serious

62 J. Young, *The Exclusive Society* (London: Sage, 1999).

63 N. Lacey and H. Pickard, 'From the Consulting Room to the Court Room: Taking the Clinical Model of Responsibility without Blame into the Legal Realm', *Oxford Journal of Legal Studies* 33 (2012), 1.

64 Lacey, n. 59 above.

offences, moral evaluations of penal and social policies seem to become less salient and economic considerations become more prominent. In criminal justice agencies, a yearning for moral language and direction is often felt, and sometimes expressed, albeit 'below the radar'.⁶⁵

95. It can be argued that these various conditions combine to shape penal policy and practice in ways that are often subtle, hidden and obstructive of rational and humanitarian reform.⁶⁶ But if these claims are broadly correct – if the postulated conditions do, indeed, exist and have these consequences – what significance does this have for the claims in this Report about the importance of limiting the penal use of imprisonment?

96. The most important answer, we think, is that it in no way reduces the importance of the social values discussed earlier in this Part, or the relevance of those values as a guide to the appropriate uses of imprisonment. They remain values that are widely seen as morally and politically *attractive* in contemporary liberal democratic societies. At the same time, in a social theoretical perspective, they appear to be *appropriate* to these societies in that they foster solidarity. They help to build unity and inclusiveness while also recognising and valuing diversity and individuality.

97. However, the social and economic dynamics summarised above suggest reasons why it has proven so difficult to reconcile the social values discussed earlier in this Part with the actual penal policies and practices that have been followed in Britain over the past two decades. This is especially true for Britain and other liberal market countries that have been so radically affected by economic restructuring and, in particular, the disappearance of many low-skill jobs amid the development of a knowledge economy and the decline of industrial production. A climate of thought has developed in which the largely adverse effects of current policies and practices of imprisonment on fundamental social values – in particular, the fostering of solidarity – have been obscured from view. And this climate of thought, it can be suggested, has been

65 See A. Liebling and B. Crewe, 'Prisons beyond the New Penology', in J. Simon and R. Sparks (eds.), *The Sage Handbook of Punishment and Society* (London: Sage, 2012).

66 Some of the best writing on these matters is Young, nn. 60 and 62 above; R. Ericson, *Crime in an Insecure World* (Oxford: Polity Press, 2007); Boutellier, n. 56 above; Garland, n. 57 above; I. Taylor, *Crime in Context* (Oxford: Polity Press, 1999). Other outstanding analyses of the impact of late modernity on identity and working practices include R. Sennett, *Corrosion of Character: the Personal Consequences of Work in the New Capitalism* (London: W. W. Norton, 1998).

encouraged by widespread experience of life in Britain in the conditions of late modernity.

98. This should not, however, lead us to fatalistic conclusions – to a view that nothing can be done; that policies and practices must be left as they are. We have given many reasons why changes in the penal use of imprisonment are necessary. We have also noted some of the conditions of contemporary post-industrial societies, such as Britain, that provide the context in which such changes must be planned and achieved. Without understanding that context, our grasp of how best to improve penal policy will inevitably be flawed.

Part II: Concluding Comments

99. No attempt has been made in this Part of the Report to engage in any detail with the large and exhaustive literature on the appropriate use of imprisonment or to rehearse in detail familiar arguments in favour of making much less use of this mode of punishment than is presently done. Nor have we yet offered any determinate account of the ways in which reliance on imprisonment should be reduced. We have not considered here the kinds of offence for which imprisonment should or should not be available, or whether, and how, attempts should be made to reduce sentence lengths either across the board or for particular kinds of offence. These issues will be considered in Part III. In this Part, the aim has been to assemble some reminders of why this mode of punishment should be seen as troubling and problematic, and why, in consequence, there should be a presumption against its use. We have tried to offer a broad perspective by linking issues about imprisonment to fundamental social values and to the changing social and economic conditions in which penal policy and practice are formed.

100. In brief, our argument so far has been that we can identify a cluster of values that are both normatively and sociologically important for a contemporary democracy like our own. These are values of:

- liberty;
- autonomy, dignity and solidarity;
- inclusion;
- security understood inclusively; and
- moderation or modesty.

101. If we think about how these values can be actualised and sustained, as values for all members of political society (including those who break its laws), we can see how seriously they are infringed, or at least compromised, by reliance on imprisonment as a common mode of punishment. In deciding our penal policies and in constructing and operating our system of criminal justice, we should therefore work with a presumption against imprisonment as a punishment – a presumption that is defeasible, but not easily rebutted. In Part III of the Report, we turn to the more practical question of how we could make this presumption more effective.

Part III

Strategies for Reducing the Prison Population

Part III: Summary

Significant changes in the use of imprisonment are unlikely to be brought about solely by changes to the sentencing system. The right social and political conditions also need to be in place if change is not to be short-lived. Three overarching issues arise:

- policymaking needs to take place in a longer-term context, with greater separation of sentencing policy from the political process;
- respect for criminal justice expertise needs to be rebuilt, with aspects of policy assigned to representative and expert institutions such as a new Penal Policy Committee;
- changes must cover the whole criminal justice system, not just the use of imprisonment, and make links to wider areas such as health, education, employment and social services.

With these issues addressed, a range of strategies could be applied to reduce reliance on imprisonment and put a presumption against it into force. Six key strategies are discussed here, with specific proposals on each included in the body of the Report:

1. Using diversion from the courts more extensively
2. Promoting greater use of alternative forms of sentence
3. Prohibiting or restricting the imposition of short custodial sentences
4. Removing or restricting the sanction of imprisonment for certain offences
5. Reviewing sentence lengths
6. Removing mentally disordered and addicted persons from prisons

Two further proposals are made outside those specific strategies, to:

- urgently review the case of each IPP prisoner who has served the minimum term, with a view to release; and
- mandate the Sentencing Council to take a fresh look at its statutory duties and powers in relation to the costs and the effectiveness of different forms of sentence.

Implementing this spread of strategies and proposals could significantly reduce imprisonment and deliver considerable societal and economic benefits as a result.

