

THE SHORT PRISON SENTENCE: AN OBITUARY?

Abstract: Short prison sentences are used frequently despite several obvious deficiencies. They are disruptive without being reformatory, expensive, and contribute to prison overcrowding. The interests of justice would be better served by an increased reliance on community service and restorative justice, options that remain chronically underutilised despite their potential to offer a proportionate and effective response to minor offences.

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Introduction

'Now, if you are to punish a man retributively, you must injure him. If you are to reform him, you must improve him. And men are not improved by injuries.'

George Bernard Shaw, *The Crime of Imprisonment*, 1946.

My purpose in what follows is to offer some reflections on the role of the short prison sentence and what might be done to reduce its popularity. These are offered in line with the stated ambition of the *Irish Judicial Studies Journal* to stimulate dialogue among academics, practitioners and judges.¹ During the 1990s I worked in the Centre for Criminological Research at Oxford University and sat as a lay magistrate in the city's court. After a finding of guilt I had to decide, with my two colleagues on the Bench, on an appropriate disposal, up to a maximum of six months imprisonment on a single charge. As a result, I believe that I have a sense of the challenges associated with making the punishment fit the crime. Having sent people to prison I appreciate the weight of this decision. This paper is written by an academic with practitioner experience (albeit somewhat dated at this stage) to contribute in some small way to the perennial dialogue about punishment and its consequences (intended and otherwise).

Short prison terms are the norm in Ireland. It was ever thus.² The most recent annual report of the Irish Prison Service relates to 2022. It shows that two thirds of committals under sentence were for less than a year and almost half were for less than six months. The pattern was broadly the same ten years previously (see Table 1).

¹ The mission statement reads as follows: 'The primary purpose of the *Journal* is to provide Irish judges with analyses and opinions that are relevant and useful to them in their work. In addition, the *Journal* also aims to provide a forum where academics and practitioners can communicate views on matters of law and judicial policy to the judiciary and to each other.' <<https://www.ijsi.ie/about-us/>> accessed 20 June 2024.

² For historical data on the operation of the criminal justice system see Ian O'Donnell, Eoin O'Sullivan and Deirdre Healy, *Crime and Punishment in Ireland 1922 to 2003: A Statistical Sourcebook* (Institute of Public Administration 2005).

Table 1: Committals to prison (excluding fine defaulters)

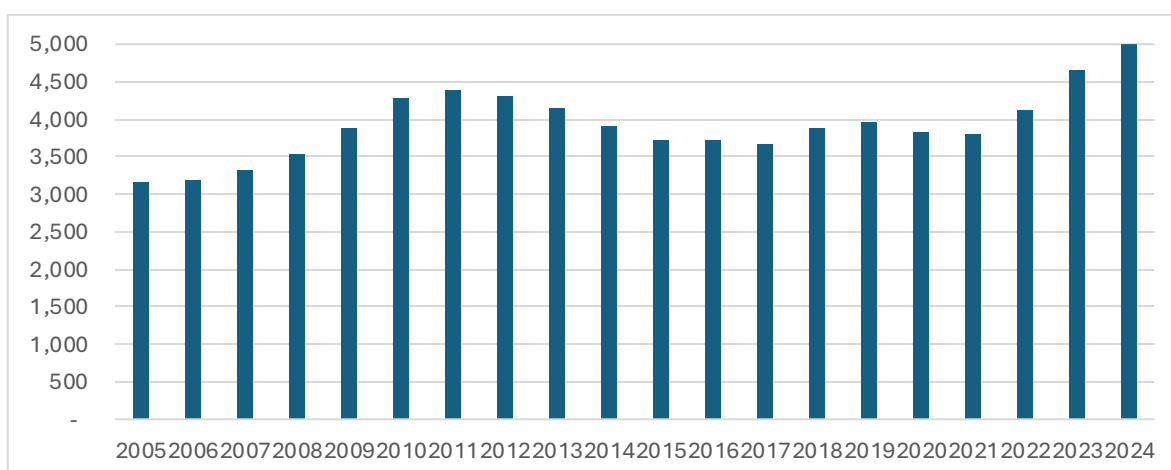
	<u>2022</u>	<u>2012</u>
Less than three months	790 (17%)	780 (15%)
Three months to less than six months	1,333 (29%)	1,487 (28%)
Six months to less than twelve months	923 (20%)	1,273 (24%)
Twelve months and above	1,604 (34%)	1,682 (32%)
All	4,650	5,222

Source: Irish Prison Service, *Annual Report 2022*, Appendix VI.

This consistency contrasts with considerable variation in the daily average prison population. The trend for the past twenty years is shown in Figure 1. A steady rise between 2005 and 2011 was followed by a sustained fall until 2017. The reasons for this decline are not well understood and I argued at the time that:

If some of the cost savings associated with falling prisoner numbers were directed towards a programme of research to deepen understanding and guide policy, a short-term gain might be converted into a sustainable programme of decarceration ... It would be a matter of considerable regret if what might prove to be a once-in-a-generation opportunity was not seized.³

This opportunity was squandered.⁴

Figure 1: Daily average prison population

Source: Irish Prison Service, annual reports 2005 to 2022. For 2023 and 2024 a snapshot figure for 20 June is used <<https://www.irishprisons.ie/information-centre/statistics-information/2015-daily-prisoner-population/>> accessed 20 June 2024.

³ Ian O'Donnell, 'Ireland's shrinking prison population' (2017) 27/3 *Irish Criminal Law Journal* 75.

⁴ While teaching programmes in criminology have proliferated at third-level institutions, well-designed, high-quality empirical research remains scarce, and the funding environment is ungenerous. Small grants, made available sporadically for modest projects that, typically, must be completed alongside an individual's preexisting commitments, are insufficient to build an adequate knowledge base.

