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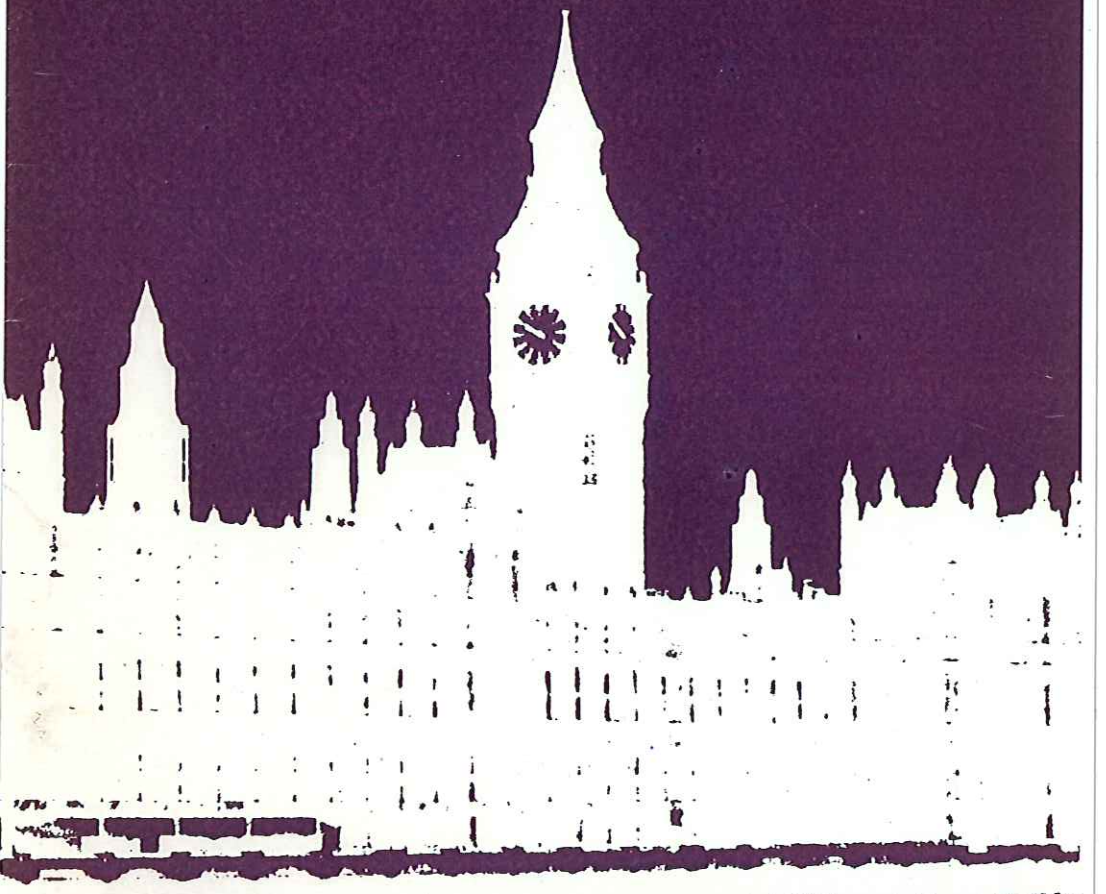
Policy Study No 104

Custody reconsidered

clarity and consistancy in sentencing

Andrew Ashworth



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8 Wilfred Street, London SW1E 6PL
1989

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Acknowledgements

I would like to record my gratitude to Dr Sheila Lawlor and Oliver Knox at the Centre for Policy Studies for their patience and for their kind assistance in the shaping of this small study.

Support toward research for this study was provided by the Institute of Policy Research.

ISBN 1-870265-54-8

Printed in England by G.Donald & Co. Ltd.
Unit 2, 54 Kimber Road, London, SW18 4PP

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Introduction

SENTENCING POLICY IN BRITAIN HAS REACHED AN AWKWARD STAGE. There is doubt about the extent to which prison fulfils any of the expectations of the public. Certainly, it *punishes*; and expresses the outrage which people feel towards many of the crimes which afflict us. Certainly, too, it removes, for a period, a few dangerous criminals from our midst.

But on the other hand, there is little evidence that imprisonment acts as a powerful deterrent, even less that it reforms the offender. On the contrary, it is seen to act as a breeding ground for crime. Nor, as I shall show, can it be held to play any significant part in the prevention of crime, or the protection of the public. And it is colossally expensive, demanding some £880 million a year.

For these and other reasons governments over the last twenty years have sought to encourage non-custodial sentences; and to reduce the prison population by such means as remission and parole – to the point where the average member of the public today has little idea of the real duration or severity of any given prison sentence.

Despite this, more and more offenders are sentenced for longer and longer periods. Why? Partly because the existing alternatives to custody are not considered satisfactory; partly because the Government is anxious not to breach the principle of the independence of the judiciary. But the proper nature and limits of this principle are perhaps not well enough understood. This has led me to my main conclusion; which is that a small Sentencing Commission should be set up, with the principal duties of defining sentencing aims and policies; and establishing sentencing guidelines for all categories of crime.

These guidelines might follow the example already set down by the Lord Chief Justice from time to time – but with the important difference that they would be systematic, designed to form a corpus to be consulted by every court in the land.

The Commission, which would be responsible to the Lord Chancellor, would include not only members of the judiciary but representatives from all parts of the criminal justice administration.

Sentencing, which must be the sheet anchor of the criminal

justice system, would become more intelligible, clearer and more consistent; in short, more just. And we might hope to see an end to the paradox whereby prison is increasingly deplored, and increasingly used.

