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Prison and Why We Send People There: Does it Work? Should it?

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Prisons And Why We Send People There: Does It Work? Should It?

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Personal Punishment

The shackles on a Gresham Professor of law are heavy. The ball and chain tying him to this podium are a burden he knows will attach six times a year and for which he prepares by trying to type in advance the thoughts he forecasts he may scatter. And the burden is heavy because finding vaguely lawyerly things of interest for non-lawyers is not entirely easy.

So I have tried to find things of possible interest to a non-lawyer audience but not necessarily things of which I have been already knowledgeable. I have had to learn first. But the topics have always been of some interest me, at least a bit

On top of that, this lawyer has suppressed personal opinions in the interest of balance, as if lawyers were ever in a state of constant equilibrium.

This is the 21st lecture and only three more to come - so I can start to let go and say what I really think on topics about which I have had some long lasting - if lightly-informed - interest. Tonight, punishment, and more particularly, prison.

Lack of detailed scholarship could make this - and maybe the next lecture on Sex and the Law - 'Gresham-lite' lectures where I will express my own possibly wayward opinions insufficiently backed by scholarship. For that very reason it (they) should not be light - or lite - in any sense because your contribution may and should correct mine. And to that end there will be two, not one, Q and A's punctuating the hour.

Introduction

In criminal cases I have dealt with here and elsewhere, I have tried to get defendants convicted and sentenced. As a defence counsel, I have tried to keep them free. In neither case when they have gone to prison have I enjoyed the process. As a part time judge - a 'Recorder' - sitting for about 6 weeks a year for 30 years I have had to sentence people in the usually modest cases that Recorders try. It never gives me pleasure although I have to do what I have agreed with the state to do.

Over the years, I have detected in some judges and some prosecutors relish / pleasure in the sentencing process. Pleasure in wielding power, perhaps in delivering pain to fellow humans. I have also detected in judges as they grow older a decreasing inclination to sentence others to loss of the time spent in freedom that the judge knows is for him / her in reduction not production - or have I imagined that?

I have never been to prison as a prisoner and my visits to jails and to the cells of courts have been infrequent. Even so, the grim misery of loss of liberty, however felt or sensed, is hard to overstate. I confess to grave perturbation when I think of the prison door clanging behind me; almost as bad as contemplating the last door opening onto the corridor to the execution cell. Maybe this much personal imagination makes my ruminations unrealistically severe on a system I work with well enough as part of one of my jobs.

I have a couple of friends who have been to prison recently. One is an MP - Denis McShane - who may have been unfortunate in being prosecuted for expenses crimes where others far 'worse' were not and where there was no evidence he benefited personally much or at all. The other is a chap in his 30s charged with 'historic' sex allegations dating back to a time when he was in his early 20s and the girl(s) were teenagers. More about them later, maybe. Personally I could see no individual or societal benefit in either being imprisoned and little if any benefit for the victims of the sex offender. As a friend, I might say that just as the friends and relations of those I have sentenced may have said and felt similar things about sentences of imprisonment that I have imposed.

Conundrums

Most of my judicial colleagues seem to see the general sense and logic of imprisoning people on a reasonably regular basis. I have always retained some skepticism though I entirely accept that there are those who have to be kept from the rest of us because by birth they really are inherently dangerous, or by reason of something that happened to them in life they have become so dangerous or - for those who believe in free will - those who have made free choice to become so dangerous. They MUST all be detained.

And when I look at the images of prisons and their inmates I find the prisoners pretty scary and can see why perhaps they should be kept behind a wall.

But yet. Two opening thoughts relating to opposite ends of the arc of public perception of culpability. The worst

of all cases: what can it be for an innocent man brought onto the world by the force of creation to face imminent execution - as the single non-murderer Timothy Evans infamously did or as millions of Jews or thousands of Bosnians and the countless others subject to the ultimate punishment for being born into the wrong part of some society have done - when wholly blameless? What can it be for an innocent man totally blameless wrongly convicted of crime to hear the cell door clang behind him knowing his cell marks the limits of his existence for a time, a very long time or even unto death?

At the other end, for many, what can it be for a person brought by force of creation onto the world to find that the very nature he has at birth and that he cannot change, or the nature he was given in childhood and for which he bears no real responsibility, who committed grave crime by unstoppable impulse is to lose the freedom he might have had at birth; and to lose it for a very long time?

Do - did - either of these *deserve* punishment, whether the ultimate punishment of death or, in the case of those who lack responsibility for the natures they have, detention in horrible circumstances?