Prisoner numbers increased slightly in 2018 and 2019 before falling back in the following two years, no doubt on account of the impact of the Covid-19 pandemic on crime rates, prosecutions, and early release policy. There has been an abrupt change since then with the daily average number of prisoners surging from 3,792 in 2021 to 5,002 on 20 June 2024 – a jump of more than 30 per cent in three years. This sudden lurch upwards has put the system under intense strain. Extra beds have been installed in cells that were already far from spacious and some prisoners are sleeping on mattresses placed on the floor, a situation described by the Prison Officers' Association as 'pack 'em, stack 'em and rack 'em.'⁵

Overcrowding is incompatible with dignified treatment and proper sentence planning. It places enormous demands on staff, militates against adequate time out of cell, and aggravates tensions on the landings.

One approach to addressing prison overcrowding is to build additional cells. This is the current government's preferred approach. In his maiden speech as Taoiseach, Simon Harris TD, promised to 'expand prison capacity' without specifying to what extent or over what timeframe.⁶ Five months previously his predecessor, Leo Varadkar TD, had pledged to introduce 600 more prison places 'over the next couple of years'.⁷ This is a huge increase in a penal system as small as Ireland's, and the commitment was made without any evidence to support the necessity or scale of the proposed expansion.

In a debate on the prison service the government explained that capital funding of €49.5m had been made available 'to create accommodation for up to 670 prisoners' with the first tranche of extra places scheduled to come on stream in 2024.⁸ The number of promised new cells has continued to rise and Minister for Justice, Helen McEntee TD, announced that enough funding had been secured in Budget 2025 to 'deliver over 1,100 prison spaces in the coming years'.⁹ It is not clear how many of the proposed places are intended to ease congestion and how many will provide additional capacity.

An alternative approach to tackling overcrowding is to reduce the flow of people into prison and to curtail the duration of their stay. This was the option chosen by the Joint Committee on Justice, Defence and Equality which called unanimously for 'the adoption of a "decarceration strategy"; a declared intention by the Government to reduce the prison population by one-third over a ten-year period'.¹⁰ This call was all the more striking given that the committee began its work in 2011, at which time the prison population had reached a hitherto unprecedented level (see Figure 1).

The Council of Europe cautions against an overemphasis on new buildings, observing that while prison population growth and the associated overcrowding certainly present challenges

⁵ Conor Gallagher, 'Chronic overcrowding in prisons allows bullies to "thrive" and will only get worse, Minister to hear', *The Irish Times* (27 April 2023). On 20 June 2024, the women's prison in Limerick was the most crowded facility in the country, operating at 125 per cent of bed capacity. It was followed by Limerick men's prison and the Dóchas Centre (both 120 per cent), and Mountjoy men's prison (116 per cent) <https://www.irishprisons.ie/wp-content/uploads/documents_pdf/20-June-2024.pdf> accessed 28 June 2024.

⁶ Dáil Deb 9 April 2024, vol 1052, no 1.

⁷ Philip Ryan, 'Leo Varadkar promises 600 new prison spaces as part of crime crackdown' *Irish Independent* (18 November 2023).

⁸ Dáil Deb 2 May 2024, vol 1053, no 4.

⁹ Department of Justice, 'Minister McEntee secures record €3.9bn budget', Press Release, 1 October 2024.

¹⁰ Joint Committee on Justice, Defence and Equality, *Report on Penal Reform* (Houses of the Oireachtas, 2013) 9. This recommendation was enthusiastically received across the political spectrum (Ian O'Donnell, 'Making progress with penal reform' (2013) 23/3 *Irish Criminal Law Journal* 66-69).

in terms of efficient administration and the protection of human rights, the ‘extension of the prison estate ... is generally unlikely to offer a lasting solution’.¹¹ Construction projects are expensive, take time, and provide little more than a temporary measure of relief. If new developments take place on existing sites, cramped facilities become even more restrictive, and the limited amount of available outdoor space is further curtailed. (Uncertain) economies of scale are counteracted by a (certain) diminution in quality of life. Irish prisons are too populous anyway and packing ever more bodies into existing and new premises is at odds with the imperative to reap the benefits that accompany reduced scale.¹²

The balance of informed opinion suggests that the best approach to prison crowding is to ease the pressure of numbers rather than to provide additional spaces because ‘prison population numbers rise as a result of extensive prison construction’.¹³ Building, it would seem, begets more building.¹⁴

Ireland’s population rose by over one million in the twenty-year period covered by Figure 1. There is no simple relationship between the number of people living in a country and the number of prisoners. The latter depends on crime rates, victims’ propensity to report, investigative efficiency, prosecution practice, pleas entered, sentences imposed, early release mechanisms, political priorities, and the legislative environment. The level of crime is influenced by demographic factors such as age and gender, the socio-economic context, and prevailing opportunity structures rather than the sheer number of people. The fact that the national population has been on a steady upward trajectory at the same time as the number of prisoners has fluctuated shows this correlation is imperfect.

Punishing hard and short

Data from the Courts Service show that imprisonment and suspended sentences are popular in the District Court while community service is not.¹⁵ The pattern is clear. When we consider summary offences, the District Court hands down six times as many prison sentences as community service orders and five times as many suspended sentences (see Table 2). For indictable offences dealt with summarily the ratio is even higher, with eight times as many prison sentences and almost six times as many suspended sentences (see Table 3).

There is some variation by offence type. Community service is never used in the few sexual offences that are dealt with to a conclusion in the District Court and it is rarely used for theft, fraud or robbery. Proportionately, it is most likely to be awarded for indictable drug offences dealt with summarily, followed by indictable public order and assault offences dealt with summarily, then for summary road traffic offences.

