

REDUCING THE USE OF CUSTODY AS A  
SANCTION:  
A REVIEW OF RECENT INTERNATIONAL  
EXPERIENCES

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How might a legislature reduce the use of custody as a sanction? Constraining rising – or reducing stable – prison populations remains a challenge confronting most western nations. It is now fully twenty years since the United Nations Standard Rules for Non-Custodial Measures<sup>1</sup> (the so-called “Tokyo Rules”) were adopted, the principal goal of which was to reduce the traditional reliance on imprisonment as a legal punishment. Throughout the 1990s, however, prison populations rose in many common law jurisdictions, particularly England and Wales and the United States.<sup>2</sup> A recent Home Office survey, published in 2003, notes that prison populations have risen in almost three-quarters of the countries included since the previous survey five years earlier.<sup>3</sup> These trends are particularly disconcerting when one considers that crime rates, and hence the volume of offenders appearing before the courts, were stable or declining during much of this period.

A number of explanations for the rise in prison populations have been advanced.<sup>4</sup> Although these will not be explored in this paper, the causes of high or rising prison populations include the following:

- Judicial resistance to alternative sanctions;
- Political and popular pressure on sentencers to get tough

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<sup>1</sup> UN Document A/RES/45/110.

<sup>2</sup> The adult prison population of England and Wales rose from 36,000 in 1991 to 62,000 in 2003, an increase of 71%; see Hough, Jacobson and Millie, *The Decision to Imprison: Sentencing and the Prison Population*. London: Prison Reform Trust, 2003.

<sup>3</sup> Walmsley, *World Prison Population List* (5<sup>th</sup> ed.), London: UK, Home Office Research, Development and Statistics Directorate, 2003.

<sup>4</sup> See the discussion in Garland, *The Culture of Control. Crime and Social Order in Contemporary Society*. Chicago: University of Chicago Press, 2001 and in Roberts, Stalans, Indermaur and Hough, *Penal Populism and Public Opinion. Lessons from Five Countries*. Oxford: Oxford University Press, 2003.

- with offenders;
- Creation of mandatory minimum terms of custody.

The purpose of this paper is rather to review some of the solutions that have been proposed or adopted around the world. This exercise represents a step towards identifying the components that make up a successful decarceration strategy. As will be seen, a diversity of responses has been adopted in recent years. The focus here is on the use of incarceration as a sanction; I do not address the equally pressing problem of remand detention. The paper is restricted to strategies that exist within the criminal justice system. A more radical – and potentially more effective approach for appropriate cases – involves diverting cases away from the justice system in the first place. While this approach focuses primarily on less serious cases, these individuals can represent a significant proportion of the courts' caseload. For example there is a growing movement promoting the use of criminal mediation.<sup>5</sup>

Reducing prison populations in jurisdictions (such as many American states) that employ a sentencing guidelines matrix is relatively straightforward; it consists of moving more offences into the community sanctions zone of the grid, or reducing the sentence lengths prescribed by the guidelines. Matters are more complicated in common law countries that do not employ formal sentencing guidelines such as those found across the US. I do not deal with the use of numerical guidelines such as those contained in the US-style sentencing grids, for the sole reason that no other jurisdiction has adopted this simplistic approach to structuring judicial discretion.<sup>6</sup>

Most of the strategies discussed here involve legislative intervention in the sphere of sentencing. It is a regrettable fact that many legislatures have proved reluctant to intervene in the sentencing process, preferring to leave the determination of sanction to judicial discretion, with very little guidance beyond the maximum penalty structure. I say that this is regrettable, for as Professor O'Malley points out "the legislature has a vitally important role in prescribing punishments and other dispositions that are available to courts and the factors that may or should be taken into account [at

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<sup>5</sup> Palmer, "Justice in whose interest? A Proposal for Institutionalised Mediation in the Criminal Justice System", *South African Journal of Criminal Justice* (1997) 10 (1), 33-45.

<sup>6</sup> In November 2000, Western Australia introduced legislation to adopt a sentencing matrix, although to date the legislation has yet to be proclaimed into law.

sentencing]”.<sup>7</sup> Unfortunately, not all legislatures have accepted their responsibility in this respect.<sup>8</sup>

The article provides a brief discussion of a near universal problem for sentencing: resisting public pressure to make sentencing harsher and concludes by summarizing the steps that may comprise a successful integrated strategy. One obvious feature of the international experience to date is that no jurisdiction has evolved a completely integrated approach to lowering the use of custody. First, however, it is worth summarizing trends with respect to the relative use of custody.

### I. PROPORTIONATE USE OF CUSTODY

There is considerable variation in the proportionate use of custody as a sanction, even between jurisdictions with comparable crime rates. For example, in Finland, only 7% of dispositions involve incarceration, compared to 28% in New Zealand, 35% in Canada and 61% at the state level in the U.S.<sup>9</sup> This cross-jurisdictional variation is significant because it suggests that the use of imprisonment reflects attitudes to punishment as much as a judicial response to the seriousness of the crime problem. In other words, if Finland can tolerate a low custody rate, there is hope for other countries where imprisonment is more frequently imposed as a sanction.