There may be other less clear-cut manifestations of the same conundrum: historic sex offenders pay now for a culture that existed in the 60's 70's 80's when they were young men with testosterone swilling around, released in an all its works by a culture that affected alike doers and those to whom things would be done. I must be cautious in what I say: at the moment society approves condemnation of those proved to have breached years ago rules according to standards more effective today. So do not misquote me lest I should be burned at the stake. I am not justifying the behaviour of our older perverts - just noting that they were not that different from others who may have done the same but got clean away, some of them now crossing their fingers as they sit in judgment in parliament or elsewhere. There are, after all, many in positions of power whose success for themselves and even for their country may be linked to the boost that testosterone gave them in their careers. Am I allowed to mention - probably not - that many women hearing of some of the historic sex cases comment on the way parallel victimhood was dealt with by a slap round the face at the time and no long memory and disturbance of personality. No I am not.

More recently and one of the conundrum questions no government will ask can be posed about the rioters of the summer of 2011. Rightly condemned. Rightly punished. Who can forget the long established furniture business in Croydon, established over generations, burnt to the ground by greed and the wickedness of a near riot. But. We knew - but cannot be allowed to say too loud - that if the young people of South London had been swapped at birth with the children of the Gloucestershire ruling class they would have each behaved, in each case, as the other child did. Prison? Of course.

On another hand there are those who make deeply cynical, calculated decisions to break the contract by which they are - or should regard themselves as - bound to the state that protects them who profit by old fashioned robbing a bank, by new-fangled defrauding customers of the bank where they work or, say, persuading old ladies that their roofs need repairing - badly and at great cost. Such individuals have no excuse of any kind for what they do but are far less vilified that are the sex molesters. Prison? Probably.

What do these conundrums reveal to those who do not go to prison and commit no crimes but who would probably queue for public hanging if there were one and even more for beheading in the Tower or a disemboweling on the Strand if the practice were to return?

Is there something sinister behind our willingness and regular enough enthusiasm to punish and imprison that says as much about the good people as the bad?

Why, most obviously as a problem, do we spend much energy and cast many votes in justifying prison - which periodically 'works' according the political fashion - and not on stopping people doing the things that take them to prison?

To be more specific and completely unrealistic on how crime might, in some idealised society, be controlled if collectively we genuinely wanted a life without crime or with much less crime? Prohibition or dramatic reduction in consumption of alcohol to reduce offenses of violence if alcohol shown to be a constituent element of sexual and other violent crimes? Censorship of sexually explicit film and video. Flattening by tax regimes of wealth differentials to reduce money greed. Video cameras everywhere to make intending sex offenders more certain of being caught. Fitting every vehicle with governors restricting maximum speed to, say, 50 mph to reduce road crimes. Devotion of so much money and effort to state education from the age of 4/5 that the children of the poorest families have education that well-to-do families could not even afford - etc. Of course, none of these things is possible and for many reasons but why, if we find our punishment system for crimes that *might* be reducible, do we not at least think of them? Especially when some offenders probably really are blameless as the society they actually inhabit allows or leads them to do things they cannot control? Should we occasionally think as fancifully as this when we shape up to the hard edge of punishments, as it practiced around the world?

How should we deal with the injustice, if it is, of punishment that has the good baying for the infliction of punishment on the bad? How should we address the licentious trendsetters of the 1960's who may now hold positions of power as they voice condemnation of the Ralph Harrisese whose behavior some would better understand that they would be happy to admit? How can we accept - as we should - that if hangings came back to England the crowds watching would be greater and more enthusiastic than they were in Pepys's day or as

they were at hangings drawings and quarterings?

Gruesome capital punishment and other mutilation was spectacularly popular in London for centuries. It is hard to think it was regarded as always justice by the thousands in the crowds. There were other thinking processes at work. Are they still?

Some would have appeared at and enjoyed the beheading of Charles I and the beheading not that long after of those who tried him. Had their sense of justice gone into reverse? Pepys gives away how different his times were from ours where he recorded:

Saturday 13 October 1660

To my Lord's in the morning, where I met with Captain Cuttance, but my Lord not being up I went out to Charing Cross, to see Major-general Harrison hanged, drawn, and quartered; which was done there, he looking as cheerful as any man could do in that condition. He was presently cut down, and his head and heart shown to the people, at which there was great shouts of joy. It is said, that he said that he was sure to come shortly at the right hand of Christ to judge them that now had judged him; and that his wife do expect his coming again.

Thus it was my chance to see the King beheaded at White Hall, and to see the first bloodshed in revenge for the blood of the King at Charing Cross. From thence to my Lord's, and took Captain Cuttance and Mr. Sheply to the Sun Tavern, and did give them some oysters. After that I went by water home, where I was angry with my wife for her things lying about, and in my passion kicked the little fine basket, which I bought her in Holland, and broke it, which troubled me after I had done it.

Within all the afternoon setting up shelves in my study. At night to bed.