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What do prisons do?

It is unfortunately the case that in recent years the courts have been resorting ever more to prison sentences. In 1976 some 16 per cent of male indictable offenders were sentenced to immediate custody. By 1986 this had risen to 21 per cent. The prison population as a whole has hovered around 50,000 in the last two years, having grown from 32,000 in 1968 and 42,000 in 1978. These increases partly reflect the growing number of remand prisoners, but recent trends show that the courts are handing down longer prison sentences, as well as more of them. It is true that the average length of sentence in magistrates' courts has steadied and declined slightly – but more and more cases are being committed to the Crown Court, where the average length of custodial sentences has gone up from 17.0 months in 1980 to 18.9 months in 1987.[1]

This is of great consequence for very many reasons. Imprisonment does not appear to be effective for the purposes often claimed for it. It is expensive in terms of human misery and public resources. It breeds crime. The misery and degradation of being imprisoned in ageing and overcrowded prisons has been well documented by H.M. Chief Inspector of Prisons.[2] The expense of keeping people in prison is now put at £275 per week. Each new place in the prison building programme costs over £80,000.

It might have been expected that the total prison population would have increased even more substantially because of the imposition of more and longer custodial sentences. In fact the increase has been kept within (barely) manageable limits by the Home Secretary's manipulation of the thresholds for parole and remission. In 1983 he halved the threshold for parole from 12 months to six months, not only releasing over 2,000 prisoners on one day but also introducing a system whereby over three-quarters of prisoners serving sentences between 12 and 23 months are released early on parole. Again, in 1987 he increased remission on sentences up to 12 months from one-third to one-half. These and other changes in the reality of the length of

prison sentences imposed by the courts clearly reveal the disenchantment of the Government with the sentencing policies pursued by the courts.

So who is right? Are the courts right to be using prison sentences more and more, or are successive Home Secretaries right in saying that prison should, overall, be used less?

Some argue that the rising prison population is simply a reflection of the rising crime rate. Is it not natural that the prison population should increase if the crime rate increases? But the problem is that we do not *know* what the crime rate is, or what it has been. 'Recorded crimes' should not be taken to represent the actual crime rate. The statistics for the recorded rate of 'notifiable offences' (generally the more serious crimes) show an average rise of 4 per cent per annum in the period 1977-1987. Of the many reasons why this statistic cannot be taken as a true measure of 'the crime rate' the most important one is that it counts only those offences which are reported and recorded. An increase in reported crimes does not necessarily mean an increase in the numbers actually committed: for example, there is evidence from surveys of British households in 1972 and 1982 that most of the increase in recorded house burglaries between those years was because more householders reported them, rather than because more houses were burgled.[3] Recorded offences of rape have increased enormously in recent years (an annual average of 9 per cent between 1977 and 1987), but this may in part be attributable to initiatives to make it less harrowing for victims to report rape.

This is not to suggest that there is no increase in the rate of crime: it is merely to point out that we cannot take the figures of recorded crimes at face value, since we do not know how much of the increase is attributable to greater reporting. In any event, the statistics do not explain why the proportionate use of prison sentences by the courts is growing. The only explanations for this are that the courts are raising their sentencing levels as a matter of policy, or that crimes are becoming more serious each year (crimes of violence, sexual offences and robbery accounted for 14% of sentenced offenders in 1979 and 16% in 1987). Nor is the connection inevitable even if significant increases in seriousness could be proved. All major European countries have been suffering increases in crime, yet West

Germany has succeeded in reducing its prison population significantly since 1983.

Prison and the creation of crime

The fact is that prisons are not effective either in deterring or in reforming those sent inside them. Some 60% of prisoners re-offend within two years of their release.[4] This should scarcely surprise us. The primitive and physical nature of life in an overcrowded institution, in which prison staff cannot prevent brutal exchanges between prisoners; the passing of criminal know-how from one inmate to another which leads to the spread of new ideas for lawbreaking and sometimes to the planning of fresh crimes involving several prisoners; the cutting-off of individuals from the outside world, from family, friends, employers and others – all inflict psychological damage. Among the adversities which those leaving prison have to contend with are difficulties in finding jobs, a consequent lack of money and all the pressures which that may bring, and the temptation of contacts established in prison.

Mindless submission in primitive conditions hardly serves as an opportunity for reformation of character. Rather than as a force for deterrence or reformation, prison may be seen as a school for crime. None of this is a revelation: it was said many years ago that one cannot train people for freedom in conditions of captivity, and it has long been known that prisons have their own 'inmate sub-culture' which tends to work against official attempts to change their characters. Nor is it unknown to the Government: indeed, last year's Green Paper *Punishment, Custody and the Community* affirmed that 'imprisonment is likely to add to the difficulty which offenders find in living a normal and lawabiding life'.[5] Yet ever more frequent and ever longer prison sentences imposed by the courts suggest that, even though judges and magistrates may know that prison is useless in many or most ways, they readily allow that knowledge to be disregarded. If so, why?

Prison and the prevention of crime

The judges and magistrates may counter that, even if prison neither reforms nor deters, at least it keeps offenders out of harm's way for a period of time. In other words, it has a

protective and preventive function which justifies its increasing use in times of rising serious crime. Persuasive at first sight, this argument is weakened by the fact that the offences for which the courts pass sentence amount to such a small proportion (less than 10 per cent) of those committed. (It is hard to measure the deterrent effect in any more general way, on those who refrain from crime lest they land in gaol.)