In most western countries, a significant proportion of prison sentences is under six months in duration. For example, in Canada and Denmark, approximately nine prison terms out of ten are less than six months. In France and Sweden over 60% of prison terms fall into this category.<sup>10</sup> Ian O'Donnell reports that in Ireland the most recent statistics reveal that almost half of the sentences of imprisonment were less than three months.<sup>11</sup> Moreover, a significant proportion of sentences in most jurisdictions will be served in the community as a result of conditional release programs.

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<sup>7</sup> O'Malley, *Sentencing Law and Practice*. Dublin: Sweet and Maxwell, 2000, p. 450.

<sup>8</sup> See the discussion in O'Mahoney, *Prison Policy in Ireland: Criminal Justice versus Social Justice*. Cork: Cork University Press, 2000.

<sup>9</sup> Roberts, *The Virtual Prison. Community Custody and the Evolution of Imprisonment*. Cambridge: Cambridge University Press, 2004.

<sup>10</sup> Roberts, *The Virtual Prison. Community Custody and the Evolution of Imprisonment*. Cambridge: Cambridge University Press, 2004, Table 2.4.

<sup>11</sup> O'Donnell, "Challenging the Punitive Obsession" [1998] 8 (1) *Irish Criminal Law Journal* 51 at 55.

Offenders sentenced to short periods of custody seldom represent a threat to the community, and the length of the prison terms signifies that they have not been convicted of the most serious crimes. In short, these offenders are prime candidates for community-based alternatives to imprisonment. Since these offenders are “prison bound”, however, the substitute sanction must carry sufficient penal “bite” to accomplish the objectives of sentencing, and to ensure community support. A community-based sanction that is nowhere near the penal equivalent of a term of custody will not be seen as an adequate replacement for imprisonment.

## II. STRATEGIES TO REDUCE THE USE OF CUSTODY AS A SANCTION

### *A. Statutory directions regarding restraint with respect to the use of imprisonment*

Sentencers in common law jurisdictions such as England and Wales, Canada and South Africa have traditionally enjoyed wide discretion at sentencing, guided solely by direction from appellate courts. Over the past decade a number of legislatures have moved to curb this discretion. The most common attempt to restrict the use of custody has been to place certain principles on a statutory footing, of which restraint regarding the use of custody is the most important. The legislature needs to send a clear message to sentencers that custody should be imposed only when the court is satisfied that no other sanction will adequately promote the objectives of sentencing. Placing the principle of parsimony or restraint on a statutory footing serves a dual purpose. First, it should serve to inhibit judges from incarcerating offenders unless no community-based sanction is deemed appropriate. This of course is the primary purpose of the principle. However, if the legislature places its imprimatur on the principle of restraint it will be hard for the same legislature to introduce mandatory sentences of imprisonment at a later point, as these sentences clearly violate the principle.<sup>12</sup>

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<sup>12</sup> This is the theory at least; in reality matters do not always follow this path. For example, the Canadian Parliament codified the principle of restraint in 1996 yet created a series of mandatory minimum sentences of imprisonment a year later.

*1. Examples of the Principle of Restraint*

The principle of restraint with respect to the use of custody has been codified in a number of countries. For example, in Canada, sections 718.2(d) and (e) of the Criminal Code state that:

An offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

In England and Wales, the Criminal Justice Act 2003 re-affirms the importance of restraint in sentencing, by promoting the principle of proportionality. In determining whether a custodial sentence should be imposed, crime seriousness is established as a guiding consideration. Section 152 (2) of the Act states that:

The court must not pass a custodial sentence unless it is of the opinion that the offence, or the combination of the offence and one or more offences associated with it, was so serious that neither a fine alone nor a community sentence can be justified for the offence.

Similarly, with respect to the length of a discretionary custodial sentence, Section 153 (2) of the Act states that:

Subject to sections 51A (2) of the Firearms Act 1968 (c.27), sections 110(2) and 111(2) of the Sentencing Act and sections 227(2) and 228(2) of this Act, the custodial sentence must be for the shortest term (not exceeding the permitted maximum) that in the opinion of the court is commensurate with the seriousness of the offence, or the combination of the offence and one or more of the offences associated with it.

Taken together these two subsections articulate the principle of restraint with respect to the use and duration of custodial sentences in that jurisdiction. Other countries such as New Zealand have also recently placed the principle of restraint on a statutory footing. The language used in the New Zealand statute is particularly directive. Courts are instructed that:

When considering the imposition of a sentence of imprisonment for any particular offence, the court must have regard to the desirability of keeping offenders in the community as far as that is practicable and consonant with the safety of the community.<sup>13</sup>

And further:

The court must not impose a sentence of imprisonment unless it is satisfied that:

- (a) a sentence is being imposed for all or any of the [statutory] purposes [of sentencing]; and
- (b) those purposes cannot be achieved by a sentence other than imprisonment; and
- (c) no other sentence would be consistent with the application of the principles [of sentencing].