Great brutality was tolerable - not necessarily linked in detail to justice.

Is a truth that people in any society are content to see others punished for certain things at certain times but that there may be little coherence in the history of punishment and in particular in the history of imprisonment? To that history we should now turn...

History of Prisons - At A Canter

Prisons have been used for thousands of years to detain and remove personal freedoms of incarcerated people, often as a temporary stopgap before sentencing to death or slavery.

In Greece, prisoners were held in the poorly isolated buildings where they could often be visited by their friends and family. See Socrates cell, if it was. The Roman Empire used harsher methods with underground cells prisoners in simple cells or chained to the walls. Many prisoners not sentenced to death were sold as slaves or used by the Roman government as workforce or as "gladiators". The mighty Coliseum Arena in Rome had a slave army of 224 slaves that worked daily as a power source of the complicated network of 24 elevators that transported gladiators and their wild animal opponents from the underground dungeons to the arena floor.

In Britain Henry II built the first jails in 1166 include Newgate Prison in London that survived 700 years until 1902.

In 1215 Magna Carta marked the beginning of English judicial process saying:

Article 39 - "No free man shall be arrested, or imprisoned, or deprived of his property, or outlawed, or exiled, or in any way destroyed, nor shall we go against him or send against him, unless by legal judgement of his peers, or by the law of the land."

Conditions were inevitably primitive. Prisoners sleep on bare earth and are given bread and water every other day. Jailers charge for everything - food, blankets, fuel - even to have manacles removed.

In the 1400s, prisons found new purposes outside or beyond punishment for crime. Houses of Correction were established to control a growing vagrancy problem. The "idle poor" were locked up and punished for their "laziness". It was up to magistrates to decide if they could be released.

In the 1600s, inmate numbers soared with the growing reluctance by juries to sentence people to the gallows for petty crime.

By the 1700s, England's prisons were over-crowded. The Industrial Revolution at the end of the century led to the displacement of many people and an increase in petty crime. Numbers were swelled by debtors and in the later part of the century prisoners of war from the conflicts with Napoleonic France. Derelict ships or "hulks" in the Thames and southern ports were used as floating prisons.^[i]

Meanwhile, those other forms of punishment to which I have referred had been much more popular or at least acceptable, as Pieter Spierenburg^[ii] explains what he describes as the 'Theatre of Horror'.

Corporal punishment such as mutilation, whipping and branding were accepted and with other non-physical public punishments, including symbolic acts of shaming and dishonouring, may have had a highly ritualistic and

theatrical character, partly aimed at the deterrence from crime of the assembled public.

The nature of the penal system of Europe had changed greatly by the mid-18th century, with various forms of incarceration gradually replacing the "theatre of horror". Firstly, imprisonment with forced labour and other forms of penal servitude (such as the galleys) grew increasingly popular from the early-16th century onwards, as attitudes towards idleness and poverty changed.

The poor were increasingly expected to work, and houses of correction emerged all over northern Europe to ensure that they would do so. Secondly, attitudes to the body of the offender and to public punishment altered, with the judicial elites being more and more reluctant to hand out death sentences or penalties involving mutilation. These factors combined to make imprisonment a well-established element of criminal justice by the end of the early modern period.

But imprisonment was not yet totally dominant as a form of punishment. For example, transportation was still very popular in England, both in the 18th century to the America, and in the following century to Australia.^[iii]

Between 1786 and 1791, transportation to North America developed and around 50,000 criminals were settled there until the American War of Independence ended that option and Australia became the alternative. The first fleet with 775 prisoners – criminals as then identified although many were petty criminals or political offenders – left in 1786, followed by three large fleets between 1787 and 1791, which formed the basis of the population of the country.^[iv]

For those who were imprisoned at home, as Randall McGowen^[v] points out:

"the contrast between a prison in 1780 and one in 1865 could scarcely have been greater" (p. 79). In the 18th century, the debtors and remand prisoners in the local jails often mingled together with petty offenders who were sent to the workhouse. In the prisons there was little sign of authority, it was noisy and smelly, and some prisoners were gambling while others were drinking beer sold by the jailors. The inmates were also relatively free to mingle with friends and family. All this was to change at the end of the eighteenth century".

In 1777, John Howard, High Sheriff of Bedfordshire, published a book on prison based on 17 years study of prison conditions proposing that they should be healthy and disease-free, and that jailers should not be allowed to charge prisoners.

The book, called *State of the Prisons in England and Wales*, was highly influential but not widely put into practice until the 19th Century. The Howard League for Penal Reform – still influential today – is named after him.

1791 Jeremy Bentham philosopher published his Panopticon plan of the ideal prison. The key concept of which was to allow guards to observe the prisoners without them knowing.