When we look at the problem more widely, we see how limited and partial the 'public protection' claimed for sentencing really is. Many of the criminal offences committed in a given year are never reported (for one reason or another). Official statistics record only a modest proportion of actual crimes. (The *British Crime Survey*, which covered some 11,000 homes, revealed that the reporting rate is little higher than a quarter for many crimes[6], but let us start with the cautious assumption that half of all notifiable offences are reported to the police.) Only about 35 per cent of notifiable offences recorded by the police are 'cleared up' each year, i.e. traced to a believed offender. This proportion includes offences traced to youngsters under 10, and also those whose perpetrators have them 'taken into consideration' when they are sentenced. Perhaps about 18 per cent of all offences committed in a given year (i.e. 35 per cent of 50 per cent) are thus cleared up. Of these, just over half result in the conviction or formal cautioning of the offender – so we are down to 10 per cent or so of the total. If we subtract formal cautions from this figure, that leaves the courts with about 7 per cent of the total offences committed, for which they can pass sentence. Of course the proportion is higher for some more serious crimes and lower for some other run of the mill offences; but it is fair to point out that other calculations have put the proportion of offences for which the courts pass sentence as low as 3 per cent.[7]

So the notion that court sentences affect the crime rate as a whole is far-fetched – as is the belief that prison sentences imposed by the courts offer any very great protection to the public at large. So much crime is committed by criminals not in prison that the contribution of imprisonment to general public safety is minimal. The risk that any one of us will be burgled or assaulted is hardly affected by the fact that the prison population is 50,000 rather than 25,000. The point is reinforced if we go

back to consider the reconviction rate of persons released from prison: since some 60 per cent of them are reconvicted within two years, this means that the element of public protection is short-lived. Indeed, it may be counter-balanced by an element of public risk, in the sense that prison may have negative effects, breeding crime.

The poor reconviction rate, therefore, should lead us away from reliance on imprisonment towards non-custodial measures (by all means as demanding in their nature as seems appropriate and justified), which do not have the negative effects of imprisonment; and which tackle more directly the problem of inducing offenders to conform to the expectations of society. The apparently simple expedient of putting an offender in prison thus stands revealed as a short-sighted and often false route to public protection.

The limitations of prison sentencing

The assumption which underlies much of current sentencing policy is that the crime rate can be controlled, and victims protected, by modulations in the lengths of sentences handed down by the courts. But this is not necessarily so. It is built largely on the false belief that prison offers a measure of crime prevention which could not be achieved by other means. But prison has so many bad effects that it is difficult to see it as a positive contributor to crime control – from which indeed it may be thought to detract.

It is important to keep these arguments in perspective. They are not abolitionist: they do not argue for closure of prisons or for the uselessness of all sentencing. The conclusion is rather that sentencing practice is too greatly influenced by the belief that prison exerts a unique crime-preventive effect (which should anyway not be the primary aim of sentencing) and that sentencing itself is in the front line of public protection. In fact it should be seen as no more or less than the essential sheet-anchor of the criminal justice system, without which the preservation of order would be impossible. The question to which we must now turn is why these arguments have failed to influence sentencing practice as much as they should have; and how to put matters to rights.

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On a non-custodial course

Once the high usage and low effectiveness of prison sentences is appreciated (and the proposition commands general assent in penal policy) then the problems of how to implement more non-custodial sentences must be surmounted. Let us look briefly at some of the recent history, in order to examine why practice has proved so impervious to principle.

Twenty years of failure

The last 20 years or so have seen the introduction of several new non-custodial measures. In the mid-1960s the courts had a choice between prison and probation, fine, or a conditional or absolute discharge. The range of non-custodial measures available to the courts has been expanded considerably since then. (See the full list in Appendix A.) The purpose common to all of them has been to reduce the courts' reliance on imprisonment. For example, in 1967 Parliament introduced the suspended prison sentence. But within a few years it was seen that courts were using it in many cases where they would not otherwise have imposed a custodial sentence. So its contribution to reducing the prison population became negligible. Then in 1972 Parliament introduced the community service order, first on an experimental basis and then, in 1975, in all parts of the country. One of its principal purposes was to act as a substitute for imprisonment, but the courts found it hard to treat it solely in this way. Community service orders have been widely used by the courts, especially for offenders aged under 21 – but only about half of these would have been sentenced to custody in any case. Again, in 1982 Parliament reinforced the probation order by allowing courts to impose certain conditions, notably a requirement of attendance at a day centre for up to 60 days. But this has had little effect in reducing the prison population, for the same reasons. History shows that simply adding new non-custodial options has not led to reduced use of imprisonment.

No accurate research shows the characteristics of the cases in which the courts have used suspended sentences, community service orders and probation with a condition of attendance at

a day centre. What we do know is that during the ten years between 1976 and 1986 the use of custodial sentences went up, from 16 to 21 per cent of convictions. How is it that courts can march in entirely the opposite direction to that signposted by the legislature?

One answer is that the legislation introducing each of these measures gave little or no indication of the kinds of case for which it was considered suitable. It is true that Parliament did attempt to say something, in 1972, to remove one aberrant use of the suspended sentence which the courts had fallen into:

> A court shall not deal with an offender by means of a suspended sentence unless the case appears to the court to be one in which a sentence of imprisonment would have been appropriate in the absence of any power to suspend such a sentence[9].