Even a jurisdiction like the state of Florida, which has a relatively punitive sentencing system, promotes the principle of restraint. The Criminal Punishment Code in Florida establishes the legislative framework for sentencing. According to s. 921.002 (b), “The primary purpose of sentencing is to punish the offender. Rehabilitation is a desired goal of the criminal justice system but is subordinate to the goal of punishment”. However, an additional principle directs judges to reserve custody for “offenders convicted of serious offenses and certain offenders who have long prior records, in order to maximize the finite capacities of state and correctional facilities”.

Thus codifying a general direction to sentencers regarding the

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<sup>13</sup> Section 16(1) of the Sentencing Act 2002.

parsimonious use of custody represents the most frequently adopted attempt to curb the size of the prison population. The principle of restraint is clear enough, but this step alone will prove insufficient, otherwise the problem of rising custody rates would be easily solved. Indeed, the experience in England and Wales illustrates this point well. The restraint provision was introduced in the 1991 Criminal Justice Act. However, between 1991 and 2001, the custody rate in that jurisdiction rose significantly, as did the size of the custodial population.<sup>14</sup>

*B. Codifying the principle of proportionality in sentencing*

Many jurisdictions, including Canada, England and Wales, Finland and New Zealand have placed the principle of proportionality on a statutory footing. For example, in Canada, Parliament has designated the following principle as fundamental: “A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender”. In Florida the wording is: “The penalty imposed is commensurate with the severity of the primary offense and the circumstances surrounding the primary offense”. The Finnish statute is comparable: “The punishment shall be measured so that it is in just proportion to the harm and risk involved in the offence and to the culpability of the offender manifested in the offence.”<sup>15</sup>

Under the proposals made by the Law Commission in South Africa retributive sentencing is established by means of the first two principles that read as follows: (1) “Sentences must be proportionate to the seriousness of the offence committed, relative to sentences imposed for other categories or sub-categories of offences.”; and (2) “The seriousness of the offence committed is determined by the degree of harmfulness or risked harmfulness of the offence and the degree of culpability of the offender for the offence committed.”<sup>16</sup> Thus proportionality is established as the primordial consideration in determining sentence severity. How does this make a contribution to constraining admissions to prison? By placing desert-based limits on the severity of the sentence that may be imposed, this principle will help to restrict the use of incarceration by preventing judges from

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<sup>14</sup> Hough, Jacobson, and Millie, *The Decision to Imprison: Sentencing and the Prison Population*, London: The Prison Reform Trust, 2003.

<sup>15</sup> Criminal Code, Chapter 6, section 1, paragraph 1.

<sup>16</sup> South African Law Commission *Sentencing (A New Sentencing Framework)*, Discussion Paper 91 (Project 82), 2000. Available at: [www.law.wits.ac.za/salc/discussn/paper91sum.html](http://www.law.wits.ac.za/salc/discussn/paper91sum.html).

employing harsher sentences (i.e., more and longer terms of custody) in an attempt to curb rising crime rates.

*C. Establishing criteria for the imposition of custodial sentences*

A more forceful way of constraining the number of cases sent to prison involves the creation of specific criteria that must be fulfilled before a term of custody may be imposed. In Canada, the 2003 youth justice statute does exactly this. According to section 39 of the *Youth Criminal Justice Act*, a youth court may send a young offender to prison only if one or more of four criteria are met:

A youth justice court shall not commit a young offender to custody unless the young offender has:

- committed a violent offence; or
- to comply with previous non-custodial sentences; or
- committed an offence for which an adult is liable for a term of imprisonment greater than 2 years and who has a history that indicates a pattern of findings of guilt; or
- in exceptional cases where the young person has committed an indictable offence, the aggravating circumstances of the offence are such that the imposition of a non-custodial sentence would be inconsistent with the purpose and principles set out in section 38.

The youth justice reforms were introduced in Canada in 2003.<sup>17</sup> Since then, there has been a significant decline in the volume of young persons admitted to custody. In fact the number of young offenders in prison dropped by half as a result of the reform legislation.<sup>18</sup> Although these criteria apply only to young offenders, there is little reason why similar restrictions could not be created to limit the imprisonment of adult offenders in a similar fashion.<sup>19</sup>

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<sup>17</sup> Roberts, "Sentencing Juvenile Offenders in Canada: An Analysis of Recent Reform Legislation", *Journal of Contemporary Criminal Justice* (2003) 19(4), 413-434.

<sup>18</sup> Thomas, *Youth Court Statistics*, 2003/04. Juristat, Volume 25, Number 4, 2005.

<sup>19</sup> Admittedly it may be harder to convince legislatures to introduce strict criteria for the imposition of custody for adults given the general recognition that imprisonment is more harmful for juveniles than for adult prisoners.



1. *Requiring reasons for sentence*

A weaker approach to creating specific criteria that must be fulfilled before an offender can be committed to custody consists of requiring judges to provide reasons for sentence. Many countries have created a statutory obligation on judges to provide reasons for the sentences that they impose. Such a requirement facilitates appellate review and is in the interests of the administration of justice. However, requiring judges to justify a term of custody may also help to lower the proportionate use of custody; judges may be less likely to impose a sentence that requires specific justification. Once again the *Youth Criminal Justice Act* in Canada provides a useful illustration. Section s. 39(9) of the Act creates a duty for youth court judges who impose a term of custody to provide reasons why “it has determined that a non-custodial sentence is not adequate” to achieve the purpose of sentencing ascribed to the youth court system.