1. In Part II of this Report, we argued that sentencing policies and decisions should be guided by a presumption against the use of imprisonment as a punishment. In this Part, we examine a range of strategies for reducing reliance on imprisonment, in order to show how such a presumption can be given effective force. Six strategies are set out in the sub-sections that follow; they are of three kinds:

- **Making greater use of alternatives to imprisonment** – specifically, diversions from the criminal court and non-custodial modes of punishment for a wider range of offences and offenders, to avoid being led to premature decisions that the presumption against imprisonment is rebutted (discussed in strategies 1 and 2).
- **Identifying the kinds of case in which the presumption against imprisonment should be vigorously asserted** – offenders who are suffering from mental disorders or addictions; cases in which a custodial sentence would be very short; and certain other categories of offence (discussed in strategies 3, 4 and 6).
- **Looking more critically at kinds of case in which the presumption has not been taken seriously enough** – at the increase in lengths of custodial sentence during the last 20 years, and at the use of mandatory minimum sentences (discussed in strategy 5).

Overarching Issues and Conditions for Change

2. At the outset, it must be emphasised that significant change in the use of imprisonment is unlikely to be brought about solely by changes to the sentencing system. If the wider social and political conditions are unfavourable, any attempt to change the approach to sentencing are likely to be stunted and short-lived. So, before embarking on a detailed discussion of measures related to sentencing, three overarching issues need to be confronted.

3. First, it is widely understood that the short-term framework within which policymaking goes forward is one of the factors leading to the (unplanned) expansion of prison numbers in England and Wales. In particular, there is intense competition between the main political parties to appear 'tough' on law and order.¹ Many commentators on the criminal process – even those who have advocated planned prison expansion – acknowledge the need for an informed public debate about effecting some separation of sentencing policy from the political process.² But this will only be possible if the main political parties can reach a framework agreement about the distancing of key aspects of criminal justice policy, such as the size of the prison system, from party political debate.

4. How might this be achieved? Although they operated in very different political circumstances, up to the early 1960s the Prison Commissions provided a precedent for an institutional mechanism offering a degree of political insulation for prison policy. What is needed now is an independent mechanism for inquiry to generate an expanded debate. This would involve the widest possible range of social groups and consider a broad range of the non-penal policies and institutions on which criminal justice practices bear. In committing themselves to act on the outcome of such an inquiry, the main parties would distance the issue of crime control from the upward pressure created by electoral competition.

5. But this would not be enough in itself to guarantee success. Thus, a second important condition would be the rebuilding of respect for expertise, empirical and normative, in the field. Such an inquiry should therefore be serviced by a substantial expert staff. Furthermore, following implementation of its conclusions, development of particular aspects of future criminal justice policy should be assigned to institutions encompassing both wide representation and expertise. The removal of criminal justice policy from party political competition would open up the possibility of a solution akin to what the creation of the Monetary Policy Committee (MPC) did for fiscal policy – which is widely regarded as one of the key successes of the last Labour administration.

1 N. Lacey, *The Prisoners' Dilemma: Political Economy and Punishment in Contemporary Democracies* (Cambridge: Cambridge University Press, 2008); R. Reiner, *Law and Order* (Cambridge, Polity Press 2007).

2 Lord Carter of Coles, *Securing the Future; Proposals for the Efficient and Sustainable Use of Custody in England and Wales* (London: Ministry of Justice, 2007).

6. By transferring the task of setting interest rates to an independent body of experts in the Bank of England, making this body's deliberations transparent, and setting up robust mechanisms of accountability to parliament, Gordon Brown crafted a strategy which has commanded remarkable public and political support. The process also demonstrated that direct governmental control is not the only effective form of accountability in a democratic system. In a similar way, the creation of a *Penal Policy Committee* could free penal policy from some of the pressures of short-term party politics, whilst preserving effective accountability (though of course the relationship between such a Committee and the existing Sentencing Council would need to be carefully considered).

Proposal:

Consider the creation of a new Penal Policy Committee

7. The third condition is that changes must cover the whole criminal justice system, rather than being restricted to the use of imprisonment. As was evident in Part I, the criminal justice system consists of a series of inter-related institutions and decisions. The system should therefore be viewed as an organic whole. Even if achieving a significant reduction in the use of imprisonment were the sole objective, it could only be accomplished through measures taken in different parts of the system. Moreover, the criminal justice system is a realm of social policy that is and should be linked to others, such as health (including mental health), employment, education and supporting social services.

8. Policymakers should be urged to review the evidence on protecting the public from crime from a broad point of view. Issues and opportunities to be considered include:

- crime prevention programmes;
- policies on early years education;
- child protection and family policy within the spheres of education and social services;
- the possible contribution of youth employment schemes;
- policing styles;
- forms of diversion from prosecution; and

- the proper place of restorative justice and other methods of conflict-resolution.

9. With these three points in mind, we now move on to assess the contribution that six strategies can make to reducing reliance on sentences of imprisonment. These strategies draw on the statistical trends and policies described in Part I, and on the deeper reasoning of Part II.

Strategies for Reducing Imprisonment

Strategy 1: Greater Use of Diversion from the Courts

Proposal:

Introduce a presumption that low-level offenders be dealt with out of court

10. We have just emphasised the importance of preventing and responding to as much criminal offending as possible through social services, the health service, education and employment. In terms of improving public safety, these may be no less, and are often more, effective.

11. In those cases where a formal criminal justice response is necessary, more offenders could be diverted from prosecution. In particular, more of those committing non-serious offences could be dealt with *outside the court system*. The rationale for this is that:

- i) the formal court system should be reserved for the more serious cases;
- ii) it is essential to avoid the danger that persistent low-level offenders who go to court might easily 'go through' fines and community sentences and end up in prison.