But this is very hypothetical, and requires the court to exercise mental agility to consider the approach it would take if the suspended sentence were not available. It is hardly surprising that this formulation has been castigated as both impractical and illogical – impractical because it requires a very artificial course of reasoning, and illogical because, if the sentencer took proper account of all mitigating factors when calculating the length of sentence appropriate to the case, what further mitigating factors could there be to justify suspending the sentence?

The reason for resorting to abstract formulations, as Parliament did in this case, is that the territory of sentencing is so uncharted that it is not thought practical to indicate types of offence or offender for which the sentence might be appropriate. The result is that the courts had a new measure to use, with virtually no constraints on how they used it (within the outer limits set by the legislation). The Court of Appeal did make a few pronouncements about the patterns of reasoning to be adopted by courts when imposing a suspended sentence or a community service order, but these hardly amount to a triumph for the system of appellate review; they mostly serve to show how little guidance Parliament had formulated. For the introduction to be successful there must be co-operation between the policy-makers and the sentencers. The guidelines must be clear. And there must be proper training to ensure that the new

measures are well understood. In short, the Executive and the Judiciary must find a way to co-operate on these matters. None exists now. A framework for this is proposed in chapter 4.

The latest phase in the attempts of the Executive to steer the courts towards greater use of non-custodial measures is embodied in the Government's Green Paper *Punishment, Custody and the Community*. This document begins by setting out the desirable policies, roughly as Chapter 1 suggests, and then canvasses opinions on forms of non-custodial measures which the courts would be prepared to use as a serious substitute for custodial sentences. This seems to reveal tacit acceptance that it would not be proper (for undisclosed practical or constitutional reasons) for Parliament to instruct the courts to substitute certain measures for custodial sentences, so that the prudent course is to enquire what the courts themselves are *prepared* to use. The outcome of this strategy will not be known for some while yet, but the whole drift of the Green Paper is towards shaping the non-custodial measures in such a way as to obtain the 'confidence of the courts' (paras. 1.8, 1.9 and 2.21): confidence which it may well be impossible to obtain unless some non-custodial sentences are, and are seen to be, more tightly superintended by the courts themselves.

There are two major exceptions to the Executive's 'non-interventionist' policy of recent years. The first is embodied in section 1(4) of the Criminal Justice Act 1982, as now amended by the 1988 Act[10]. This sub-section prevents a court from imposing a custodial sentence on an offender aged under 21 unless no other method of dealing with him is deemed appropriate; and further requires the court to specify one of three reasons for imposing custody in a case where it decides to do so. There is evidence that, after some early years in which the courts did not know quite how to apply the new requirements, the sub-section is now influencing courts' reasoning in borderline cases. The three conditions specified by Parliament in this legislation are more detailed than any other statutory criteria in the field. With the assistance of judgments from the Court of Appeal, they have by now generated a body of practical guidance. This may be a fruitful harbinger for other sentencing policies – with, it may be hoped, some reduction in the delay of four or five years before Court of Appeal guidance becomes

substantial and effective.

The second major exception is in the development of Intermediate Treatment schemes for juvenile offenders[11]. This has been achieved not through statutory criteria but by local co-operation between all the relevant agencies, including the probation service and members of the juvenile bench. By hard work and a shared appreciation of the nature of the problems and the alternative approaches available, the use of custody for juveniles has been reduced significantly in this decade, from 7,700 in 1981 to 4,100 in 1987.[12] This demonstrates what shared understanding and commitment between courts and the executive can achieve. There is no evidence that this lower use of custody has led to any increase in lawbreaking among the young – many of whom have been spared the negative effects of custody.

But other than in the realm of young offenders, governments have refrained from using legislative formulae to shape sentencing in accordance with their policies, and have relied on broad policy statements, notes of guidance and other informal mechanisms. These have manifestly not met with success in expanding the use of non-custodial measures as substitutes for prison.

The principle of judicial independence

It is a cardinal constitutional principle that the independence of the courts must be safeguarded. In deciding each case the courts must be free from any pressure towards a particular finding, free to take their decisions without fear or favour. In this country the principle is supported by the protected tenure of the judges. As the constitutional lawyer Jennings explained, the judiciary is subordinate to the legislature but must be independent of the administrative authorities. Some are tempted to extend this independence into fields where it does not or should not apply. And sentencing is a case in point.

The constitutional propriety is that Parliament lays down the powers of the courts, and when a court decides upon the sentence in each case, it should not be subject to pressures or fears which might lead it to decide with partiality. But this is very far from any suggestion that it is unconstitutional for Parliament to place restrictions on the court's discretion to

sentence within the statutory bounds.

Of course Parliament can introduce detailed legislation on sentencing: section 1(4) of the Criminal Justice Act 1982, mentioned above, is an example of just that. No-one has suggested that it is unconstitutional. Some might say that it was unwise for the legislature to go into such detail, and that the criteria laid down were unpractical and ill-considered, but these are criticisms of an entirely different kind: ones which stem from the belief that sentencing policy is best left to the courts, within loose outer limits set down by Parliament. Such a belief has been encouraged over the years by Parliament's tradition of non-interference with sentencing policy, bolstered by the present Government's open support for such a policy. But the proposition that it is unconstitutional for Parliament to restrict the courts' traditional sentencing discretion is one thing, the proposition that such legislation is rare or unwise another matter altogether. This latter has nothing to do with the principle of judicial independence: it is a policy preference, and that is all.