*D. Limiting the impact of Previous Convictions at sentencing*

Any sentencing system that imposes significantly and progressively harsher sentences on recidivists will have a problem with rising prison populations. All sentencing systems consider an offender’s prior record,<sup>20</sup> but the challenge is to prevent the “recidivist sentencing premium” from swamping desert based considerations, and increasing the number of offenders sent to prison. It is important, for the purposes of reducing the prison population, to prevent criminal history from having an undue influence on sentencing outcomes. A significant proportion of offenders appearing before the courts have criminal records; if each previous conviction is weighed again at each subsequent sentencing hearing, incarceration is the likely result.

Previous convictions are seen to be relevant to deterrence and incapacitation; harsher sentences are perceived to be necessary to deter recidivists. Under a cumulative sentencing model, sentence severity should increase in a linear fashion to reflect the number and seriousness of an offender’s previous convictions. In contrast, according to a just deserts sentencing model, first offenders or those

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<sup>20</sup> Roberts, “Paying for the Past: The Role of Criminal Record in the Sentencing Process” in Tonry (ed.) *Crime and Justice. A Review of Research*, vol. 22, Chicago: University of Chicago Press, 1997

with modest criminal histories, should receive a first offender discount. Once the offender has accumulated, say, four or five convictions, this discount should cease to apply, and the full tariff for the offence should be imposed. However, sentence severity should not continue to increase to reflect each additional conviction. This latter model is known as the “progressive loss of mitigation”.<sup>21</sup> The recent Criminal Justice Act in England and Wales increases the influence of previous convictions at sentencing. Thus section 143(2) of the Act stipulates that:

In considering the seriousness of an offence (“the current offence”) committed by an offender who has one or more previous convictions, the court must treat each previous conviction as an aggravating factor if (in the case of that conviction) the court considers that it can reasonably be so treated having regard, in particular to –

- (a) the nature of the offence to which the conviction relates and its relevance<sup>22</sup> to the current offence, and
- (b) the time that has elapsed since the conviction.

In this way, if the court considers it relevant, each previous conviction will inflate the quantum of punishment imposed – in short, cumulative sentencing. Some desert theorists argue that an offender’s previous convictions at sentencing should play no role at sentencing, but this would prove unacceptable to the community. The sentencing model to which most members of the public subscribe recognizes the relevance of criminal history. However, some constraint must be placed on sentencers, or previous convictions will become more important than the seriousness of the crime. And, since many offenders have previous convictions, the result will be that an increase in prison populations as institutions fill up with recidivists.<sup>23</sup>

In this respect the sentencing reform proposals advanced by the

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<sup>21</sup> Ashworth, *Sentencing and Criminal Justice* (4th ed.), Cambridge: Cambridge University Press, 2005.

<sup>22</sup> Relevance is not defined, but presumably it denotes the similarity of the current to previous offending. Here there are clear parallels with the US sentencing guideline schemes. For example, in the state of Washington similar prior convictions count more heavily than dissimilar priors. The result is that recidivists who commit the same kind of offences will pay a much higher price for their previous convictions (see Roberts, *supra*, note 20).

<sup>23</sup> von Hirsch and Roberts, “Legislating Sentencing Principles: The Provisions of the Criminal Justice Act 2003 relating to Sentencing Purposes and the Role of Previous Convictions” *Criminal Law Review*, August (2004), 639.

Law Reform Commission in Ireland, and more recently by the South African Law Commission offer a useful model. It will be recalled that the Law Reform Commission of Ireland took the position that “although it may be justifiable to take account of the offender’s previous criminal record...the sentence should be kept in proportion to the seriousness of the current offence(s)”.<sup>24</sup> The South African proposals state that: “the presence or absence of relevant previous convictions may be used to modify the sentence proportionate to the seriousness of the offence to a *moderate degree*”.<sup>25</sup> This phrase would require clarification from appellate courts; however, it does introduce a clear constraint upon the degree to which the severity of a sentence can be increased to reflect the offender’s previous convictions. No such constraint exists under the English Act, where each prior conviction must aggravate sentence severity, as long as it is considered recent and relevant.

#### *E. Restraining Penal Escalation*

Many judges follow what might be termed a sentencing strategy of “penal escalation”. If an offender receives a non-custodial sanction and is subsequently re-convicted, judges tend to gravitate towards a more severe disposition on the second or subsequent occasion. This is a form of recidivist premium; the judicial logic underlying the strategy is that if a community based sanction did not “work” on the first occasion (as evidenced by the offender’s re-appearance before the court), perhaps custody is the answer on the second.