¹¹ Council of Europe Committee of Ministers, Rec. R(99)22 Concerning Prison Overcrowding and Prison Population Inflation, adopted on 30 September 1999, para 2. It may be 25 years old, but this recommendation has lost little of its force.

¹² Smaller is better if we are serious about minimizing the harms of incarceration. See, for example, <<https://www.rescaled.org/>> accessed 28 June 2024.

¹³ Council of Europe, *White Paper on Prison Overcrowding* (Strasbourg, 2016) 22.

¹⁴ There is a wearily circular feel to these arguments. I recall delivering the Liam Minihan Lecture in 1999 under the (intentionally!) punning title ‘The Crisis Building in Irish Prisons’, a reference to the government’s attempt to relieve the pressure of rising prisoner numbers by providing additional places. This approach did not provide a lasting solution then and is unlikely to do so now. The lecture was published as Ian O’Donnell, ‘Punishment and politics’ (1999) 49 *Doctrine & Life* 581-87.

¹⁵ While short prison sentences are not exclusive to the District Court this is where they are most often imposed and, as a result, I am limiting my focus accordingly. The same issues pertain to fleeting bouts of incarceration regardless of the originating court.

Table 2
District Court, summary offences: outcomes

	<u>Imprisonment</u>	<u>Suspended</u>	<u>Community Service</u>
Road Traffic	1,200	1,288	270
Drugs	71	69	10
Sexual	16	10	0
Larceny / fraud / robbery	0	1	0
Public order / assault	1,509	1,215	239
Other	1,000	708	102
All	3,796	3,291	621

Source: Courts Service, *Annual Report 2022*, 92.

Table 3
District Court, indictable offences dealt with summarily: outcomes

	<u>Imprisonment</u>	<u>Suspended</u>	<u>Community Service</u>
Road Traffic	114	32	8
Drugs	686	883	223
Sexual	7	29	0
Larceny / fraud / robbery	3,045	1,636	244
Public order / assault	159	276	48
Other	678	438	65
All	4,689	3,294	588

Source: Courts Service, *Annual Report 2022*, 93.

Unfortunately, no breakdown of sentencing outcomes is available by geography, judge, offence type and seriousness, plea, or defendant characteristics such as gender, age, ethnicity, race and prior record. Nor is it apparent how many suspended sentences are later activated, or the level of non-compliance with community service orders that leads to revocation and eventual imprisonment. There are continuing problems linking data across the various criminal justice agencies and this hinders understanding. For example, the number of prison sentences imposed in the District Court cannot be mapped onto the number of prison committals. There have been many calls over the years for improved data and research. It would be tedious to rehearse them here, but it is noteworthy that despite the repetitive nature of these calls, and the absence of any contrary view, substantial knowledge deficits persist.

Community service is a direct alternative to imprisonment and for a sentence to be suspended requires a prior determination that it was serious enough to merit custody. This implies that there is a degree of interchangeability or punitive equivalence among these sanctions and, as such, it should be possible to rebalance the distribution.

Because the door revolves quickly for short termers, they make a greater contribution to the ‘flow’ as opposed to the ‘stock’ of prisoners. While persons sentenced to less than six months constituted 46 per cent of committals in 2022 (see Table 1) they made up only 4 per cent of those in custody on an average day the same year.¹⁶ Parallel – and even more intensive – efforts will be required when it comes to the long sentence prisoners who constitute the bulk of the daily average population. Initiatives that might be considered in this regard include making greater use of the enhanced rate of remission (33 per cent versus the standard 25 per cent) which is permitted under the prison rules, but seldom used;¹⁷ speeding up release on parole for prisoners who have been punished enough and no longer pose a threat to public safety;¹⁸ promoting use of the community return scheme;¹⁹ and reevaluating sentencing practice more generally in terms of underpinning rationales, consistency and efficacy.²⁰ An additional raft of measures will be required to tackle the number of persons remanded in custody – now at a record high – and the duration of their stay.

Many factors contribute to rising prisoner numbers, in other words, and so any reductive strategy will have to be multifaceted.

While limiting the volume of short sentences will not have a dramatic impact on the daily average population, it will ease the pressure on committal prisons in terms of processing and accommodating large numbers of individuals for very brief periods. Reducing this carceral churn will free up resources that can be put to better use in terms of regime operation and sentence planning. Furthermore, if those who appear before the courts on minor charges could be dealt with proportionately and more effectively by way of a community disposal than incarceration, it is in the interests of justice to travel in this direction, even if the impact on the prison population is slight.

Downsides of brevity

Brief bursts of custody are damaging for a variety of reasons. If the person being punished has somewhere to live, they may lose it, and securing stable accommodation post-release is

¹⁶ Irish Prison Service, *Annual Report 2022* 49.

¹⁷ The criteria are set out in Rule 59 of the Prison Rules 2007, SI 252/2007 and Prison (Amendment) (No 2) Rules 2014, SI 385/2014. Between 1 October 2020 and 30 September 2021, just 65 prisoners were granted enhanced remission (Dáil Debates, answer to Parliamentary Question No 100, 21 October 2021). During 2023, 288 prisoners applied for enhanced remission, of whom 81 (28 per cent) were successful (Conor Gallagher, ‘Sharp drop in number of prisoners approved for early release’, *The Irish Times* (30 September 2024)).