Independence and idiosyncrasy in practice

A much greater problem in the existing system arises from the fact that there are about 1,000 judges and 27,000 magistrates sitting in the courts and passing sentence. This poses tremendous difficulties of co-ordination, whatever policy is decided upon: to persuade so many people to march in step, in matters now objective, now subjective, now technical, now common sense, would be an achievement indeed. The problem has been recognised for some years now, and some steps have been taken. In the 1960s the training of magistrates began, and training and 'refreshing' of lay magistrates is now widespread. In the last ten years a system of judicial studies has been built up, with courses for newly-appointed recorders and judges and refresher courses for those with longer standing appointments, all organised by the Judicial Studies Board.

Important as they are, however, these efforts to train sentencers remain crude. One difficulty is that they are seen as a poor substitute for 'experience'. This may be a criticism of training for any job or office. But the argument is sinister, especially when it is harnessed to the confidence of senior members of a bench of magistrates (or of those who have

practised in the criminal courts for many years before going on to the judicial bench). It gives scope to the insidious force of entrenched attitudes and habits of thought – which make it very difficult to bring about changes of policy. An even greater difficulty, however, comes when one enquires what the magistrates and judges should be trained or refreshed in. They may have the limits of their legal powers set forth; they may have the true nature of each of the available sentences and orders described; they may even have a discussion of principles laid down by the Court of Appeal when hearing appeals against sentence. But this does not add up to a coherent body of principles or guidance. In the Crown Court it leaves a great deal to the inclinations of the individual sentencer. In the magistrates' courts it leaves great leeway for the local justices' clerk and the bench to develop their own standards and approaches. The problem cannot be resolved by training until a more coherent and complete body of sentencing is clearly laid down.

Can appeals against sentence supply any such clear principles? When the Court of Appeal hears them, it often refers to, or lays down, a principle. But the system is not very effective. First, fairly few appeals are heard. Secondly, the appeal system has been one-sided until very recently, hearing only appeals by offenders against allegedly severe or unlawful sentences: the advent of the Attorney General's references to allegedly lenient sentences will go a small way towards redressing the balance[13], but such references may well be infrequent, and several years may pass before the judgments have any great impact on sentencing practice. Third, the guidance afforded by the Court of Appeal's judgments is patchy, sometimes contradictory and certainly not designed as a coherent set. This is not to deny that there have been advances in recent years. One of the greatest developments of the common law in modern times has been the sentencing guideline judgment, which Lord Lane, as Lord Chief Justice, has used with increasing effect and sophistication. About two or three times a year the Court of Appeal, with Lord Lane presiding, takes an area of sentencing which is causing difficulties and prepares a guideline judgment which travels well beyond the facts of particular cases and which sets out general parameters for the courts. Among the topics covered in this way are such sentences as the long-term detention of juveniles,

deferred sentences, partly suspended sentences, and punishments for offences such as drug dealing and importation, causing death by reckless driving, rape, social security fraud and theft in breach of trust. Lord Lane's guideline judgments show his recognition of the need for clearer guidance. Yet the present system cannot provide this: guideline judgments are few and far between, and it will be well into the next century before they are developed into the coherent network of standards which both sentencers and the public have a right to expect. It is one of the principal arguments of this paper that both the system for training sentencers and the system for formulating guiding principles for sentencing need to be improved, and that an essential first step is greater discussion of the fundamentals.

Sentencing is becoming more complex – but no more consistent

The argument that sentencers need more, and more consistent, guidance must be set in the context of the growing technicality of sentencing in recent years. Changes in the law which may be laudable in themselves are producing an unwelcome effect *in toto*. Growing concern for the victims of crime has led to the requirement that courts should always consider the making of a compensation order, and give reasons should they decide not. Then there are the requirements of the Drug Trafficking Offences Act and the other provisions on forfeiture of property and profits, which require courts to proceed through various stages of reasoning. These are only two examples of the greater complexity now imposed. We have to acknowledge that sentencing, always regarded as a difficult task, is becoming more difficult; and this reinforces the argument that a thorough review of sentencing is needed which looks at all its purposes and practices. The developments of the last ten or twenty years are untidy and incoherent, producing some absurdities and inconsistencies and giving little confidence that legislature, executive or courts know where they are going. If the only constant trend is to make sentencing more complex, without making it more consistent or effective, both sentencers themselves and the public may properly be dissatisfied.

The role of public opinion

It may well be that the public wants sentencing to be consistent;

and deserves to have it so. But is it not also true that the public wants more severe sentencing, and would reject any move towards less reliance on imprisonment? Many of the rather crude opinion polls of the 1980s indicate that the public would welcome tougher sentences, but a recent and more sophisticated survey of the attitudes of some 1,200 randomly-selected members of the public reveals a more complex pattern.[14] This survey found that the majority supported tougher sentences, at least for crimes like rape and robbery, and that two-thirds of the respondents did not think that sentencers were in touch with the views of ordinary people. The paradox of the findings is that a majority of the respondents under-estimated what sentencing levels are. In other words, many thought that sentencing should be tougher, and yet sentences were tougher than they thought. Other findings from this more probing survey are that those who have been victims of crime tend, overall, to be less punitive than non-victims (as the *British Crime Survey* also found), and that many people over-estimate the risk of being a victim and the prevalence of violent crime. But what emerges most strongly of all is that public opinion, ignorant of real sentencing levels, is a complex phenomenon which should not be taken at face value. Broad assertions, therefore, about the punitive attitudes of a public which wants more severe penalties are too simplified to form any part of the basis of sentencing policy.

4
Towards clarity and consistency

That sentencing to prison does not necessarily deter, reform, or even protect; that notions about the independence of the judiciary are often ill-conceived; that sentencing policy has become ever more incoherent and complex; that there is a need for a policy which is at once clearer and more consistent (without any loss to flexibility or trespass upon the proper independence of the judiciary) – all this can be agreed by most of us and should lead us towards policies which can be translated into practice by those whose duty it is to sentence the individual.