It was never built exactly as intended but was the model for, among others, Pentonville and Millbank prisons.

The Panopticon has not only been applied ever since – it has also generated philosophical discussion which covers, in part, the philosophy of imprisonment.

French philosopher Michel Foucault argued that Panopticon functioned to make prisoners take responsibility for regulating their behavior because if they cared about the implications of bad behavior they would act in the manner prescribed by the institution at all times on the chance that they are being watched. In time, as the sense of being watched would get under their skin to such an extent that prisoners might come to regulate their behaviour as if they were in a Panopticon at all times, even after they have been released from the institution.^[vi] Foucault saw prison as part of a larger attempt by bourgeois society to discipline and dominate, and to punish the slightest deviation from what it prescribed as normative behaviour.

Despite debate about the state of prisons in the early 19th century, prisons in England in the 1820s generally still operated on the basis of informality and it was the influence of penal experiments in America that led to the most sustained effort in England to reconstruct prisons in the following decades.

It has been argued by David J. Rothman^[vii] that the 1820s and 30s in the States were characterised by widespread fears about the supposed disintegration of society and the family and that reformers discovered the prison as a place to teach order and discipline to the offenders, who were perceived as a fundamental threat to the stability of society. The basic idea was to hold prisoners in solitude in order to shield them from the supposed contaminating influence of other convicts. Being left in complete silence with only the company of one's conscience and the Bible was to bring about the spiritual renewal of the offender. Also, a strict diet of work and military discipline would help to turn them into law-abiding citizens. Prison building flourished until the 1840s, aimed at transforming the prison from a physically and morally filthy place of confinement into a clean and rationally functioning reform-machine. The optimistic belief in the new prison based on uniformity and impersonality was widespread. One prison chaplain insisted: "Could we all be put on prison fare, for the space of two or three generations, the world would ultimately be the better for it".^[viii]

In 1817 England, Elizabeth Fry, a Quaker was appalled at prison conditions and over-crowding, founded a prison school for children held with their mothers and set up Association for the Improvement of the Female Prisoners

in Newgate. She and her brother Joseph John Gurney persuaded Home Secretary Sir Robert Peel to introduce prison reforms.

And in the 1878 Prisons Act led to the closure of the worst prisons and all prisons were brought under the control of a national system run by the Prison Commission and the act also saw the adoption of John Howard's reforms and a shift in emphasis from prisons being a place of punishment to reform. And two new ideas were introduced - "decarceration", which replaced sentences with supervision in the community, and "therapeutic incarceration", which reduced the punishment element in imprisonment.

In 1922, regimes of keeping prisoners in silence or alone were criticised for creating high instances of insanity. Four hundred volunteer teachers started working in prisons.

1948 Criminal Justice Act. This created a model for modern day prisons recommending longer periods of imprisonment for training and rehabilitation and efforts were made to involve staff in the reform of prisoners. [\[ix\]](#)

Elsewhere, France continued their practice of penal colonies until the middle of 20th century (most notably in French Guiana and its infamous prison Devil's Island), and Russia also used remote penal colonies in the frozen north-east Siberia.

Wars that engulfed the world in the 20th century brought the formation of concentration camps. Most famous examples of those types of prisons happened during World War II, when Nazi government formed over 300 detention centers in which political opponents, Jews, gypsies, criminals and others were detained without judicial process.

Since WWII, UK prison policy has been up and down, responsive (sometimes famously) to political mood. In the USA "supermax" prisons became widespread across the entire United States with prisoners held for 23h long periods of cell isolation.

Does our thinking - mine at least - become messy because in a scientific age we unrealistically expect society's allocation of punishment for crime to be neatly calibrated according to an absolute measure of badness where such calibration is neither possible nor what society really desires because there is still - as there was in Greece, in Rome and ever since (to focus on our own historic part of the world) - a willingness to punish according to fashion as well as according to any coherent theory or philosophy? There was no overriding UN Declaration of Human Rights to deter Romans from crucifying Christians and to deter bystanders from ogling just as the people of Pepys time thronged first to the butchering one side of a political divide and then to the butchering of the other. Did all the onlookers of all centuries of the worst barbarities of man really believe that what was happening was just or unjust, or did they simply accept that for the time being that was what their own society did, just or otherwise? Should we see in the barbaric killings right now by other groups of those of whom we disapprove something similar however much we must condemn it? And at home should all the manifest wrinkles in the system of punishment be accommodated in the same way: we simply accept the use of prison for some people? We prefer not to go too deeply into why we are so content for it to be used as it is.

Rothman observed of the prison system that it "can still prompt an inmate to want to meet the man who dreamed it all up, convinced that he must have been born on Mars" - and yet it is use around the world.