¹⁸ Time spent in custody prior to release on licence has increased dramatically. Life sentence prisoners granted parole in 2023 had served an average of 29 years and 10 months before the meeting at which a decision was made in their favour (Parole Board, *Annual Report 2023* 12). The time actually served will be slightly longer than this as an additional period must have elapsed between this meeting taking place, the decision being communicated to the individual in question, and the practical arrangements being put in place for their release. This compares with an average of just over 7½ years for those released between 1975 and 1984, just under 12 years for releases between 1985 and 1994, and just under 14 years for releases between 1995 and 2004 (Irish Prison Service, *Annual Report 2009* 23). The establishment of a statutory Parole Board in 2021 was accompanied by an extension of the time to first review from seven to 12 years and an emphasis on victim participation. These changes may exacerbate delays (Shane McCarthy and Ian O’Donnell, ‘Victims and the Parole Act 2019’ (2021) 65 *Irish Jurist* 188-95).

¹⁹ This applies to prisoners serving sentences of between one and eight years. If deemed suitable they can be granted renewable temporary release having served at least half of the sentence. Release is conditional on undertaking supervised community service. In 2022, 176 people benefited from the scheme (Probation Service, *Annual Report 2022* 19).

²⁰ For authoritative surveys of sentencing see Thomas O’Malley SC, *Sentencing: Towards a Coherent System* (Round Hall 2011), *Sentencing Law and Practice* (3rd edn, Round Hall 2016) and *Sentencing: A Modern Introduction* (Clarus Press 2024). Over the past quarter of a century Professor O’Malley’s contribution to scholarship in this area is unrivalled and the aforementioned three books constitute just a sampler of his output. He was gracious enough to comment on an early draft of this paper and I am obliged to him for his insights.

more difficult than ever given the depth of the housing crisis.²¹ If they are working, their employer may be unable or unwilling to hold a job open for them; career progression is seldom enhanced by the acquisition of a prison record. Their children may end up in care, thereby adding an element of intergenerational trauma to an already fraught situation. Victims may have had no involvement in the case beyond providing an initial statement to An Garda Síochána and their needs often go unaddressed.

Waiting lists for psychological services are long and treatment programmes take time to complete. Therefore, if the individual before the court is battling addiction or poor mental health, as is so often the case, a period of incarceration measured in terms of a few weeks or months is too short to allow for meaningful treatment.²² If they have managed to steer clear of criminal peers, this will end as soon as the prison gate clangs shut behind them. Finally, prison is stigmatising and may confirm a person in their criminal identity and further distance them from law-abiding society.

For all these reasons short prison sentences contribute to increased recidivism. They are disruptive without being reformative. Furthermore, imprisonment is expensive. The average cost of a prison place in 2022 was €84,067.²³ This equates to €7,000 every month and is a waste of public resources not just for the individuals concerned but for the general population who can never benefit from their talents and may come to view them with disdain or even hostility. Parsimony is required in both the use of punishment and the associated expenditure.

There is nothing radical about the observation that the use of short prison sentences could – and should – be curtailed. Indeed, this has been adopted as a high-level priority by the Department of Justice. The *Review of Policy Options for Prison and Penal Reform 2022-2024* states this clearly:

Finding alternatives to short prison sentences, particularly those of less than three months, may be an effective pathway to explore; it offers the greatest reduction of disruption for individuals and for the prison service. It can also be said with some confidence that such short sentences are given for the least serious offences, and so there is less risk to community safety in replacing them with a community sanction.²⁴

And furthermore: ‘Core to the review is therefore an approach that seeks to reduce the number of short-term prison sentences and provide the Courts with effective and sustainable alternatives’.²⁵ I would go further and prioritise finding alternatives for sentences up to six months (rather than three) as these account for almost half of all prison committals each year (see Table 1). If community options were substituted for these sentences, the impact would be significant.

²¹ There were 14,303 people in emergency accommodation in June 2024 compared with 8,014 in June 2021. <<https://www.housingagency.ie/data-hub/homelessness>> accessed 1 August 2024. This underestimates the level of homelessness as it excludes anyone who is sleeping rough, couch surfing, living in a tent, or in direct provision. It also excludes homeless people in hospitals, prisons and domestic violence refuges.

²² In January 2024 there were 1,804 people on waiting lists to access prison psychology services (Dáil Debates, answer to Parliamentary Question No 290, 25 January 2024).

²³ Irish Prison Service, *Annual Report 2022*, 11.

²⁴ Department of Justice, *Review of Policy Options for Prison and Penal Reform 2022-2024* (Dublin, 2022) 13.

²⁵ *ibid.* 14.

International observers have been struck by the high use of short sentences in Ireland. The Council of Europe Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) noted following a periodic visit that:

Given the research that shows prison sentences of less than six months (and even of 12 months) to be far less effective than community sentences as well as being too short for the prison services to work meaningfully with the persons concerned, greater efforts should be made to avoid sending persons to prison for periods of less than six months.²⁶

The CPT recommended that ‘the Irish authorities take steps to tackle the phenomenon of local overcrowding in the prisons through promoting greater use of alternatives to imprisonment and remand detention, and notably as regards short sentences’.²⁷ A survey of the international evidence relating to recidivism conducted for the Department of Justice commented:

While not for a moment wishing to trespass on the independence of the judiciary, it might be helpful to highlight the lack of support in the papers reviewed for the deterrent value of short prison sentences and the likely (social and financial) benefits associated with a move away from brief bursts of custody as a response to law breaking. If prison is criminogenic, as the evidence suggests, the arguments in favour of using it less are persuasive. While necessary as a last resort, the desirability of a more parsimonious approach is indicated.²⁸

It goes without saying that perpetrators of serious harm are an entirely different story. A proportionate response in such cases will occasionally necessitate several years in prison.²⁹ Fortunately, they constitute a small minority of those who come before the courts. In 2022, there were 44 committals to prison of ten years and above and 17 life sentences (in combination comprising around one per cent of the total number of committals under sentence that year).³⁰ They fall outside the remit of this paper which addresses minor offences for which community sanctions and measures should be viewed as the default response, with imprisonment as the seldom-used alternative.