The aims of sentencing

Sentencing should not be seen primarily as a means of public protection or crime control, which are the main responsibility of other sectors of the criminal justice system. Rather, the principal function of sentencing is to mete out deserved and proportionate punishment. Custody need not be the only – perhaps not even the principal – means of imposing severity where severity is deserved, especially since so much evidence suggests that prison is counter-effective in so many ways.

A sentencing system should therefore exercise the utmost restraint in the use of custody, reserving it for those crimes which do deserve a punishment so severe that no sentence short of prison can be countenanced.

In such very serious cases the deserved sentence must be clear and unambiguous. At present it is not. It is plain wrong that sentences pronounced in court should have such different meanings in practice. The Carlisle Committee's recommendations for restoring reality to all parts of a custodial sentence would be one important step towards a more rational and effective use of imprisonment, requiring compulsory supervision in the community as part of the sentence for those serving between one and four years, and preserving a discretion when dealing with dangerous prisoners serving longer terms.[15] But the Carlisle Committee, too, recognised the need for 'a determined effort on the part of the Government and the judiciary to secure a reduction in the length of prison sentences.'

A similar reality must be brought to all the non-custodial sentences which are listed in Appendix A. And the disciplinary measures which form part of the sentence must be properly enforced. Orders must mean what they say.

People are right to expect consistency in sentencing, since consistency, together with predictability, lie at the heart of the rule of law. But this is not to deny the need for flexibility too; and it is of course the resolving of this dilemma which is one of the major duties of the courts. For without an element of discretion, within a clear framework of principles and policies, unequal cases will be treated equally.

The present sentencing system fails to achieve a proper balance between flexibility and consistency. Recognition of this surely underlies the Lord Chief Justice's introduction of structured guidelines into sentencing policy: a work which needs to be taken very much further, as we shall argue.

The course to reach the aims

By what means should the sentencing system move towards these principles? The soundest foundation for change is the desire for it among those involved – the Government, the sentencers, the legal profession and others working in the criminal justice system. Great changes of heart are difficult to bring about in the short term, although there is every reason to try to challenge the old assumptions about crime and punishment immediately.

The first task is to work for a change in attitude among those responsible for formulating penal policy and those involved in the administration of criminal justice. In particular, a new emphasis should be given to the training of barristers, solicitors, magistrates and judges: one which treats sentencing not simply as a matter of discretion nor even as a matter of learning principles laid down by the Court of Appeal, but rather as a matter of understanding the dynamics of crime and punishment, with particular reference to imprisonment. In other jurisdictions public prosecutors play a key role in this, and steps should be taken to equip members of the Crown Prosecution Service with knowledge and understanding of the present state and future direction of sentencing practice and policy.

Some of the steps to follow in reforming the system are

already partly in place. The Lord Chief Justice has been promulgating a series of guideline judgments coming down from the Court of Appeal; why else hand down such judgments if the sentencing practices of the courts had not shown the need for a clearer and more coherent statement of sentencing levels and principles? The time has now come to place these developments on a systematic basis. And this is not simply a matter of increasing the number of guideline judgments until they cover all the crimes for which the courts frequently pass sentence. Not, indeed, that this would be a simple matter, since the guidelines for different crimes would need to be inter-linked, a task hitherto unnecessary because of their scarcity up till now.

The real problem with calling upon the judiciary to provide a complete network of sentencing guidelines is that they would be fashioned solely from a judicial perspective, and informed only by the judicial outlook on the aims and effectiveness of sentencing. But I have argued that many of the assumptions underlying sentencing practice in recent years are badly mistaken. Whilst the senior judges have developed the guideline judgment into an important vehicle, and in doing so have shown that the common law can still be adapted to perform new functions, it is a vehicle which is at present being driven in the wrong direction.

A mechanism is needed which allows the judicial expertise in formulating guidelines to be harnessed to the experience of other professionals such as probation officers, prison governors and magistrates. This is particularly important because there is no indication that the senior judiciary can successfully develop guidelines for use in the magistrates' courts: they lack the necessary practical experience to do so. Yet the magistrates' courts are the source of some 55% of receptions into prison each year, and make a large number of other sentencing decisions which have great consequences for people's lives. The present structure of sentencing guidance does not and cannot cope with sentencing in the magistrates' courts. Fortunately there are moves afoot to develop more guidelines for sentencing in the magistrates' courts, following on from the *Suggestions for Road Traffic Penalties*.[16] These moves show that the problem has been recognised and is being tackled, but it would be preferable if the new approaches were co-ordinated with new sentencing

guidance for the Crown Court.

What, then, is needed is the creation of an independent Sentencing Council or Commission to carry out the work of developing practical guidance and guidelines. This body should be composed of a senior judge together with a circuit judge and a recorder, who have greater and more recent experience of Crown Court sentencing; a lay magistrate; a stipendiary magistrate; a justices' clerk; a prison governor; a chief probation officer; a senior civil servant; and an academic. This suggests a complement of ten, of whom five would be sentencers. The body should be supported by a secretariat which could provide the support needed.

The first task of the Council would be to establish the sentencing aims and policies to be pursued. This should not prove as controversial a task as might be thought. There has been a succession of official reports in this country all pointing towards less use of custody and less reliance on deterrent reasons for sentencing.[17] And these have now been joined by a number of well-argued and detailed papers from other Commonwealth countries. Close study of the report of the Canadian Sentencing Commission (1987) would make an excellent foundation for the work of such a Sentencing Council as I propose.