12. In the English context, this would mean that such offenders are dealt with either by the police (by way of simple cautions, Penalty Notices for Disorder,³ or other out-of-court disposals) or by the Crown Prosecution

Service (by way of conditional caution).⁴ To some extent, this policy has been adopted in recent years, resulting in a transfer of sentencing power away from magistrates' courts and towards the police. This does, however, raise questions of institutional competence and of accountability that should not be overlooked in the pursuit of cheaper responses and reduced paperwork for the police.⁵

13. For some 15 years, many young offenders in England and Wales have been 'diverted' by the use of reprimands and final warnings, and there is little doubt that this has made a lasting contribution to the reduced use of custody for young offenders.⁶ Indeed, the number of juveniles sentenced has decreased every year since 2007, and in 2012 was 25% lower than in 2011, largely because fewer juveniles were arrested and prosecuted.⁷

14. The Scottish system of Children's Hearings is a long-established diversionary approach. Under this system, children or young people under the age of 16 who are thought to be 'in need of protection, guidance, treatment or control', including those who have committed criminal offences, are referred to a Children's Panel, whose 'paramount' concern must be 'the need to safeguard and promote the welfare of the child'.⁸ As a result of this approach, persons under 16 are hardly ever prosecuted, resulting in a much reduced resort to custody for the under-16s.

15. In respect of adult offenders, Scottish prosecutors have extensive diversionary powers. Fixed offers of conditional penalties ('fiscal fines') have been available since 1988 (under s. 56 of the Criminal Justice (Scotland) Act 1987); and under ss. 50-51 of the Criminal Proceedings etc. (Reform)(Scotland) Act 2007, prosecutors can offer an alleged offender the opportunity to pay compensation to the victim or to undertake unpaid work as an alternative to prosecution. Prosecutors may also

4 Criminal Justice Act 2003, Part I.

5 N. Padfield, R. Morgan and M. Maguire, 'Out of Court, Out of Sight? Criminal Sanctions and Non-Judicial Decision-Making', in M. Maguire, R. Morgan and R. Reiner (eds.), *Oxford Handbook of Criminology* (5th edn; Oxford: Oxford University Press, 2012), 955.

6 See Part I, paras. 29–30.

7 <https://www.gov.uk/government/publications/criminal-justice-statistics-quarterly-update-to-december-2012> Criminal Justice Statistics Quarterly Update to December 2012 England and Wales, 42.

8 Children's Hearings (Scotland) Act 2011: the quotations are from ss. 66 and 25. Only when it is necessary to 'protect [...] members of the public from serious harm (whether physical or not)' should the child's welfare not be the 'paramount' consideration (s. 26). See NCH (Scotland), *Where's Kilbrandon Now?* (Edinburgh: NCH, 2003).

divert cases to social work or other interventions. A recent report has recommended the expansion of both the diversionary powers already available to prosecutors and the relatively limited powers available to police.⁹

16. There is evidence from three places that diversion at an early stage of criminal justice is associated with reductions in the prison population:

- the recent experience of the fall in the youth imprisonment rate in England and Wales, attributable in part to increasing diversion from prosecution;¹⁰
- the role of conditional non-prosecution in Germany, the condition being either paying compensation to the victim, or participating in victim-offender mediation, or undertaking unpaid work in the community; and
- the role of 'transactions' between prosecutor and offender in the Netherlands, usually involving the payment of compensation to the victim or a fine to the Treasury.¹¹

17. In both Germany and the Netherlands, the prison population has fallen in the last six to seven years, and these diversionary measures are used for many property offences, drug crimes and assaults. It is noteworthy that the German and Dutch approaches give prominence to victim compensation, thereby reducing the risk that victims of crime might fairly object to greater diversion.

Strategy 2: Promoting Greater Use of Alternative Forms of Sentence

Proposal:

Deal with more offenders by means of financial penalties and community-based sanctions rather than incarceration

9 Dame E. Angiolini, *Commission on Women Offenders* (Scottish Government, 2012), Part 4.

10 R. Morgan and T. Newburn, 'Youth Crime and Justice: Rediscovering Devolution, Discretion and Diversion?', in *Oxford Handbook of Criminology* (n. 5 above), 490.

11 R. Allen, *Reducing the Use of Imprisonment: What can We Learn from Europe?* (Criminal Justice Alliance, 2012), 8.

18. The rationale for this proposal is:

- i) It is disproportionate and wrong that many offenders are sent to prison not because of the seriousness of their crime but because courts have 'run out of alternatives'. That suggests that their offences are not so serious as to justify imprisonment, but that there is a lack of imagination about alternative sanctions.
- ii) In particular, persistent offenders whose crimes are not of high seriousness must be dealt with in the community. Many offenders are sent to prison because of their past records, even though the experience of prison is unlikely to improve them in any way.¹²
- iii) Financial penalties and non-custodial sentences are no less effective than prison in terms of reconviction rates, and often better.

19. Community sentences are the most demanding of these non-custodial disposals and should in principle be imposed only if the case is unsuitable for a conditional discharge or a fine. If they are used by default, the danger is that the probation service will become 'silted up' with relatively non-serious offenders.¹³ Community sentences should not be used for low-risk offenders. However, in recent years such sentences have become more intensive and, until 2012, the provisions for dealing with breaches of the requirements of community sentences emphasised imprisonment as the default sanction.¹⁴

20. A related, and we can hope also temporary, problem has been the considerable use of imprisonment for breach of suspended sentences, breach of community sentences and breach of the conditions of licence (for released prisoners).¹⁵ The Legal Aid, Sentencing and Punishment of Offenders Act 2012 loosens and broadens the courts' powers on breach of a community sentence and breach of a suspended sentence. Insofar as these changes enable courts to avoid resorting to custody, these are moves in the right direction.

12 It is notable that the proportion of convicted offenders with 15 or more previous convictions has increased from 20% in 2002 to over 30% in 2012: <https://www.gov.uk/government/publications/criminal-justice-statistics-quarterly-update-to-december-2012>, Offending Histories Tables - 2012; Table Q75.