In the "Oxford History of the Prison", that looks at prison from many angles, prison emerges neither as a glorious humanitarian effort, nor as a totalitarian project aimed at social or class control. Some definite progress could be discerned over time, for example with women in prison and with ultimate elimination of corporal punishment [\[x\]](#) but administrators believed that the mere denial of freedom was not punishment enough and thought up various ways of intensifying the pain of imprisonment. Their industriousness made the hand crank and the tread wheel common features in prisons of the second half of the 19th century. The latter was an especially cruel device, constructed of a series of steps on a huge wheel which was to be turned around by the prisoner's climbing motion. Not only was the work physically exhausting, but it was also mentally grueling for the prisoners as it produced absolutely nothing. A medical and scientific committee was set up in the 1860s to determine the amount of labour that could be expected from the prisoners, and after rational deliberation the experts concluded that prisoners sentenced to hard labour were to ascend 8,640 feet per day.

The belief that supposedly objective methods of criminal-biology or psychiatry were the key to solving all problems associated with criminality became widespread. These disciplines seemed to provide a way of scientifically determining who was destined to offend again, and thus to be locked away forever. But they did not work.

Compared to the worst excesses of the 19th century, life inside has today improved in some ways. Ventilation and sanitation have changed the prison infrastructure, recreational options like sports, libraries and TV's have. Yet, order and discipline is still prioritised over individual treatment. Riots, gangs and HIV are pressing problems, and so is over-crowding in institutions often purpose-built to suit the ideals of 19th century punishment: less than one quarter of English prisons in use in the late 1970s were built in the 20th century.

'Surveying the last 200 years of the history of the prison, one might well ask why the constant failure of the prison to live up to its claims has had no impact on its continuing longevity. The history of the prison emerges as

a succession of phases of over-exaggerated optimism in the power of the prison to change human behaviour, swiftly followed by failure in the realm of reality. One explanation for the survival of the prison might be that it has been successfully presented as the embodiment of a variety of contradictory justifications for punishment: it can be seen as incapacitating, retributive and as educative; either as harsh punishment or as benevolent reform, whichever suits the public mood best.'

No research has been able to demonstrate a positive link between a higher rate of imprisonment and a reduction of the crime rate. In fact, "the less effective the prisons are in reducing crime, the higher the demand for more imprisonment". The view persists that increased severity of punishment will lead to less crime. In this context, the prison has also become a weapon in politics. Being "tough on crime" today is a precondition for election to public office, and imprisonment remains the preferred way of demonstrating this resolve in the never ending but constantly proclaimed "war on crime". It emerges from this book that as long as this naive belief in the powers of the prison is not put into perspective by its history of failed promises, the rallying cry of politicians in Britain and the US will continue to be "prison works" - irrespective of which party they belong to. [\[xi\]](#)

A Modern Challenge

And, now, we are having to consider Norway but without time or space to do justice to what may be ultimately reforming of what we all do to those who break our laws. Look up their prisons famed for what seems like luxury for inmates along with a maximum 20 year sentence for any crime even the crimes committed by Anders Breivik. Penitentiary managers from the USA are shocked, as would be many from UK, at Norway's prisons. The totally civilised life with prisoners living together and cooking together in units or, in the secure prison at Halden, with running track, art on the walls and really comfortable accommodation challenges every assumption that imprisonment and loss of liberty needs to be compounded by pain or other punishment of some kind. Let us see. Recidivism as measured in Norway is 20%; contrast USA at over 70% and UK rates not much lower.

Where are we in the UK on sending people to prison? What, will the audience, think is the true purpose of sentencing and in particular of prison?

The Audience View and The Official View

At any given time in our history there should be an acceptable certainty about what we do when we punish people in the name of the state. It cannot lean too far in the direction of reform or of retribution (pure punishment) if the system as a whole is to attract public support. The views of the citizen are as important as the views of the lawyer and the judge save to the extent that any individual knows more about what achieves a state's judicial purpose, which may include the settling of distress in victims or the reduction of recidivism (things of which, although a part time judge, I can claim no special knowledge and thus no expertise beyond the non-lawyer) The present position represented by a video put out by the Sentencing Council includes:

I am Julian Goose, I am the resident judge here at Sheffield, I am the honorary recorder of Sheffield.

How does a judge decide what sentence someone should get?

Sentencing is not just about punishment. It is important that sentencing actually helps to protect the public and to do that sentencing involves both a punishment element but also rehabilitation both of those go together to form the sentence.