A penalty in search of a rationale?

The effectiveness of any sentencing system depends on the aims it is attempting to achieve. Irish judges espouse a strong commitment to rehabilitation and endeavour to individualise the penalties they impose. They have wide discretion and this can be tailored to the demands of the specific case so that the punishment fits the crime. In the District Court, a key decision is whether a crime meets the custody threshold and, if it does, whether community service or a suspended sentence would best serve the interests of justice. Individualisation, discretion and an openness to rehabilitation are essential elements of a humane sentencing system. So too is robust independent scrutiny of the operation of the courts which does not threaten the separation of powers.

²⁶ Council of Europe, *Report to the Government of Ireland on the Visit to Ireland Carried Out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 23 September to 4 October 2019* (Strasbourg, 2020) para 29.

²⁷ *ibid.*

²⁸ Ian O’Donnell, *An Evidence Review of Recidivism and Policy Responses* (Dublin, 2020) 93.

²⁹ As a former member of the Parole Board (2017 to 2021) I am familiar with the factors associated with releasing the most serious offenders from prison.

³⁰ Irish Prison Service, *Annual Report 2022* 78.

The commitment to rehabilitation as a sentencing aim was expressed many years ago by the Court of Criminal Appeal in the following terms:

The objects of passing sentence are not merely to deter the particular criminal from committing a crime again but to induce him in so far as possible to turn from a criminal to an honest way of life and indeed the public interest would best be served if the criminal could be induced to take the latter course.³¹

It used to be thought that when deliberating upon an appropriate sentence, the court was required to take a stepwise approach considering rehabilitation first, then punishment and incapacitation, and finally individual and general deterrence.³² The implication was that rehabilitation was always paramount. This is no longer the prevailing view and according to the Court of Appeal:

While we do not now think that this is necessarily a correct statement of principle and prefer an approach in which the correct prioritisation of penal objectives is to be determined by the circumstances of the particular case based on the evidence, we readily accept that in many cases it may indeed be appropriate to prioritise the penal objective of rehabilitation. There will, however, be other cases where it may be appropriate to prioritise deterrence, or retribution and incapacitation.³³

Well-designed treatment programmes can reduce recidivism risk if they are delivered according to clear criteria by skilled staff and take account of factors such as age, gender, race and ethnicity.³⁴ These programmes take time to complete in full and, given the length of existing waiting lists (see footnote 22), they are unlikely to be available to those serving brief prison sentences. Additionally, they may place undue emphasis on individuals to change their lives despite significant social obstacles:

It would be a lot to expect that any programme, however well-designed, well-intentioned and well-implemented, could trump the practical challenges associated with returning to an environment characterised by unstable housing, negligible employment prospects, poor family and community ties, and antisocial peers. If substance misuse is added to the mix, the odds are heavily stacked against even the most highly motivated offender. Quite simply, it is unrealistic to think that years, and even decades, of socialisation will be reversed by a programme delivered over a number of weeks or months in a criminal justice setting.³⁵

Incarceration for a brief period is unlikely to deliver a significant rehabilitative benefit.

In some cases, judges may be inclined to impose a non-custodial sentence but the resources to support, say community service or restorative justice, are underdeveloped in their area. Or perhaps they are not fully apprised of what community sanctions and measures entail. Or they are sceptical about their rigour and effectiveness. Or they may cling to the notion – despite evidence to the contrary in the form of repeat offenders appearing before them – that imprisonment is an effective deterrent.

³¹ *The People (DPP) v O'Driscoll* (1972) 1 Frewen 351.

³² *The People (DPP) v GK* [2008] IECCA 110.

³³ *The People (DPP) v O'Brien* [2018] IECA 2, 46.

³⁴ Ian O'Donnell, 'Measuring recidivism: A research note' (2020) 64 *Irish Jurist* 47-63.

³⁵ Ian O'Donnell, 'Reducing reoffending: Choices and challenges' (2020) 17 *Irish Probation Journal* 17.

Many offenders act impulsively and do not think through the consequences of their actions. Their judgement may be clouded by alcohol, drugs, mental illness or heightened emotion. They are difficult to deter because they are not in a state of mind to consider potential outcomes and make a rational calculation of the pros and cons of different courses of action. Additionally, what we know about criminal decision making suggests that immediate rewards are preferred to costs that are unclear and some way distant. The likelihood of being caught quickly is given more weight than the prospect of a sentence at some point in the future, even a potentially harsh one. Certainty and celerity trump severity. If imprisonment worked, then those subjected to it would not trouble the courts again. The fact that 45 per cent of persons released from prison in 2019 were reconvicted within one year indicates otherwise.³⁶

Incarceration for a brief period is unlikely to have significant deterrent value.

The time actually served is significantly shorter than that imposed because standard remission of 25 per cent is applied to any sentence longer than one month and, due to overcrowding, some prisoners are allowed home ahead of schedule on temporary release, thereby eroding punitive differentials that may have been carefully built into sentences.³⁷ Others are released as part of the community support scheme which applies to sentences of between three months and twelve months.³⁸

These back-door mechanisms diminish the potentially incapacitative effect of imprisonment, which is already modest when a sentence is short. They also have adverse implications for truth in sentencing as the decision of the court may be poorly correlated with the execution of the sentence. This is an understandable cause of unease and frustration.

Incarceration for a brief period is unlikely to offer much in the way of incapacitation.

It might be argued that if a sentencing system were based on the notion of just deserts then short sentences might be acceptable, or even required. The Irish system does not have desert as its primary rationale; judges are free to choose their preferred aim in any particular set of circumstances, so it cannot be said that imprisonment is ever an imperative in the kinds of cases that come before the District Court. Moreover, even if desert was the sole guiding philosophy, it would not necessarily justify short prison sentences because it is possible to devise other sentences that may be considered equivalent to imprisonment in terms of punitiveness, including community service and suspended sentences.³⁹

Incarceration for a brief period is not the only way to give offenders what they deserve.