13 See R. Morgan, 'Thinking about the Demand for Probation Services', *Probation Service* 50 (2003), 7.

14 See Legal Aid, Sentencing and Punishment of Offenders Act 2012.

15 See Part I, para. 13.

21. The rise in recalls of prisoners released on licence accounted for some 16% of the increase in the English prison population between 1995 and 2009,¹⁶ although this total comprises two different groups, those in breach of licence and those committing a further offence. However, not all breaches or further offences warrant committal to prison. The rationale for curtailing the use of imprisonment is to bring about more proportionate responses to offenders who break their conditions but whose original offence was not sufficiently serious to require imprisonment. The evidence that this is workable comes from Germany, where the activation of imprisonment for breach is treated as a last resort, to be used only if the offender grossly or persistently violates the conditions of the sentence or licence. Such a system has not led to problems.¹⁷

22. The evidential basis for this strategy is shared with strategy 1, diversion from the courts. England and Wales already have a wider variety of non-custodial sentences than most other countries; the issue is rather the failure to resource them adequately and the unwillingness on the part of courts and officials to make greater use of them. The numbers receiving such sentences decreased from 176,000 in 2011 to 150,000 in 2012.¹⁸ In contrast, the youth justice system in England and Wales has reduced its proportionate use of custody in the last decade (from 7.9% down to 6.6% of convicted juveniles), while maintaining its proportionate use of community-based sanctions and increasing its reliance on referral orders.¹⁹

23. In the Netherlands, the introduction of the 'Task Penalty' (a community-based sentence), presumptively to be used in place of prison sentences up to three months, was followed by a reduction in the number of unsuspended prison sentences.²⁰ However, this approach calls for circumspection: if community sentences are ever more intensive, there might be a tendency to 'ratchet up' the sentence level in the event of a breach or a further offence.

16 Ministry of Justice, *The Story of the Prison Population, 1995-2009* (Ministry of Justice, 2009), 7.

17 Allen, above n. 11, 10.

18 <https://www.gov.uk/government/publications/criminal-justice-statistics-quarterly-update-to-december-2012>, *Criminal justice statistics quarterly to December 2012 full report* (PDF), p. 40.

19 See Part I, paras. 29–30, and Morgan and Newburn, above n. 10, 519.

20 Allen, above n. 11, 13.

24. The economic arguments for reducing reliance on imprisonment were made in Part I, paras 39–41, and wider social costs and benefits were reviewed in Part II, Section 2(a). Given that this strategy promises a reduction in expenditure (because fines and community sentences are cheaper to administer than imprisonment), and no predicted reduction in effectiveness in terms of reconviction rates, it ought to be adopted.

25. The Sentencing Council has a statutory duty to ‘have regard to the cost of different sentences and their relative effectiveness in preventing re-offending’ when exercising its functions, notably when drafting guidelines.²¹ Yet the Council has not adverted to this statutory duty in any of its publications, even though it would clearly have relevance to the shaping of sentencing guidelines for offences that are not in the first rank of seriousness, such as some assaults and some frauds. In the light of the strong and substantive arguments in favour of greater use of non-custodial sentences, the Sentencing Council should review the evidence and readjust its custody thresholds to incorporate more non-custodial sentences in the place of short prison sentences.

Strategy 3: Prohibiting or Restricting the Imposition of Short Custodial Sentences

Proposal:

a) Prohibit courts from imposing prison sentences below a certain limit; or

b) Create a presumption against imposing such a sentence unless there are exceptional circumstances (instead, courts would be required to impose either a suspended custodial sentence or a community sentence).

21 Coroners and Justice Act 2009. But the criminal justice system as a whole lags well behind other fields such as health and transport in developing relevant methods of measuring costs and benefits.

26. Those who go into prison for short sentences are, by definition, not major offenders. Rather, they are people who have either committed a single bad act or (more frequently) are persistent low-level offenders for whom the courts see themselves as having 'run out of options.' The short prison sentence is often, therefore, more an expression of frustration than a 'necessary' response to a conspicuously serious offence. Our proposal incorporates two ways of restricting the use of short prison sentences.

27. Is there evidence that such a strategy would be effective in reducing the use of short prison sentences? The evidence in England and Wales, whilst not recent, is not favourable. When the suspended sentence was introduced in 1967, courts were required to suspend all sentences under six months (with limited exceptions). But in practice the courts did their best to escape from this straitjacket, including some cases where a seven-month sentence was imposed simply to circumvent the law.²² English courts are in general strongly opposed to mandatory sentencing provisions. Whether sentencing guidelines could prevent circumvention of such a prohibition or restriction is a moot point; but, internationally speaking, such laws do not appear to be a fruitful approach, partly because they can so easily lead to higher sentences.²³

28. However, suspended sentences are used more widely in European countries that have lower imprisonment rates than Britain. For instance, in Germany a court must suspend any sentence of less than six months unless special circumstances exist.²⁴

29. In England and Wales, s. 68 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 reintroduced the suspension of sentences of up to two years' imprisonment. However, that is a permissive law, not a presumptive or mandatory provision. In Scotland there has been a presumption against imposing immediate sentences of imprisonment of three months or less since 2011. As discussed in Part I, it is not yet clear what effect this has had – figures suggest that there are fewer sentences of this length, but more sentences of between three

22 The classic study is by A. E. Bottoms, 'The Suspended Sentence in England', *British Journal of Criminology* 21 (1981), 1.

23 J. V. Roberts, 'Reducing the Use of Custody as a Sanction: a Review of Recent International Experience', in M. Hough, R. Allen and E. Solomon (eds.), *Tackling Prison Overcrowding* (Bristol: Policy Press, 2008).

24 Allen, above n. 11, 10.

and six months.²⁵ If such a law were to be introduced in England and Wales, it would need to be framed in legislation and would rely on the Sentencing Council either to issue a general guideline concerning the custody threshold and/or to incorporate relevant guidance in any offence guideline for which short custodial sentences were a possibility.