Restricting this tendency by courts represents a way of containing the number of prison sentences imposed. A provision in the *Youth Criminal Justice Act* in Canada is intended to discourage judges from escalating the severity of the sentence in response to subsequent offending. Having imposed an alternative to custody for one offence, some judges shift to custody if a youth re-appears before the court, reasoning that the first sentence was insufficient to discourage the offender. Section 39(4) addresses this judicial reasoning, providing:

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<sup>24</sup> Law Reform Commission of Ireland, *Consultation Paper on Sentencing*. Dublin: The Law Reform Commission, 1993, p. 384.

<sup>25</sup> South African Law Commission *Sentencing (A New Sentencing Framework)* Discussion Paper 91 (Project 82), 2000, s. 3(4) (emphasis added). Available at: [www.law.wits.ac.za/salc/discussion/proposal](http://www.law.wits.ac.za/salc/discussion/proposal).

The previous imposition of a particular non-custodial sentence on a young person does not preclude a youth justice court from imposing the same or any other non-custodial sentence for another offence.

While s. 39(4) does not prohibit judges from following the “step principle” logic at sentencing, the provision makes it clear that the same alternative may be imposed on separate occasions.

#### *F. Creation of Alternate Forms of Custody*

As Barry Vaughan notes, in relation to juvenile offenders, “the most popular way of reducing the incarceration rate is to provide more non-custodial alternatives”.<sup>26</sup> The same can be said for the sentencing of adults. An obvious way to decrease the use of imprisonment as a sanction is to offer judges more sentencing options in the hope that one of the alternatives will prove an acceptable substitute for imprisonment. This strategy has been embraced by many jurisdictions. However, simply increasing the range of sanctions available to sentencing courts has not to date accomplished the anticipated reductions in prison populations. One limitation on alternatives to imprisonment is that they are not as severe, or are not perceived to be as severe as a term of custody. This limits the extent to which alternative sanctions can be substituted for terms of imprisonment. The development of tougher community based sanctions is one response to this problem.

#### *1. Home Alone: Home Confinement Sanctions*

The search for more punitive community-based sanctions has led to the creation of another variation on imprisonment: community custody. The purpose of home confinement, or community custody is to isolate the offender, rupture criminogenic associations, and promote steps to rehabilitation – only the first of these objectives is easily accomplished in prison. Home confinement regimes vary widely – some are quite punitive in nature, others resemble a term of probation with a curfew condition.<sup>27</sup> As well, the ambit of these sanctions varies considerably. Usually, the sanction is used to replace

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<sup>26</sup> Vaughan, B. “Breaking out of Jail: Generating Non-Custodial Penalties for Juveniles”, [2000] 10 (3) *Irish Criminal Law Journal* 14 at 14.

<sup>27</sup> A discussion of representative models can be found in Roberts, *The Virtual Prison, Community Custody and the Evolution of Imprisonment*, Cambridge University Press, 2004.

relatively brief periods of institutional confinement.

Community custody has long been a feature of the Finnish criminal justice system. Finland remains the jurisdiction that has employed community custody sentences to the greatest extent. Called conditional imprisonment, it has proved a success in that jurisdiction, and has played an important role in reducing the use of incarceration as a sanction. Over the past 50 years, the volume of conditional sentences imposed in Finland has increased dramatically. In 1950, conditional imprisonment accounted for 2,812 sentences, under a third of all sentences of imprisonment. In 2000, 13,974 such dispositions were imposed, representing just under two thirds of all prison sentences.<sup>28</sup>

Assignment to home detention in New Zealand requires a two-step approval process involving the judiciary and an administrative body. Only some offenders will be eligible for home confinement. Of these, only a minority will be granted leave to apply, and many will ultimately be turned down by the parole board. Less than one-third of prisoners who have applied for home confinement have been granted release to the program.<sup>29</sup> An even smaller percentage of all prisoners within the range of sentence length will serve part of the sentence in the program. In 2001, only 10% of offenders sentenced to a prison sentence of two years or less (and therefore within the ambit of the home detention regime) were actually released to serve their sentences at home.<sup>30</sup> The most recent jurisdiction to introduce a community custody sanction is England and Wales. The 2003 Criminal Justice Act created a sentence called a suspended sentence of imprisonment.<sup>31</sup>

In Canada the home confinement sentence (known as a conditional sentence of imprisonment) may replace<sup>32</sup> most sentences of custody of up to two years in duration. This embraces fully 96%

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<sup>28</sup> Lappi-Seppala, *The Principle of Proportionality in the Finnish Sentencing System*, 2002.

<sup>29</sup> Gibbs and King, "Home detention with electronic monitoring: the New Zealand experience", *Criminal Justice*, 2003, 3, 199-211.

<sup>30</sup> Spier, *Conviction and Sentencing of Offenders in New Zealand: 1992-2001*. Wellington: New Zealand Ministry of Justice, 2002.

<sup>31</sup> Ashworth, *Sentencing and Criminal Justice* (4<sup>th</sup> ed.), Cambridge: Cambridge University Press.