The evidence indicates that short terms of imprisonment are less effective as regards reducing recidivism than suspended sentences or community service. They may even lead to an

³⁶ Central Statistics Office, *Prison Re-offending Statistics 2019* <www.cso.ie> accessed 19 June 2024. The Central Statistics Office uses 'reoffending' and 'reconviction' synonymously. This is incorrect. The latter is a subset of the former.

³⁷ The legislative basis for temporary release is set out in the Criminal Justice Act 1960, as amended by the Criminal Justice (Temporary Release of Prisoners) Act 2003.

³⁸ The scheme is run by Care After Prison <<http://careafterprison.ie/community-support-scheme/>> accessed 28 June 2024. A front-page report in *The Irish Times* on 28 August 2024 (Conor Gallagher, 'Sharp rise in early release of inmates due to overcrowding') revealed that in March 2023, several rule changes had been introduced to alleviate the overcrowding crisis. These included extending the community support scheme to prisoners serving up to 18 months.

³⁹ For an overview, see David J. Hayes, 'Penal impact: Towards a more intersubjective measurement of penal severity' (2016) 36 *Oxford Journal of Legal Studies* 724-50.

increased likelihood of further criminality.⁴⁰ The recidivism surveys carried out by the Central Statistics Office show that, as noted above, 45 per cent of prisoners released in 2019 were reconvicted within one year. This compares with 21 per cent of those given community service.⁴¹

Incarceration for a brief period may increase crime.

A change of lenses?

The view that prison should be used frugally is widely shared. In its *Report on Sentencing* the Law Reform Commission stated: ‘Since criminal sanctions involve pain and deprivation, they should be used all the more sparingly if we are uncertain of their benefits either to society or to its individual members.’⁴² And, furthermore: ‘The Commission is unanimous in recommending that a sentence of imprisonment should only be regarded as a sanction of last resort.’⁴³

The principle of parsimony is reflected in the Children Act 2001, which directs courts to use detention as a last resort when punishing children:

any penalty imposed on a child for an offence should cause as little interference as possible with the child's legitimate activities and pursuits, should take the form most likely to maintain and promote the development of the child and should take the least restrictive form that is appropriate in the circumstances; in particular, a period of detention should be imposed only as a measure of last resort.⁴⁴

The *Review of Policy Options for Prison and Penal Reform* set out six priority actions. The first of these was: ‘To consider the incorporation of prison as a sanction of last resort in statute, in relation to people who do not pose a risk of serious harm’. The underlying rationale was ‘to reduce reoffending and overcrowding in prisons.’⁴⁵ The second priority action was: ‘To develop and expand the range of community-based sanctions including alternatives to imprisonment’. The same rationale was stated.⁴⁶

In 2003, the Law Reform Commission recommended that District Court judges should provide ‘concise, written reasons’ when imposing a custodial sentence and that they ‘should record the aggravating and mitigating factors which influenced the decision, with particular emphasis on why the noncustodial options available to the judge are not appropriate’.⁴⁷ This

⁴⁰ O'Donnell, *Evidence Review of Recidivism* 93. A recent study in the Netherlands found that, compared to non-custodial sanctions, short terms of imprisonment significantly increased the likelihood of further offending (Hilde T. Wermink, A.A.J. Blokland, J. Been et al., ‘Estimating effects of short-term imprisonment on crime using random judge assignments’ (2024) 41 *Justice Quarterly* 317-46).

⁴¹ This underestimates the magnitude of the difference because recidivism rates tend to be higher for those serving short sentences. For example, the one-year reconviction rate was 58 per cent for those released after serving three to six months compared with 37 per cent for those who served more than 12 months <<https://www.cso.ie/statistics/crimeandjustice/>> accessed 16 August 2024.

⁴² Law Reform Commission, *Report on Sentencing* (LRC 53-1996) para 2.3.

⁴³ *ibid* para 2.2.

⁴⁴ Section 96(2) ‘Principles relating to exercise of criminal jurisdiction over children’.

⁴⁵ Department of Justice, *Review of Policy Options for Prison and Penal Reform* 4. The qualification in this priority action is unnecessary; prison should be a last resort for all offenders. If there is to be any exception it should be based on harm caused rather than an estimation of future risk.

⁴⁶ Department of Justice, *Review of Policy Options for Prison and Penal Reform* 5.

⁴⁷ Law Reform Commission, *Report on Penalties for Minor Offences* (LRC 69-2003) para 3.17.

practice has not been generally adopted.⁴⁸ Placing an onus on judges to exhaust all other options before imposing a custodial sentence, and then explaining their decision in writing if they choose to deprive an individual of their liberty, could help to curtail the number of prison sentences.

In addition to giving legislative expression to the principle that incarceration should be a last resort for adults – as it already is for children – consideration could be given to the abolition of sentences of less than six months, or the introduction of a presumption against sentences this short. These options require careful analysis and precise drafting. If a presumption were to be favoured over abolition it would be essential to specify unambiguously any cases for which a short period of detention may continue to be merited, and the reasons why. If changes are introduced, it will be imperative to review their impact and refine policy and practice as required.

It hardly needs to be said that the reason short sentences are imposed in the first place is that the law provides for them. There are relatively few summary offences (e.g. possession of cannabis for personal use on a first or second conviction, and some public order matters) for which imprisonment is not available. Although it is unlikely to happen politically at a time when tough talk on crime seems to be the order of the day, it would be useful to inaugurate a general review of sentencing options for minor offences, to explore whether imprisonment might be removed as an option in some cases.