Strategy 4: Removing or Restricting the Sanction of Imprisonment for Certain Offences

Proposal:

Remove imprisonment as the maximum penalty for certain offences, or whole categories of offence, altogether

30. A bolder strategy would be to remove imprisonment as the maximum penalty for certain offences altogether, replacing it with a community sentence. This might involve reviewing all summary and low-level offences to see whether any of them should have imprisonment abolished as a punishment (as Parliament did for begging and for soliciting for prostitution, in 1982).²⁶

31. Alternatively, and even more boldly, imprisonment could be abolished for a whole category of offences, or its use restricted by means of a prohibition with an 'exceptional circumstances' proviso. For example, this strategy could be used for 'pure' property offences, i.e. excluding those that violate another right, such as robbery, domestic burglary and blackmail. The rationale for such a radical step is that the wrong done by the offence, i.e. the invasion of a right to property, is not so egregious as to justify depriving the offender of the much more fundamental right to personal liberty through imprisonment.²⁷

25 Criminal Justice and Licensing (Scotland) Act 2010, s. 17; see above, Part I, para. 20.

26 Criminal Justice Act 1982, ss. 70–71.

27 For fuller argument, compare A. J. Ashworth, *What if Imprisonment were Abolished for Property Offences?* (Howard League, 2013), with Sentencing Council, *Fraud, Bribery and Money Laundering Offences Guideline: Consultation* (2013), 14–20.

32. Pure property offences such as theft, handling stolen goods and criminal damage should be dealt with proportionately, by means of financial sanctions (particularly compensation to the victim) and community sentences. There is already a broad foundation for this approach in the legislative provision forbidding courts from imposing a prison sentence unless the offence(s) is/are 'so serious that neither a fine alone nor a community sentence can be justified'.²⁸ However, this statutory provision is referred to only rarely by the Court of Appeal when hearing sentencing appeals, and it is unclear how prominently it features in sentencers' deliberations.

33. The evidential basis for taking this approach further comes partly from Parliament's abolition of imprisonment for begging and for soliciting for prostitution in 1982. Importantly, this applies to both first-time and repeat offenders. No matter how many times the offence is committed, it does not merit imprisonment, especially for the disadvantaged people often to be found committing such offences. Also pertinent are the practices of Her Majesty's Revenue and Customs (HMRC) in relation to tax offences and the practices of the Department of Work and Pensions (DWP) in relation to benefit fraud. HMRC resorts only rarely to prosecution, relying instead on various forms of financial claw-back including compounding and civil penalties.²⁹ DWP prosecutes more frequently, but relies primarily on financial claw-back mechanisms which are tailored specifically to the means of persons who are already on benefits and have no other funds.³⁰

34. Such approaches could be transferred to property offences such as pickpocketing, theft from motor vehicles, theft from shops, criminal damage and so forth. This would require a radical reordering of financial sanctions and introduction of innovative community sentences. The example of HMRC and DWP might be followed, but innovative solutions may require greater resources, which could be justified on a 'justice reinvestment' basis, given the prospect of reducing prison expenditure.³¹

28 Criminal Justice Act 2003, s. 152(2).

29 www.hmrc.gov.uk/prosecutions/crim-inv-policy.htm.

30 <http://campaigns.dwp.gov.uk/campaigns/benefit-thieves/penalties.asp>.

31 *Report of the Commission on English Prisons Today* (London: Howard League for Penal Reform, 2009).

35. Those who have committed 'pure' property offences constitute the largest group of prison admissions each year. They make up 8% of adult male sentenced prisoners (about 5,000) and – even more significantly – 21% of female sentenced prisoners.³² The Corston Report argued that prison sentences should not be imposed on women unless they are 'serious and violent offenders who pose a threat to the public'.³³ The same principle should apply to men.

36. There are two ways in which this policy could be implemented. One would be by legislation, controversial as the task of identifying groups of non-serious property offences would undoubtedly be. The other would be through the Sentencing Council's formulations of guidelines, with the Council giving its own reasons for operating, say, a presumption against using imprisonment for certain types of offence. In practice, this is already done when the Council's lower category ranges for certain offences exclude custody. What is missing, however, as on the issue of the cost and effectiveness of sentences,³⁴ is a rounded and principled discussion of the issue that has across-the-board application.

Strategy 5: Reviewing Sentence Lengths

Proposal:

Review sentence lengths in relation to those of other European countries, including maximum penalties and mandatory minimum sentences, and sentences for murder and drug offences

37. Sentence lengths have grown significantly in recent years, without a clear overall plan. The public bodies charged with creating sentencing guidelines have not, generally speaking, seen it as their task to alter sentence levels. Parliament has raised maximum penalties and has introduced mandatory minimum sentences, and the courts have taken

32 Ministry of Justice, *Offender Management Statistics 2012*, Table 1.3a.

33 Baroness Corston, *Review of Women with Particular Vulnerabilities in the Criminal Justice System* (London: Home Office, 2007), ch. 5.

34 See at n. 21 above.

their cue from the generally punitive attitude generated by government ministers and vocal sections of the media.³⁵

38. There is a need for a cool, clear look at sentence lengths in relation to those of other European countries. The rationale for this is that people are becoming accustomed to ever-higher sentences, without stopping to reflect on the need for so much deprivation of liberty. One detailed task would be to examine the case for each mandatory minimum sentence. Questions should include: Is it disproportionate? Does it prevent the courts from doing justice in the individual case? And can it be argued that it has had a significant effect on the level of relevant offending?

39. Similarly, questions can be asked about whether the levels set for minimum terms for murder by Schedule 21 of the Criminal Justice Act 2003 are justifiable. Not only are they much higher than those applied in the previous decade, but the Lord Chief Justice has held that sentence levels must now be raised for manslaughter, attempted murder and robbery in order to conform to Parliament's intentions – although whether this was really Parliament's intention in 2003 remains a contested issue.³⁶ Guidelines for the sentencing of drug offenders have recently been issued by the Sentencing Council,³⁷ but (apart from the Council's reduction of sentence levels for certain drug couriers) the overall levels remain higher than necessary. A dispassionate overview of the whole range of sentence levels is sorely needed.