When it comes to the court actually passing sentence, its necessary firstly to identify what the harm has been - that is the harm to the victim or victims and secondly the blameworthiness, how serious is the conduct of the offender, taking those together and then looking at what makes it more serious or less serious fixing the sentence as a balance taking into account mitigating or lessening serious or aggravating - more serious - features then comes to a sentence that needs to be imposed. There is also the necessary process of adjusting for sentences where people plead guilty. There is a policy that the courts apply created by law, by parliament, that those who plead guilty at the earliest stage will get a certain amount of discount from their sentence. If they plead guilty late in the day they get much less off and the reason for that is because not only does it save court time but it avoids added trauma for the victim having to wait until a trial comes to an end before finally they see justice being done.

Note the candid observation 'not just about punishment'. Contrast Norway with its focus on returning people to society.

The **Sentencing Council** is worth visiting. It lists subjects for your research:

About sentencing

- a. Information for victims
- b. About guidelines
- c. You Be The Judge

- d. Sentencing basics
- e. Types of sentence
- f. How sentences are worked out
- g. Who does what?
- h. Young people and sentencing
- i. Sentencing myths

Information for victims

Sentences are decided based on the harm caused or intended and the nature of the offender's role - so the impact on the victim is an important consideration in determining the offender's sentence.

In October 2013, the Government published the Code of Practice for Victims of Crime, which aims to put victims first in the criminal justice system, make the system more responsive and easier to navigate.

Within the Code is information about the Victim Personal Statement. This is the victim's opportunity to tell the court about the effect a crime has had on them. The code is available on GOV.UK and includes details on what victims are entitled to in the Code.

Courts also have a duty to consider compensation orders in all cases - which means that if the offender has the money to pay compensation to their victim, then they can be required to do so. Also, the courts must order a Victim Surcharge - an extra amount added on - which is paid into a fund that helps improve services for victims of crime.

The Sentencing Council produces sentencing guidelines that magistrates and judges refer to in court. The guidelines always take into account the impact on the victim and do an important job in making sure the punishment fits the crime.

When putting together draft guidelines the Council always involves victims' groups so that the experience of the victim is considered at the outset. The Council then publishes a consultation on the draft guideline so that anyone affected by the offence, or any member of the public, can give their views.

If you have been a victim of any crime or you have been affected by a crime committed against someone you know, there are a variety of sources of help and advice.

Visit GOV.UK, and [Victim Support](#) for more information on your rights, help from Victim Support, the police, probation services, court and prison staff.

Sentencing Guidelines

Imprisonment is the most severe sentence available to the courts.

Custodial sentences are reserved for the most serious offences and are imposed when the offence committed is "so serious that neither a fine alone nor a community sentence can be justified for the offence" (section 152(2) of the Criminal Justice Act 2003).

A custodial sentence may also be imposed where the court believes it is necessary to protect the public. The length of the sentence depends on the seriousness of the offence and the maximum penalty for the crime allowed by law.

There are also some minimum sentences that have been introduced by Parliament for some serious offences unless there are exceptional circumstances:

a minimum sentence of seven years' imprisonment for a third Class A drug trafficking offence and three years for a third domestic burglary;

a minimum sentence of five years for certain firearms offences; and

a minimum sentence of five years for using someone to mind a weapon.

Types of custodial sentence. There are a number of different types of prison sentence available to a court. Read the sections on suspended sentences, determinate sentences, extended sentences, and life sentences to find out more.

The Domestic Burglary

The Sentencing Council directs a judge as to how s/he should sentence and, thus how and when there should be

imprisonment. One question for the non-lawyers audience is whether this does reflect public consensus:

Extracting from a detailed flow chart:

The guideline applies to all offenders aged 18 and older

"Every court must, in sentencing an offender, follow any sentencing guideline which is relevant to the offender's case..... unless the court is satisfied that it would be contrary to the interests of justice to do so."

Structure, ranges and starting points

Within each offence, the Council has specified three categories which reflect varying degrees of seriousness. The offence range is split into *category ranges* – sentences appropriate for each level of seriousness. The Council has also identified a starting point within each category.

Starting points define the position within a category range from which to start calculating the provisional sentence. This guideline adopts an offence based starting point. Starting points apply to all offences within the corresponding category and are applicable to all offenders, in all cases.

Once the starting point is established, the court should consider further aggravating and mitigating factors and previous convictions so as to adjust the sentence within the range. Starting points and ranges apply to all offenders, whether they have pleaded guilty or been convicted after trial. Credit for a guilty plea is taken into consideration only at step four in the decision making process, after the appropriate sentence has been identified.

This is a serious specified offence for the purposes of section 224 Criminal Justice Act 2003 if it was committed with intent to:

- (a) inflict grievous bodily harm on a person, or
- (b) do unlawful damage to a building or anything in it.

Triable either way [magistrates or Crown Court]

Maximum when tried summarily: Level 5 fine and/or 26 weeks' custody Maximum when tried on indictment: 14 years' custody.

offence range: Community order – 6 years' custody.