The current model of justice sees crime as a violation of the State and its laws and focuses on establishing guilt so that an appropriate measure of pain – measured in months of imprisonment, hours of community service, or the monetary value of a fine – can be handed down. Restorative justice, on the other hand, sees crime as a violation of relationships. Its emphasis is on trying to repair the harm done, often by reaching an agreement between the parties involved. The focus is on solving problems, recognising the impact of crime on victims, and holding offenders accountable. Often the approach taken involves a court referral to a local scheme followed by victim-offender mediation where both parties meet in a structured context with a trained facilitator. The offender will have admitted guilt, participation is voluntary for all concerned, and the outcome is based on consent.⁴⁹ A satisfactory resolution obviates the need for any further sanction to be imposed.

Restorative justice has generally been used for petty crimes involving juveniles. But its potential range of application is much wider and there have been successful outcomes in cases of assault, criminal damage, theft and burglary.⁵⁰ The kinds of crimes dealt with by the District Court (see Tables 2 and 3) are eminently amenable to a restorative process.

The first conclusion of the National Commission on Restorative Justice, which was chaired by District Court judge Mary Martin, was that it ‘is an invaluable cost-effective option for the criminal justice system in responding to and combating crime.’⁵¹ The Commission recommended that, where a judge is contemplating a custodial sentence of up to three years, he or she should be required to consider a process such as victim-offender mediation instead.

⁴⁸ However, if reasons are not given, the decision may be liable to judicial review. See *Lyndon v Collins* [2007] IEHC 487 for an account of the law in this area.

⁴⁹ For an early elaboration of the potential contribution that restorative justice might make to the criminal process, see Ian O’Donnell, ‘Challenging the punitive obsession’ (1998) 8 *Irish Criminal Law Journal* 51-66.

⁵⁰ For practical examples of restorative justice in action see Restorative Justice Services, *Annual Report 2022* and <<https://restorativejustice.ie/case-studies/>> accessed 17 June 2024.

⁵¹ National Commission on Restorative Justice, *Final Report* (2009) 20.

This recommendation would embrace all District Court cases given the limited jurisdiction of this court. Mediation should happen alongside strenuous efforts to promote community integration. The Commission called for nationwide implementation of restorative justice ‘not later than 2015.’⁵² This has not happened, and it is mystifying why progress has been so slow.⁵³

While the Commission’s recommendations have not been fulfilled, a high-level commitment to the principles of restorative justice can be found in the *Programme for Government* which includes a pledge to: ‘Work with all criminal justice agencies to build capacity to deliver restorative justice, safely and effectively’.⁵⁴ Similarly, the *Justice Plan 2023* promises to: ‘Deliver restorative justice safely and effectively’, and its ninety-first objective is to: ‘Continue to promote and support the provision of restorative justice at all stages of the criminal justice system’.⁵⁵

Tables 2 and 3 show that community service orders are far less popular than imprisonment and suspended sentences in the District Court. The interchangeability of these sanctions suggests there is considerable potential for a shift of emphasis. Little is known about the extent to which judges opt for restorative justice. Ian Marder estimated that 413 such referrals were made nationwide in 2022.⁵⁶ This is around one third of the number of community service orders and a small fraction – no more than 3 per cent – of the number of immediate and suspended prison sentences.⁵⁷

What was intended to be mainstream remains marginal and the adoption, in a non-trivial way, of restorative justice could have a significant impact on the number of short sentences imposed. It is difficult to disagree with the conclusion of a Department of Justice policy paper published in August 2023 that: ‘It is reasonable to conclude that Ireland is yet to use restorative justice to its maximum potential, that the use of this process would increase greatly if it is more widely available, and that this would result in significant savings to the State.’⁵⁸ Given the degree of consensus about the need to reduce the dependence on imprisonment, especially for minor offences, how can meaningful progress be made?

Moving forward

There is a tendency among academics to conclude their papers with a call for more research. This is one of those rare occasions where such a call would be redundant. There is no doubt that short prison terms are overused and counterproductive. We do not require any more studies to reinforce this fact. Nor do we need time for further cogitation. What we need is action to reduce the amount of carceral churn.

Problems that are longstanding and deeply ingrained are not necessarily ineradicable. Table 4 shows committal figures including fine defaulters. There were so few of them in 2022 that the numbers hardly change (compared to Table 1) when they are added to the mix, with 204

⁵² *ibid.* 108.

⁵³ Glacial progress is not unusual when it comes to criminal justice reform. See Ian O’Donnell, ‘Penal policy in Ireland: The malign effect of sustained neglect’ (2013) 102/407 *Studies: An Irish Quarterly Review* 315-23.

⁵⁴ *Programme for Government: Our Shared Future* (2020) 86.

⁵⁵ Department of Justice, *Justice Plan 2023* 33.

⁵⁶ <<https://restorativejustice.ie/referrals-and-completions-in-2021-and-2022/>> accessed 14 June 2024.

⁵⁷ It may also be the case that restorative justice is preferred in lower tariff cases that would not have led to community service or a prison sentence (suspended or otherwise).

⁵⁸ Department of Justice, ‘Promoting and supporting the provision of restorative justice at all stages of the criminal justice system’ (2023) 6.

extra committals for less than three months and just one for a longer period. But there is a dramatic difference compared to 2012 when more than 8,300 additional short prison terms resulted from unpaid fines (8,057 for less than three months and another 247 for between three and six months). The Fines (Payment and Recovery) Act 2014 was commenced in full on 11 January 2016.⁵⁹ Since then the decline in defaulters being committed to prison has been as precipitous as it has been welcome.