40. What is the evidential basis for reconsidering sentence lengths? It is that other European countries such as Germany and the Netherlands have lower sentence levels for most crimes than do England and Wales, without higher crime rates. Indeed, what distinguishes English imprisonment rates is not so much the proportionate use of prison sentences as the length of those sentences. France, the Netherlands and the Nordic countries imprison a higher proportion of offenders than does this country, but their prison populations are significantly lower per head of population because the sentences are shorter. Germany has reduced its use of imprisonment as its crime rate has fallen in the last five to six

35 See Part I, paras 42–47.

36 D. Jeremy, 'Sentencing Policy or Short-Term Expediency?', *Criminal Law Review* (2010), 593–607; *Wood* [2010] 1 Cr App R (S) 6, at [23]; *Attorney-General's Reference No. 60 of 2009 (Appleby)* [2010] 2 Cr App R (S) 311, at [22].

37 Sentencing Council, *Drug Offences: Definitive Guideline* (2013).

years, but the fall in the crime rate in Britain has not been accompanied by a scaling-back of reliance on the prison.³⁸ Given this evidence from elsewhere in Europe that sentence lengths could be lower without loss of deterrent value, a dispassionate review of all English sentence levels ought to be a priority.

41. In England and Wales, longer sentences are causing significant management difficulties as well as considerable expense. A larger prison population, housed more cheaply, and for longer, is a dangerous and counter-productive response to reducing levels of crime. Using fewer, carefully resourced places more wisely and constructively would lead to better outcomes, both in prison and on release. New modes of delivery of prison sentences must be carefully evaluated in order to inform future policy.

42. Any review of mandatory penalties would have to result in legislation. This is closely linked to another vexed question in this country, the lack of structure for maximum penalties. Not since 1978 has there been any systematic analysis of maximum penalties, and in 1978 the conclusion was that the issues were so complex that the statutory maxima should be left undisturbed.³⁹

43. If we are to move towards a more rational and humane penal system, a review of sentences is a task that will have to be confronted soon. The tactic of avoidance succeeds only in perpetuating anomalies and injustices. As for action on actual sentence lengths, this is a matter within the purview of the Sentencing Council. However, the Council's general approach – like that of its predecessor bodies – is not to depart from current sentence levels but to attempt to rationalise sentences within that envelope. The arguments in Part II of this document indicate that now is the time for an evidence-based and principled review of this policy.

38 National Audit Office, Briefing for the House of Commons Justice Committee, *Comparing International Criminal Justice Systems* (National Audit Office, 2012), 22; Allen, above n. 11, 6.

39 Advisory Council on the Penal System, *Sentences of Imprisonment: a Review of Maximum Penalties* (1978).

Strategy 6: Removing Mentally Disordered and Addicted Persons from Prisons

Proposal:

Remove mentally disordered offenders, offenders with learning difficulties and those suffering from drug or alcohol addiction from prison through investment in and transfer to more appropriate facilities, treatment and rehabilitation.

44. The removal of mentally disordered offenders and offenders with learning difficulties from the prisons has long been regarded as the right course. The rationale is obvious: prison is an unsuitable environment for such offenders, who should properly be treated or at least accommodated in appropriate facilities. This is therefore a question of justice,⁴⁰ rather than merely a means of reducing the prison population. The problems, however, are equally obvious. The mental hospitals are full to overflowing, they sometimes regard offenders as disruptive patients, and they may be unwilling to accept such prisoners on a transfer.

45. The Bradley Report observed that:

*'Custody can exacerbate mental health problems, heighten vulnerability and increase the risk of self-harm and suicide.'*⁴¹

46. In the absence of massive spending on mental health facilities and some change in hospital admissions policies, prisons are likely to house a significant number of mentally disturbed offenders for some time to come. Some similar arguments apply to those suffering from drug or alcohol addiction. It is well known that there is a shortage of community facilities for treating such persons. A 'justice reinvestment' rationale would justify greater efforts to ensure adequate community provision and rehabilitation for these groups.

40 For a nuanced view of the issues, see J. Peay, *Imprisoning the Mentally Disordered: A Manifest Injustice* (LSE Law, Society and Economy Working Papers, 7/2014).

41 Lord Bradley, *Report on People with Mental Health Problems or Learning Disabilities in the Criminal Justice System* (Ministry of Justice, 2009), ch. 1.

Part III: Concluding Comments

47. Before we summarise the prospects of the six strategies, one problem that may be of a more temporary nature – but still of considerable importance – should be mentioned. It arises from the abnormally high numbers of prisoners serving indeterminate sentences. On average, 3% of prisoners in European countries are serving indeterminate sentences, whereas the figure for England and Wales is 19%.⁴² This country's percentage was already above average prior to 2003, but there are now some 5,800 prisoners serving sentences of Imprisonment for Public Protection (IPP), many of whom have long passed the end of their minimum sentence and yet have not had access to the courses necessary to give them the chance of release.⁴³

48. The European Court of Human Rights has held that such IPP prisoners are unlawfully detained,⁴⁴ and the final ruling of the Grand Chamber in Strasbourg is awaited. The IPP sentence was criticised by the Chief Inspector of Prisons, by the Judiciary, and by many others, including the Coalition Government in its 2010 Green Paper. It has now been replaced by the presumptive sentence of life imprisonment for a second listed offence, a much more tightly drawn sentence for 'dangerous' offenders.⁴⁵ However, the urgent problem is the need to review the case of each IPP prisoner who has served the minimum term, with a view to release. Many of these IPP sentences were imposed under mandatory provisions for offences not in the first rank of seriousness, as demonstrated by the fact that some of the minimum terms were only for one or two years.

Proposal:

Urgently review the case of each IPP prisoner who has served the minimum term, with a view to release.

42 See above, Part I, para. 12. R. Allen, *Reducing the Use of Imprisonment: What can We Learn from Europe?* (Criminal Justice Alliance, 2012), 7.

43 Ministry of Justice, *Offender Management Statistics Quarterly Bulletin January to March 2012, England and Wales*, (2012), 9.

44 *James, Wells and Lee v. United Kingdom* (2013) 56 EHRR 399, judgment of 18 September 2012.