The second task would be to review the sentencing levels for the crimes with which the courts most frequently deal. Existing practice should be assessed, using both official statistics and recent research into Crown Court sentencing.[18] Levels of custodial sentence would then be lowered, in accordance with the principle of restraint, but the whole sentence would have meaning (as the Carlisle Committee recommends). The Council would discuss and weigh the factors relevant to sentencing for each type of offence; here the expertise already gained from the construction of guideline judgments would be most helpful. The objective would be to construct a set of guidelines for each of the crimes which frequently come before the courts. Whether the guidelines should be in the narrative form pioneered by the Court of Appeal (see the specimen guideline in Appendix B), or in a more summary form, would be for the Council to decide.

Of course guidelines cannot cover all eventualities. Sentencers would have to use their discretion to resolve difficult questions. But the distinct merit of guidelines would be to

establish a common framework and common principles. There is little experience of drafting guidelines for the choice among non-custodial measures; here the Sentencing Council would strike out into the unknown. In doing so it should seek to foster uniformity of approach, but not to pretend that there can ever be easy or absolute uniformity of sentences. Courts would retain a discretion not only within the guidelines but also to depart altogether from them in cases where they think that a different approach is necessary – provided that the reasons for any such departure are openly stated. This would enable the offender, the victim and the public to know why an unusual course has been taken, the reasons for which would be open to appeal.

A third task for the Sentencing Council, much neglected in discussions of sentencing, is to devise a statement of general principles to assist courts in the exercise of their discretion. One such important matter is the effect of previous convictions on sentence. Other matters include the effect of a guilty plea, the sex or age of the offender, and the payment of compensation to the victim. Factors which ought *not* to be taken into account should also be clearly stated. And in describing factors which should mitigate or aggravate the offence, an attempt should be made to give an appropriate weight to each one; despite the difficulties of generalisation, with factors such as credit for a plea of guilty some guidance can and should be given.

By establishing these three criteria:-

i) aims and policies of sentencing;
ii) guidelines for particular offences; and
iii) general principles of sentencing

the Sentencing Council would have completed the initial phase of its work.

The creation of an independent Sentencing Council would be a constitutional innovation of some importance. Its line of accountability should be through the Lord Chancellor. It should be obliged to lay before Parliament its annual reports. Its declarations might acquire legal force as subordinate legislation, by the making of statutory instruments under the Act which established the Council. Such arrangements would ensure overall parliamentary accountability, without making its detailed decisions subject to piecemeal alterations which could throw a

scheme into disarray. The contents of the statutory instruments would be open to interpretation by the Court of Appeal when hearing appeals, and appellate case-law would thus be grafted onto the guidelines. The guidelines would need to be regularly reconsidered in the light of experience – which means that the Sentencing Council should become a permanent body charged with monitoring the implementation of the new system, and with revising the guidelines and principles when appropriate. But it must be remembered that judicial discretion to depart from the guidelines where there are reasons for doing so will remain. Such departures could be tested on appeal, as they are under the present system. In this way flexibility and consistency can be reconciled.

5

Is rethinking radical enough?

The Carlisle Report is the latest in a long line of official reports which have affirmed that our courts use imprisonment too much. The Government has recognised this practically in the 1980s by increasing remission and parole. And in the recent Green Paper it has stated expressly that custodial sentences may be counter-productive.

What we need is to recognise the proper function of sentencing, to acknowledge the limited usefulness of custody, and to rethink sentencing policy in a way which is practical, fair and cost-effective.

It is no longer possible to pretend (if it ever was) that increasing the number and length of prison sentences is the way to improve public protection: proper crime prevention strategies in the community offer a far more practical approach than the present high levels of imprisonment. To break the association in the public mind between more frequent and longer prison sentences (on the relatively few offenders passing through the courts) and better public protection calls for political courage; but those who look to custodial sentencing for better public protection must be persuaded that they are looking in the wrong direction. Prison must be confined to the uses for which it is fit: the removal from society of really serious offenders who deserve it. To ensure this, we need an immediate and systematic rethinking of sentencing policy – which must clearly include *demanding* non-custodial sentences to mete out proper punishment, and express due condemnation.

Appendix A

List of available non-custodial measures

Absolute discharge
Conditional discharge
Binding over
Deferment of sentence
Compensation order
Fine
Probation order (with or without added conditions)
Community service order
Suspended sentence of imprisonment

For offenders aged 17-20, an attendance centre order is available, whereas suspended sentences are not.

For offenders aged under 17, the choice of measures is specially restricted, but one prominent non-custodial measure is intermediate treatment.