Where sentencing an offender for a qualifying offence the Court must apply Section 111 of the Powers of the Criminal Courts (Sentencing) Act 2000 and impose a custodial term of at least three years, unless it is satisfied that there are particular circumstances which relate to any of the offences or to the offender which would make it unjust to do so.

Step One

Determining the offence category

- 1 Greater harm and higher culpability
- 2 Greater harm and lower culpability or lesser harm and higher culpability
- 3 Lesser harm and lower culpability

Factors indicating **greater harm.**

The of/damage to property causing a significant degree of loss to the victim (whether economic, sentimental or personal value).

Soiling, ransacking or vandalism of property.

Occupier at home (or returns home) while offender present.

Trauma to the victim, beyond the normal inevitable consequence of intrusion and theft.

Violence used or threatened against victim.

Context of general public disorder.

Factors indicating **lesser harm.**

Nothing stolen or only property of very low value to the victim (whether economic, sentimental or personal).

Limited damage or disturbance to property.

Factors indicating **higher culpability**.

Victim or premises deliberately targeted (for example, due to vulnerability or hostility based on disability, race, sexual orientation).

A significant degree of planning or organisation.

Knife or other weapon carried (where not charged separately).

Equipped for burglary (for example, implements carried and/or use of vehicle).

Member of a group or gang

Factors indicating **lower culpability**.

offence committed on impulse, with limited intrusion into property.

Offender exploited by others.

Mental disorder or learning disability, where linked to the commission of the offence.

Step Two

Starting point and category range. The court should determine the offence category using the table below.

Category 1 or Category 2 or Category 3

The court should determine culpability and harm caused or intended, by reference only to the factors below, which comprise the principal factual elements of the offence. Where an offence does not fall squarely into a category, individual factors may require a degree of weighting before making an overall assessment and determining the appropriate offence category.

Having determined the category, the court should use the corresponding starting points to reach a sentence within the category range below. The starting point applies to all offenders irrespective of plea or previous convictions.

Where the defendant is dependent on or has a propensity to misuse drugs and there is sufficient prospect of success, a community order with a drug rehabilitation requirement under section 209 of the Criminal Justice Act 2003 may be a proper alternative to a short or moderate custodial sentence.

A case of particular gravity, reflected by multiple features of culpability or harm in step 1, could merit upward adjustment from the starting point before further adjustment for aggravating or mitigating features, set out on the next page.

Burglary Offences Definitive Guideline

Starting Point

(Applicable to all offenders) Category Range (Applicable to all offenders)

Category 1 3 years' custody 2-6 years' custody

Category 2 1 year's custody High level community order – 2 years' custody

Category 3 High Level Community Order Low level community order – 26 weeks' custody

The table below contains a non-exhaustive list of additional factual elements providing the context of the offence and factors relating to the offender. Identify whether any combination of these, or other relevant factors, should result in an upward or downward adjustment from the starting point. In particular, relevant recent convictions are likely to result in an upward adjustment. In some cases, having considered these factors, it may be appropriate to move outside the identified category range.

When sentencing category 2 or 3 offences, the court should also consider the custody threshold as follows:

has the custody threshold been passed?

if so, is it unavoidable that a custodial sentence be imposed? if so, can that sentence be suspended?

Factors increasing seriousness

Statutory aggravating factors:

Other aggravating factors include:

Factors reducing seriousness or reflecting personal mitigation

Offender has made voluntary reparation to the victim.

Subordinate role in a group or gang.

No previous convictions or no relevant/recent convictions.

Remorse.

Good character and/or exemplary conduct.

Determination, and/or demonstration of steps taken to address addiction or offending behaviour.

Serious medical conditions requiring urgent, intensive or long-term treatment.

Age and/or lack of maturity where it affects the responsibility of the offender.

Lapse of time since the offence where this is not the fault of the offender.

Mental disorder or learning disability, where not linked to the commission of the offence.

Sole or primary carer for dependent relatives.

Previous convictions, having regard to a) the nature of the offence to which the conviction relates and its relevance to the current offence; and b) the time that has elapsed since the conviction*.

Offence committed whilst on bail.

Child at home (or returns home) when offence committed.

Offence committed at night.

Gratuitous degradation of the victim.

Any steps taken to prevent the victim reporting the incident or obtaining assistance and/or from assisting or supporting the prosecution.

Victim compelled to leave their home (in particular victims of domestic violence).

Established evidence of community impact.

Commission of offence whilst under the influence of alcohol or drugs.

Failure to comply with current court orders.

Offence committed whilst on license.

Offences Taken Into Consideration (TICs).