<sup>32</sup> There are other criteria that must be fulfilled before a court can impose this sentence. Imposition of the sentence must be consistent with the codified purpose and principles of sentencing; the offence must not be one that carries a minimum term of imprisonment (few such crimes exist in Canada) and the court must be confident that the offender does not represent a threat to the community.

of custodial sentences imposed. This wide ambit of application is a double-edged sword. On the one hand, it permits the sanction to replace a large number of terms of institutional imprisonment, thereby increasing the decarceration effect of the sentence. On the other hand, it permits courts to impose a term of custody for crimes of violence seriousness enough to justify a lengthy (by Canadian standards) term of imprisonment. This does not often happen, but when it does, media coverage is very negative. Since the creation of the sanction (in 1996) there have been repeated calls to amend the sanction by preventing judges from imposing a conditional sentence for serious crimes of violence.

This image problem aside, research has demonstrated the effectiveness of the Canadian home confinement sentence in reducing the volume of admissions to custody. Pre and post implementation analyses of admission statistics demonstrate that within three years, a 13% reduction in admissions was directly attributable to the new sanction.<sup>33</sup> This represents about 55,000 offenders who served their sentences of imprisonment at home, rather than in a correctional facility. In addition, the success rate – the proportion of orders completed without a violation of conditions – appears relatively high. Over the first four years of the new sanction, approximately four orders out of five terminated without violation of the conditions.<sup>34</sup>

### *G. Importance of creating a Sentencing Commission*

Attempting to achieve an important policy goal through legislative interventions alone is far from easy. The process of amending existing statutes is time consuming and susceptible to political pressures. For this reason, a number of jurisdictions have established temporary or permanent sentencing commissions to guide the reform process. These commissions have much to contribute to the policy goal of reducing admissions to custody.

First, they create a policy “buffer” between the legislature and the sentencing process. For example, a commission comprised of judges, criminal justice professionals and scholars is unlikely to pursue policies such as mandatory sentencing in order to respond to populist pressures (see discussion below). The principal cause of the

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<sup>33</sup> See Roberts and Gabor, “Living in the Shadow of Prison: Lessons from the Canadian Experience in Decarceration.” *British Journal of Criminology*, 2004, 39(1): 92-112.

<sup>34</sup> Roberts, *The Virtual Prison. Community Custody and the Evolution of Imprisonment*. Cambridge: Cambridge University Press, 2004.

creation of mandatory sentencing laws in western nations during the 1990s would appear to be the influence of penal populism: politicians responding to pressure to “get tough” and “do something about crime”.<sup>35</sup>

Second, a commission can more rapidly access and utilize relevant statistical information such as prison population trends. Third, a commission can draw upon the expertise of professionals, whereas a legislature is guided by standing committees composed of politicians who seldom have the necessary experience to evaluate draft legislation pertaining to the sentencing process.

Sceptics may argue that independent commissions of this kind are somehow undemocratic, and that reform of the sentencing process should remain firmly within the grasp of Parliament. If properly constructed, however, sentencing commissions supplement and enhance the work of Parliament, without usurping parliamentary authority.<sup>36</sup> Sentencing Commissions exist throughout the United States at the state and federal levels. In addition, a number of other countries such as Canada and Belgium have created temporary commissions to review the sentencing process and create proposals for reform.

At this point I briefly comment on three strategies to reduce the use of incarceration which in my view carry considerable danger.

### *1. Abolishing short sentences of imprisonment*

A number of commentators have proposed abolishing all sentences of custody under a certain limit, for example, six months. This strategy may easily backfire. Judges may decide that a term of custody is necessary, and then, having arrived at this determination, would be forced to impose a six month term. The average duration of custodial terms would then rise, as some cases formerly attracting a sentence of a couple of months would now jump to the mandatory six month minimum. This proposal thereby has the effect of creating a form of mandatory minimum sentence.<sup>37</sup> In addition, the logic

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<sup>35</sup> Roberts, Stalans, Indermaur and Hough, *Penal Populism and Public Opinion. Lessons from Five Countries*. Oxford: Oxford University Press, 2003.

<sup>36</sup> For example, one mechanism to ensure that reforms proceed expeditiously while remaining within the sphere of parliamentary activity is by means of negative resolution in the legislature. The Sentencing Commission would propose draft legislation that is subsequently reviewed by legislative committee and this would become law unless a negative resolution supported by a specified number of members of Parliament were passed.

<sup>37</sup> See discussion in Brodeur and Roberts, “Taking Justice Seriously”, *Canadian Criminal Law Review*, (2001), 7, 77-92.

underlying the reform is questionable. Imagine amending the fine provisions by creating a minimum amount, requiring courts to impose a fine of, say, at least 1,000 Euros. A reform of this nature would make little sense to the community. If a particular disposition carries some penal value it should do so at all stages of a continuum. It is worth noting in this context that the Australian Law Reform Commission of Australia recently published a comprehensive review of sentencing reform options. The abolition of sentences of less than six months was one of the reforms examined, but ultimately rejected by the Commission.<sup>38</sup>

## 2. *Periodic Amnesties*

Some jurisdictions employ sporadic, one-time conditional release initiatives that reduce the prison population. For example in some countries such as France, general amnesties are periodically granted to mark an event of national significance. Amnesties have been used in South Africa to relieve intolerable prison conditions due to overcrowding. This is clearly an expeditious means of reducing the prison population – large numbers of prisoners can be released practically overnight. Although they can be effective in this respect, such amnesties can provoke public opposition, and undermine principled sentencing.<sup>39</sup>