45 Legal Aid, *Sentencing and Punishment of Offenders Act 2012*, s. 122.

49. We return, then, to the prospects of the six strategies set out above. The first point to be made is that they are not the only possible strategies for tackling the problem of the prison population. For instance, we have not devoted specific discussion to the population of remand prisoners, since the numbers have not grown substantially over recent years.⁴⁶ Nevertheless further efforts should be made to ensure that persons awaiting trial are not deprived of their liberty without strong justifications.⁴⁷

50. If sheer and rapid reduction of the prison population were the only objective, then one could advocate an amnesty (as occurs in some countries) or an accelerated programme of early release for certain categories of offender. But such 'back-door' methods of regulating the prison population tend to avoid the hard questions, which ought to be faced at the sentencing stage. An institutional approach would be to reconsider the sentencing powers of magistrates' courts. Two very different strategies offer themselves:

- i) expand magistrates' sentencing powers, with a corresponding reduction in their powers to commit cases to the Crown Court for sentence; or
- ii) prevent magistrates from imposing sentences of imprisonment at all.

51. One difficulty in relation to the expansion of magistrates' sentencing powers is that it is uncertain what impact this would have on the use of custody, unless combined with some other strategy. Magistrates' sentencing levels have historically been lower than those of the Crown Court for roughly equivalent cases, but it seems likely that the increase in numbers of District Judges in the magistrates' courts may have narrowed the gap.⁴⁸

52. The alternative strategy – preventing magistrates from imposing prison sentences at all – would have a dramatic short-term effect on

46 See Part I, para. 8.

47 For further discussion, see R. A. Duff, 'Pre-Trial Detention and the Presumption of Innocence', in A. J. Ashworth, L. Zedner and P. Tomlin (eds.), *Prevention and the Limits of the Criminal Law* (Oxford: Oxford University Press, 2013), 115.

48 The number of District Judges in England and Wales reached 96 in 2000, and has since grown to about 150. For an early survey demonstrating their effect on sentencing levels, see R. Morgan and N. Russell, *The Judiciary in the Magistrates' Courts* (2000), 49–52.

prison receptions. However, it would surely lead to a much higher rate of committals to the Crown Court for sentence (unless those provisions were also changed), and so the medium and longer-term prospects might be less favourable. The difficulty with these and other institutional strategies is that they do not confront the real issues: without a change of approach to the use of imprisonment, based on the kind of reasoning developed in Part II, simply altering the institutional structure is unlikely to bring lasting change.

53. All six strategies address the problem directly. Only the first – the greater use of diversion – does not directly concern the imposition of custodial sentences. But reducing the use of imprisonment requires a strategy that involves the criminal justice system as a whole, not the sentencing system alone. The third strategy – prohibiting or restricting the imposition of short custodial sentences – would test the authority of the legislature and the Sentencing Council, because judges and magistrates dislike mandatory provisions. The fourth strategy – removing or restricting the sanction of imprisonment for certain offences – is a real test of resolve. However, some such bold move must be made if there is to be significant progress, and the arguments for hiving off some lower-level property offences have been powerfully made. The sixth strategy – the removal of mentally disordered and addicted persons from the prisons – would strike an important blow for justice, as would the release of many IPP prisoners who have passed their minimum term. However, the two most obvious and central strategies are:

- the second: promoting the use of alternatives to custody; and
- the fifth: reviewing and reducing sentence lengths.

54. If these two strategies were implemented we should see a speedy and substantial reduction in prison numbers.

55. How could these two strategies be implemented? The institution most mentioned in the preceding analysis is the Sentencing Council,⁴⁹ which thus far has largely followed current sentencing levels when formulating its guidelines. The Council has the great strength that its judicial majority should enable it to take the judiciary and magistracy in a new direction.

49 The existing Sentencing Council for England and Wales; and the Sentencing Council proposed but not yet created for Scotland (see above, Part I, para. 55).

Proposal:

The Sentencing Council should take a fresh look at its statutory duties and powers in relation to the costs and the effectiveness of different forms of sentence.

56. Reviewing sentencing practice in this way would surely lead the Sentencing Council to reconsider the current use of imprisonment. However, without committed political leadership, willing to withstand the opposition of the popular press, it is unlikely that even the powerful economic and effectiveness arguments against the current use of imprisonment will hold sway. An alternative possibility noted at the beginning of this Part of the Report would be the creation of a new Penal Policy Committee, analogous to the Bank of England's Monetary Policy Committee. Such a Committee, which would be accountable to Parliament, could develop and formulate penal policies. The Sentencing Council, working to a revised remit, would then be able to implement the policies concerning sentencing.

57. At the beginning of Part III we made the case for an independent inquiry into sentencing, having secured a commitment from the leading political parties to allow penal policy to be developed in a non-partisan forum. Such an inquiry must have a broad membership, including judges, and should be encouraged to conduct public opinion exercises that descend into the details of penal policy.

58. It is important that any inquiry into penal policy should be grounded in public opinion, based on considered judgements of ordinary cases, rather than instant reactions to emotive offence labels.⁵⁰ However, research shows that most people believe, mistakenly, that crime rates have increased in recent years, and that they underestimate the lengths of sentence handed down by the courts. This combination indicates a

50 M. Hough and J. Roberts, 'Public Opinion, Crime and Criminal Justice', in *Oxford Handbook of Criminology* (n. 5 above), 279, at 280. For an example of this methodology, see B. Mitchell and J. Roberts, *Exploring the Mandatory Life Sentence for Murder* (Oxford: Hart, 2012), esp. chs 6 and 7; and J. Roberts, M. Hough, J. Jacobson, N. Moon and A. Bredee, 'Public Attitudes to the Sentencing of Offences involving Death by Driving', *Criminal Law Review* (2008), 525.

spiral of public misunderstanding on this crucial issue of public policy.⁵¹ Hence public opinion exercises will be worthwhile only if they include a strong element of public education.

59. In conclusion, an independent inquiry into sentencing, combined with the revival of respect for expertise, and a genuine attempt to remove penal policy from party politics, might be effective in producing a new social and political context for criminal justice policy. This new context would make possible the implementation of the six strategies and associated proposals put forward in this Report, which would both reduce imprisonment and deliver significant societal and economic benefits.

51 M. Hough, B. Bradford, J. Jackson and J. V. Roberts, *Attitudes to Sentencing and Trust in Justice* (Ministry of Justice, 2013), ch. 3.