Appendix B

An example of sentencing guidelines

As an example of what a Sentencing Commission might produce for all crimes, an excerpt from the 'guideline judgment'of Lord Lane, the Lord Chief Justice, in the case of *Billam* (reported in the Criminal Appeal Reports for 1986, volume 82, at p. 347), may be given. The judgment concerns sentencing for rape. It begins with a description of the physical and psychological effects of the crime, and then follows a summary of the statistics on rape sentencing. Lord Lane's words then are as follows:

> For rape committed by an adult without any aggravating or mitigating features, a figure of five years should be taken as the starting point in a contested case. Where rape is committed by two or more men acting together, or by a man who has broken into or otherwise gained access to a place where the victim is living, or by a person who abducts the victim and holds her captive, the starting point should be eight years.
>
> At the top of the scale comes the defendant who has carried out what may be described as a campaign of rape, committing the crime upon a number of different women and girls. He represents more than an ordinary danger and a sentence of 15 years or more may be appropriate.
>
> Where the defendant's behaviour has manifested perverted or psychopathic tendencies or gross personality disorder, and where he is likely, if at large, to remain a danger to women for an indefinite time, a life sentence will be appropriate.
>
> The crime should in any event be treated as aggravated by any of the following factors: (1) violence is used over and above the force necessary to commit the rape; (2) a weapon is used to frighten

> or wound the victim; (3) the rape is repeated; (4) the rape has been carefully planned; (5) the defendant has previous convictions for rape or other serious offences of a violent or sexual kind; (6) the victim is subjected to further sexual indignities or perversions; (7) the victim is either very old or very young; (8) the effect upon the victim, whether physical or mental, is of special seriousness. Where any one or more of these factors are present, the sentence should be substantially higher than the figure suggested as the starting point.
>
> The extra distress which giving evidence can cause to a victim means that a plea of guilty, perhaps more so than in other cases, should normally result in some reduction from what would otherwise be the appropriate sentence. The amount of such reduction will of course depend on all the circumstances, including the likelihood of a finding of not guilty had the matter been contested.
>
> The fact that the victim may be considered to have exposed herself to danger by acting imprudently (as for instance by accepting a lift in a car from a stranger) is not a mitigating factor; and the victim's previous sexual experience is equally irrelevant. But if the victim has behaved in a manner which was calculated to lead the defendant to believe that she would consent to sexual intercourse, then there should be some mitigation of sentence. Previous good character is of only minor relevance.

This form of narrative guideline could be produced for other offences, drawing upon the experience of sentencers and others in the criminal justice system. An alternative approach is the rather simpler one adopted recently by the Magistrates' Association in its *Sentencing Guide for Criminal Offences* (other than Road Traffic). As an example we may take their guidance on the offence of 'Theft from a vehicle' (overleaf).

Seriousness Indicators

Plus	*Minus*
High value	Impulsive action
Organised team	Vehicle unlocked
Planned	
Related damage	

Guideline

– consider compensation as a priority
– the guideline fine is £150

This excerpt must be read in the context of the more general guidance given in the 'Introduction' and the 'User Guide' to the new Magistrates' Association guidelines.

References

1 The figures are taken from the *Criminal Statistics, England and Wales, 1987* and from the *Prison Statistics 1987.*

2 Report of H.M. Chief Inspector of Prisons, 1987.

3 These figures come from the *British Crime Survey,* which is a survey of some 11,000 households: see Mike Hough and Pat Mayhew, *Taking Account of Crime: Key Findings from the 1984 British Crime Survey,* Home Office Research Study no. 85 (H.M.S.O. 1985).

4 *Prison Statistics 1986,* pp. 103-104.

5 Home Office, *Punishment, Custody and the Community* (Cm.424 of 1988), chapter 1.

6 *British Crime Survey,* above, note 3.

7 See, for example, *the Report of the Canadian Sentencing Commission* (Ottawa, 1987), p.119 for an analysis, drawing on earlier work by Andrew Ashworth and published in *Sentencing in Australia* (Australian Institute of Criminology, Proceedings No.12, Canberra, 1987).

8 For further discussion, see Andrew Ashworth, *Sentencing and Penal Policy* (London, 1983),pp. 112-139 and Chapter 10.

9 Now Powers of Criminal Courts Act 1973, section 22(2).

10 Criminal Justice Act 1988, section 123.

11 Children and Young Persons Act 1969, although the most significant developments of these programmes have taken place in the 1980s.

12 Figures from the Green Paper (above, note 5), para. 2.21.

13 Criminal Justice Act 1988, s.36.

14 Nigel Walker and Mike Hough, *Public Attitudes to Sentencing* (Gower, 1988), pp.182-202. Nigel Walker is the Wolfson Professor Emeritus of Criminology in the University of Cambridge and was formerly the Director of the Cambridge Institute of Criminology; Mike Hough is a Principal Research Officer in the Home Office Research and Planning Unit.

15 *The Parole System in England and Wales,* Report of the Review Committee chaired by Lord Carlisle of Bucklow, Q.C. (Cm. 532 of 1988). Lord Carlisle has held ministerial posts in the Home Office and other government departments, and sits as a Recorder of the Crown Court.

16 These guidelines were first introduced by the Magistrates' Association in 1966 and have been revised and up-dated on several occasions since. They have no binding force, and local benches are free to adapt them so as to produce 'bench norms' or local starting points. In 1987 Lord Hailsham, as Lord Chancellor, advocated the extension of these guidelines to non-motoring offences, and at its meeting on 2 March, 1989, the Magistrates' Association approved a 'Sentencing Guide for Criminal Offences (other than Road Traffic)'. Once again, the guidelines have no binding force and it remains to be seen how enthusiastically they are received and adopted by local benches.

17 For example, there were two reports of the Advisory Council on the penal system, *The length of Prison Sentences (1977)* and *Sentences of Imprisonment: a review of maximum penalties* (1978); the report of the Inquiry into the United Kingdom Prison Services (chairman: Mr Justice May), Cmnd. 7673 of 1979; and two House of Commons reports, the Fifteenth Report of the Expenditure Committee, *The Reduction of Pressure on the Prison System* (1978), and the report of the Home Affairs Committee, *The Prison Service* (1981).

18 See now David Moxon, *Sentencing Practice in the Crown Court*, Home Office Research Study no. 103, 1988.

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