## 3. *Changing the criteria for release on parole*

A more systematic strategy consists of increasing the proportion of a sentence of imprisonment that may be served in the community on parole. Some jurisdictions regulate their prison populations by increasing the proportion of prisoners released on parole, or accelerating parole eligibility dates with the result that more prisoners are released, and at an earlier point in the sentence. When parole cuts deeply into a sentence of imprisonment, however, a number of problems arise. First, public opposition is provoked, as members of the public question the meaning of a sentence if the offender is released into the community after having served only one-

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<sup>38</sup> Australian Law Reform Commission, *Sentencing of Federal Offenders. Discussion Paper No. 70*. Sydney: Australian Law Reform Commission, 2005.

<sup>39</sup> For discussion in the South African context, see Pete, “The Politics of Imprisonment in the Aftermath of South Africa’s first democratic election”, *South African Journal of Criminal Justice*, (1998) 11, 51-83.



third of the custodial term.<sup>40</sup> Second, proportionality in sentencing will be undermined. When reviewing parole applications, parole authorities consider the threat to the community and the possible benefit to the prisoner of release on parole. Crime seriousness and offender culpability are not generally among the criteria for granting parole. Sentences that conform to proportionality considerations at the time of sentencing can become quite different when the amount of time served in prison is considered.<sup>41</sup>

### III. ROLE OF PUBLIC OPINION

Finally, it is important to note that ultimately, promoting the use of alternatives and reducing the number of admissions to custody requires more than amendments to the statutory sentencing framework. It also requires an effort to educate the public about the fiscal, penological, and humanitarian benefits of community sentences, as well the limitations on imprisonment as a sanction. It is a regrettable reality that when asked about sentencing, or about the sentence that is most appropriate in a specific case, the public around the world first think about imprisonment. Although custody is the sanction that comes most readily to mind, it is also the one with which people are least familiar. Most members of the public know little about prison conditions, and underestimate the true severity of a sentence of imprisonment. A recent review demonstrates that this is true around the world in all countries in which public opinion polls have explored this issue.<sup>42</sup> This has an inflationary effect on public expectations of the sentencing process: if prison life is relatively easy, a sentence such as six months in prison will not be seen as a severe penalty.

Public opinion research has demonstrated remarkable commonalities with respect to criminal justice. Polls conducted in countries as diverse as Britain, Barbados, South Africa and New Zealand reveal that the public around the world share a number of common attitudes regarding crime and criminal justice. Many of these can have an indirect effect on sentencers. For example, regardless of actual trends, most people believe that crime rates are

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<sup>40</sup> In Canada for example, most prisoners are eligible to apply for full parole at the one-third mark of the sentence. Eligibility for day parole occurs even earlier at the one-sixth point.

<sup>41</sup> See discussion of this issue in Canadian Sentencing Commission, *Sentencing Reform: A Canadian Approach. Report of the Canadian Sentencing Commission*, Ottawa: Supply and Services Canada, 1987.

<sup>42</sup> Roberts and Hough, "The State of the Prison: Exploring Public Knowledge and Opinion", *The Howard Journal of Criminal Justice*, (2005) 44: 286-30.

constantly rising. This discrepancy between public perception and reality has emerged from studies conducted in many countries since the 1980s.<sup>43</sup> A recent survey in Australia also found that the majority of the public believed that crime rates had been increasing when in fact rates had been stable or falling over the period in question.<sup>44</sup>

Surveys of New Zealanders and residents of Northern Ireland have found the same result. The overwhelming majority of the sample (83%) in New Zealand believed (erroneously) that crime rates had increased over the previous two years.<sup>45</sup> In one of the few studies conducted outside Western industrialized countries it was found that residents of Barbados also held inaccurate perceptions of crime trends.<sup>46</sup> Although crime rates on the island had increased only slightly in the five years preceding the survey, 69% of respondents believed that there was a “lot more” crime. South Africans, it appears, share some of these misperceptions. The number of serious crimes reported to the police was relatively stable over the period 1994 to 1999. Despite this, a survey found that four fifths of respondents believed that the crime rate had increased “significantly”.<sup>47</sup> The consequence of this misperception is likely to be pressure on courts to sentence more severely, as the public look to the sentencing process to address the problem.

### 1. Public perceptions of sentencing trends

Public criticism of the sentencing process is a near universal problem. Examining public responses to polls about sentencing trends over the past 30 years reveals that whenever the question is posed, most people respond that sentences are too lenient.<sup>48</sup> In

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<sup>43</sup> Roberts and Hough, *Understanding Public Attitudes to Criminal Justice*. Maidenhead: Open University Press, 2005.

<sup>44</sup> Weatherburn and Indermaur, “Public Perceptions of Crime Trends in New South Wales and Western Australia”, *Crime and Justice Bulletin*, (2004) Number 80.