Annex

Key Events and Documents

1992

- Election of fourth term Conservative Government; Kenneth Clarke as Home Secretary.
- Implementation of Criminal Justice Act 1991.

1993

- Murder of James Bulger.
- Michael Howard became Home Secretary.
- Criminal Justice Act 1993 reversed Criminal Justice Act 1991 on unit fines and previous convictions.

1994

- Prison Ombudsman introduced.
- Whitemoor Prison escape.

1995

- Parkhurst Prison escape.

1996

- White Paper, *Protecting the Public*, proposed mandatory minimum sentences.
- Offensive Weapons Act increased maximum penalties for weapons offences.

1997

- Crime (Sentences) Act 1997 provided for mandatory minimum three-year sentence for third domestic burglary, mandatory minimum seven-year sentence for third Class A drug trafficking offence, and automatic life sentences for second serious sexual or violent offences.

1997

- Labour formed a government; Jack Straw became Home Secretary.
- Crime (Sentences) Act brought into force.

1998

- Crime and Disorder Act 1998 introduced anti-social behaviour orders, created Youth Justice Board, and made medium term prisoners eligible for executive recall.

1999

- Home Detention Curfew introduced to allow early release of short-term prisoners.

2000

- Murder of Zahid Mubarek at Feltham Young Offender Institution.
- Murder of 8-year-old Sara Payne.

2001

- Green Paper, *Criminal Justice: The Way Ahead*.
- Labour elected to second term; David Blunkett became Home Secretary.

2002

- Green Paper, *Justice for All*, proposed greater emphasis on public safety, indefinite detention of 'dangerous offenders', but more supervision for short-term offenders.
- Murders of Holly Wells and Jessica Chapman.

2003

- Criminal Justice Act 2003 introduced IPP (imprisonment for public protection), legislative starting points for calculating the minimum term for offenders convicted of murder.
- Carter, *Managing Offenders, Reducing Crime: A New Approach*.

2004

- National Offender Management Service created.
- Home Office, *Confident Communities in a Secure Britain: The Home Office Strategic Plan 2004–08*.
- Office for Criminal Justice Reform, *Cutting Crime, Delivering Justice: A Strategic Plan for Criminal Justice 2004–08*.
- Charles Clarke became Home Secretary.

2005

- Labour elected to third term.
- Implementation of many parts of Criminal Justice Act 2003:
 - Licence period lengthened, increasing likelihood of recalls
 - Suspended sentences made much more available, increasing breach population
 - Breach sentences must now be more onerous than that breached
 - Release at the halfway point introduced for offenders serving determinate sentences of four years or more
 - Minimum mandatory five-year sentence for possession of illegal firearms offences
 - Introduction of indeterminate and extended sentences for public protection (IPP, EPP)
 - Parole Board required to review all recall cases.
- *Hirst v UK*, European Court of Human Rights finds total ban on prisoner voting contrary to ECHR.
- *Napier v Scottish Ministers*, holding that the current practice of 'slopping out' breached human rights.

2006

- John Reid became Home Secretary.
- Home Office, *Rebalancing the Criminal Justice System in Favour of the Law-abiding Majority: Making Sentencing Clearer*.
- Home Office/Lord Chancellor's Department, *Simple, Speedy, and Summary Justice*, proposed reductions in pre-trial reviews and increased use of Penalty Notices for Disorder, freeing up court time for other cases; also encouragement of early guilty pleas to lead to reduced sentence lengths.

2007

- Creation of Ministry of Justice, with Home Office losing several criminal justice responsibilities.
- Jack Straw became Secretary of State and Lord Chancellor.
- End of Custody Licence: certain non-violent offenders released up to 18 days early.
- Carter Report, *Securing the Future: Proposals for the Efficient and Sustainable Use of Custody in England and Wales*.

2008

- Sentencing Commission Working Group Consultation and Report.
- Criminal Justice and Immigration Act 2008: changes to rules for IPPs

introducing a minimum tariff of two years; most prisoners released automatically at halfway point and on licence until the end of their sentence; fixed term recalls (for 28 days) introduced for certain prisoners.

- Corston Report, *Review of Women with Particular Vulnerabilities in the Criminal Justice System*.

2009

- Coroners and Justice Act 2009 created Sentencing Council, replacing the Sentencing Advisory Panel and the Sentencing Guidelines Council.

2010

- Coalition Government formed; Kenneth Clarke as Justice Secretary.
- Green Paper, *Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders*.

2011

- Government response to consultation on Green Paper.

2012

- Legal Aid, Sentencing and Punishment of Offenders Act 2012:
 - IPPs replaced by new life or extended sentences for 'dangerous' offenders; mandatory minimum sentences for certain knife crimes.
- Chris Grayling replaced Kenneth Clarke as Justice Secretary.

2013

- Ministry of Justice consultation, *Transforming Youth Custody: Putting Education at the Heart of Detention*. Crime and Courts Act 2013.
- Ministry of Justice, *Transforming Rehabilitation: A Strategy for Reform*.

This report has been peer-reviewed to ensure its academic quality. The views expressed in it are those of the authors and are not necessarily endorsed by the British Academy, but are commended as contributing to public debate.

Over the last two decades, the use of imprisonment as a form of criminal punishment in England, Wales and Scotland has risen sharply. What is more, our reliance on imprisonment today is acutely out of line with similar countries in Western Europe. This overwhelming reliance is compounded by the financial cost to the public purse. The human cost to those imprisoned, their dependents, those who work in the prison system, and ultimately the cost to society as a whole, must also be considered.

This report argues that we do not need to rely so heavily on imprisonment as a form of punishment, nor do we need to imprison so many people, or for such long periods of time.

This report looks at how prison policies and regimes in England and Wales, and in Scotland, have changed in the last two decades. It sets out a series of theoretical, moral and political arguments as to why we should, as a matter of urgency, reduce our reliance on imprisonment and consequently reduce the number of people in prison. This report concludes with six possible strategies through which a presumption against imprisonment could be given practical force, and could thus help to reduce our excessive reliance on imprisonment.

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