* Where sentencing an offender for a qualifying third domestic burglary, the Court must apply Section 111 of the Powers of the Criminal Courts (Sentencing) Act 2000 and impose a custodial term of at least three years, unless it is satisfied that there are particular circumstances which relate to any of the offences or to the offender which would make it unjust to do so.

Step Three

Consider any factors which indicate a reduction, such as assistance to the prosecution.

The court should take into account sections 73 and 74 of the Serious Organised Crime and Police Act 2005 (assistance by defendants: reduction or review of sentence) and any other rule of law by virtue of which an offender may receive a discounted sentence in consequence of assistance given (or offered) to the prosecutor or investigator.

Step Four

Reduction for guilty pleas.

The court should take account of any potential reduction for a guilty plea in accordance with section 144 of the Criminal Justice Act 2003 and the *Guilty Plea* guideline.

Where a minimum mandatory sentence is imposed under section 111 Powers of Criminal Courts (Sentencing) Act, the discount for an early guilty plea must not exceed 20 per cent.

Step Five

Dangerousness

A burglary offence under section 9 The Act 1986 is a serious specified offence within the meaning of chapter 5 of the Criminal Justice Act 2003 if it was committed with the intent to (a) inflict grievous bodily harm on a person, or (b) do unlawful damage to a building or anything in it. The court should consider whether having regard to the criteria contained in that chapter it would be appropriate to award imprisonment for public protection or an extended sentence. Where offenders meet the dangerousness criteria, the notional determinate sentence should be used as the basis for the setting of a minimum term.

Step Six

Totality principle.

If sentencing an offender for more than one offence, or where the offender is already serving a sentence, consider whether the total sentence is just and proportionate to the offending behaviour.

Step Seven

Compensation and ancillary orders

In all cases, courts should consider whether to make compensation and/or other ancillary orders.

Step Eight

Reasons.

Section 174 of the Criminal Justice Act 2003 imposes a duty to give reasons for, and explain the effect of, the sentence.

Step Nine

Consideration for remand time

Sentencers should take into consideration any remand time served in relation to the final sentence at this final step. The court should consider whether to give credit for time spent on remand in custody or on bail in accordance with sections 240 and 240A of the Criminal Justice Act 2003.

Going to prison is a grim business – and probably hard to understand how grim unless you have done it or known people well who have. As a society we ask several things of prison when our courts use it – retribution / deterrence / rehabilitation. Those elements have been present for some time but the balance between them no doubt changes with the ages. Providing we are honest about what we seek from imprisoning people then as a society – including the society of offenders – we should accept and be prepared to justify what we do and why we do it. But it is probably better thought through – conundrums and all – and not left for the instinctive reaction of the vengeful or those who cannot understand how easy it is for some to succumb to their inbuilt natures or to the temptations to crime that society strews in their way.

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[i] BBC Timeline: Prisons in England **As part of a BBC News website investigation into the state of British prisons**

[ii] Pieter Spierenburg PhD University of Amsterdam 1978. 1977 until 2013 Erasmus University Rotterdam; extraordinary professor of Historical Criminology

[iii] Dr Nikolaus Wachsmann, review of Oxford History of the Prison: The Practice of Punishment in Western Society, (review no. 14) <http://www.history.ac.uk/reviews/review/14>

[iv] BBC Timeline: Prisons in England **As part of a BBC News website investigation into the state of British prisons**

[v] Professor Emeritus of British History, University of Oregon

[vi] <https://philosophyforchange.wordpress.com/2012/06/21/foucault-and-social-media-life-in-a->

[virtual-panopticon/](#)see Foucault, Discipline and Punish, 201

[vii] American author and professor of [Social Medicine](#) at [Columbia University College of Physicians and Surgeons](#)

[viii] Dr Nikolaus Wachsmann, review of Oxford History of the Prison: the Practice of Punishment in Western Society, (review no. 14 <http://www.history.ac.uk/reviews/review/14>)

[ix] <http://news.bbc.co.uk/1/hi/uk/4887704.stm>

[x] The 19th century reform movement was definitely welcomed by the small number of female prisoners. Women were finally separated from male prisoners, which put an end to their constant exploitation. For example, the governors of the London Bridewell had in previous centuries run their prison as a lucrative brothel, forcing female inmates into providing sexual services - an "unorthodox form of prison employment". Corporal punishments continued as a disciplinary measure inside the prison walls well into the 20th century. The last whipping in Delaware's prisons took place in 1954, and in England flogging as punishment was abolished as late as 1967

[xi] Oxford History of the Prison: the Practice of Punishment in Western Society; Dr Nikolaus Wachsmann, review of Oxford History of the Prison: the Practice of Punishment in Western Society, (review no. 14 <http://www.history.ac.uk/reviews/review/14>)