<sup>45</sup> Paulin, Searle and Knaggs, *Attitudes to Crime and Punishment: A New Zealand Study*. Wellington: Ministry of Justice, 2003. See also Amelin, Willis, Blair and Donnelly, *Attitudes to Crime, Crime Reduction and Community Safety in Northern Ireland*. Review of the Criminal Justice System in Northern Ireland. Research Report No. 1. Belfast: Northern Ireland Office, 2000.

<sup>46</sup> Nuttall, Eversley, Rudder and Ramsay, *Views and Beliefs about Crime and Criminal Justice*. Bridgetown, Barbados: Barbados Statistical Department, 2003.

<sup>47</sup> Monograph 29. *The Problem of Prison. Correcting Corrections*. Available at: [www.iss.co.za](http://www.iss.co.za), 1998.

<sup>48</sup> This perception of leniency contributes greatly to the low levels of public confidence in the courts. Comparative research across several western nations demonstrates that of all components of the criminal justice system, courts (and sentencers) receive the most negative ratings. For further discussion see Hough and Roberts, *Public Confidence in Criminal Justice*, London: Institute for Criminal Policy Research, Kings College, 2004.

Canada, for example, the most recent poll containing this question found that approximately two-thirds (63%) of the public believed that sentences were too lenient, less than one third were of the opinion that sentences were “about right”.<sup>49</sup> According to a recent administration of the BCS, 75% of respondents believed sentences were too lenient; less than one-quarter thought they were about right.<sup>50</sup>

## 2. *Influence of Public Opinion*

The influence of public attitudes can be seen in a number of contexts. Surveys of the judiciary in Canada have demonstrated that community views influence sentencing practices: most judges acknowledging that they considered the impact on public opinion before imposing a community custody sanction.<sup>51</sup> This is further evidence of the complex relationship between the practice of the courts and the views of the community.

Community sanctions have often been represented by the news media and some politicians as lenient sentencing options.<sup>52</sup> This image problem has long plagued alternative sanctions in several countries. Michael Tonry, among others, has described the perceived leniency of intermediate sanctions as “the most difficult obstacle” to greater implementation of these sanctions.<sup>53</sup> This view is sustained by the results of numerous polls. For example, in 1996 a poll revealed that over half the American public agreed with the statement that: “community corrections are evidence of leniency in the criminal justice system”.<sup>54</sup> Americans are not unique in subscribing to this view of community based sentences.

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<sup>49</sup> Sanders and Roberts, “Public Attitudes toward Conditional Sentencing: Results of a National Survey”, *Canadian Journal of Behavioural Science* (2000) 32, 199-207.

<sup>50</sup> Mattinson and Mirrlees-Black, *Attitudes to Crime and Criminal Justice: Findings from the 1998 British Crime Survey*, Home Office Research Study No. 200. London: Home Office, Research, Development and Statistics Directorate, 2000.

<sup>51</sup> Roberts, Doob and Marinos, *Judicial Attitudes to Conditional Terms of Imprisonment: Results of a National Survey*. Ottawa: Department of Justice, 2000.

<sup>52</sup> The Lord Chief Justice in England and Wales noted the influence of the media when he wrote that: “the use of custody has increased very sharply, in response to certain highly publicized cases, legislation, ministerial speeches and intense media pressure (see *R. v. Brewster* [1998] 1 Cr. App. R. 184).

<sup>53</sup> Tonry, *Sentencing Matters*. New York: Oxford University Press, 1996.

<sup>54</sup> Flanagan, “Community Corrections in the Public Mind”, *Federal Probation* (1996) 60 (3), 3-9.

#### IV. IMPORTANCE OF PROMOTING PUBLIC AND PROFESSIONAL CONFIDENCE IN ALTERNATIVES

Educating the public about crime rates and the nature of the sentencing process is therefore an important component in the struggle to reduce the use of custody. A public that perceives crime rates to be constantly rising, and that sees judges as imposing lenient sentences, will create pressure on sentencers to impose more and longer prison terms. Public misperceptions will therefore become a cause of the problem. More than this however, it is important to promote public and professional confidence in the alternatives to imprisonment: Creating a wide range of non-custodial sanctions, or new, community-based forms of detention, will do little to reduce the volume of admissions to custody if sentencers have no confidence in these penal measures.

#### V. CONCLUSION

Reducing the prison population in a safe and principled way is far from easy. It requires a concerted effort by all stakeholders, and cannot be accomplished through statutory reforms alone. The most effective way of achieving a transformation in the penal environment from custody to community entails a series of related initiatives, beginning at the political level. Politicians must demonstrate some leadership by fostering reforms that will change practices at the trial court level. The accumulating international literature reveals some specific strategies that have proved successful, and that policy changes can have an important influence on prison populations.<sup>55</sup> What is needed now is a truly international “best practices” analysis; it is hoped that this brief survey will make a modest contribution in this regard.

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<sup>55</sup> See Snacken, Beyens and Tubex, “Changing prison populations in Western Countries: Fate or Policy?” *European Journal of Crime, Criminal Law and Criminal Justice* (1995) 3 (1), 18-53.