Table 4
Committals to prison (including fine defaulters)

	<u>2022</u>	<u>2012</u>
Less than three months	994 (20%)	8,837 (65%)
Three months to less than six months	1,334 (28%)	1,734 (13%)
Six months to less than twelve months	923 (19%)	1,273 (9%)
Twelve months and above	1,604 (33%)	1,682 (12%)
All	4,855	13,526

Source: Irish Prison Service, *Annual Report 2022*, Appendix V.

The 2014 Act brought into force a new scheme in relation to calculating the size of any monetary penalty (which must take account of an individual's financial circumstances; s 5), the potential methods of payment (e.g. in a single lump sum or by instalments; s 6), and the steps to be taken if payment is not made on time (e.g. attachment of earnings, recovery order, or community service order; s 7). Imprisonment remains an option but only in circumstances where the court is satisfied that it would not be appropriate to make an attachment order, recovery order or community service order in respect of the fined individual.

The intent of the legislation was to reduce the flow of people into prison for non-payment of fines. The cost and inconvenience associated with locating and arresting defaulters, bringing them to prison, putting them through the committal process, then releasing them – often on the same day – were high. It neither furthered the interests of justice nor boosted confidence in the courts. Also, the fines went unpaid. The 2014 Act succeeded in its goal of reducing prison committals and has had an enduring impact in this regard: its wider ramifications and any unintended effects merit consideration.

Similarly, the Criminal Justice (Community Service) (Amendment) Act 2011 was introduced to reduce the number of people sent to prison. It requires the court to consider community service instead of imprisonment for an offence that would attract a sentence of twelve months or less.

Between 2011 and 2016, the number of committals to prison for less than twelve months (excluding fine defaulters) fell from 3,700 to 2,557.⁶⁰ But this cannot be attributed to an increased enthusiasm for community service orders, which declined from 2,738 to 2,067 over the same period.⁶¹ The number of prison committals under twelve months then went into reverse and, by 2019, stood at 3,453.⁶² There has been some fluctuation since and, as Table

⁵⁹ Fines (Payment and Recovery) Act (Commencement) Order 2016, SI 6/2016.

⁶⁰ Department of Justice, *Policy Options for Prison and Penal Reform* 13.

⁶¹ O'Donnell, 'Ireland's shrinking prison population' table 1.

⁶² Department of Justice, *Policy Options for Prison and Penal Reform* 13.

1 shows, the respective number for 2022 was 3,046. As for community service orders, the trend is very different: 2,791 were awarded in 2019 but only 1,288 in 2022.⁶³ And a proportion of these more recent orders are being made in cases of non-payment of fines rather than as direct alternatives to custody.⁶⁴ In essence then the potential of community service to reduce the use of short prison sentences remains untapped.

The Department of Justice commissioned the South East Technological University ‘to identify the impact of the 2011 Act in terms of custodial sentences and community service, and to examine causes for the continued use of short custodial sentences of twelve months or less, and the possible underutilisation of community service orders’.⁶⁵ It will be interesting to learn why the 2014 Act and the 2011 Act have had divergent outcomes.

Some pertinent considerations might include the fact that under the Criminal Justice (Community Service) Act 1983, it is a condition precedent to the imposition of community service that the defendant consents to it.⁶⁶ At a time when prisons are severely overcrowded it would make sense for an individual to withhold their consent, accept a prison sentence instead, and hope to be released soon afterwards to relieve the pressure of numbers. The court must be satisfied that ‘the offender is a suitable person to perform work under such an order and that arrangements can be made for him to perform such work.’⁶⁷ It is likely that many offenders will be deemed unsuitable candidates for community service on account of poor mental and physical health and that there are parts of the country (particularly rural areas) where work is simply unavailable. Finally, the Court of Appeal decision in *O’Brien v Coughlan* has effectively exempted judges from having to account for decisions not to impose community service as an alternative to a short prison sentence.⁶⁸

Regardless of the upshot of the 2011 Act review, there would be merit in the Department of Justice setting aside the finances for an in-depth research project to examine the resource (and other) implications of making restorative justice available nationally in line with the recommendations of the National Commission.⁶⁹ Would this take place in a context where imprisonment had been made a statutory last resort? Or where sentences of less than six months had been abolished? Or where a presumption against short sentences had been introduced? Or where the status quo was allowed to persist? All of these scenarios will have to be explored and their impact on prison committals and the daily average population will need to be estimated.

A non-exhaustive list of matters to consider in such a study includes the following:

⁶³ Probation Service, *Annual Report 2019* 55 and *Annual Report 2022* 70.

⁶⁴ The number of persons given a community service order for non-payment of a fine increased from 455 in 2018 to 861 in 2019, a jump of 89 per cent in a single year. Department of Justice, *Policy Options for Prison and Penal Reform* 33.

⁶⁵ Tenders were invited by 6 July 2022 for: ‘An exploration of the use of short custodial sentences and community service orders as part of the review of the Criminal Justice (Community Service) (Amendment) Act 2011’ <<https://www.gov.ie/en/organisation-information/607bb-research-and-data-analytics/>> accessed 20 June 2024. The research was to commence as soon as possible thereafter and to be concluded within twelve months. As of 1 October 2024, it had yet to appear.

⁶⁶ The Criminal Justice (Community Service) Act 1993, s 4.1.b.

⁶⁷ The Criminal Justice (Community Service) Act 1993, s 4.1.a.

⁶⁸ The court decided that: ‘The judge was required to take into account the option of community service when deciding on sentence. That does not mean that he had to spell out expressly that he had performed his statutory duty in this regard. Obviously, he had to take it into account but he did not have to state that he had done so.’ [2015] IECA 245, para 12. The Supreme Court refused leave for a further appeal in the matter [2016] IESCDET 88.

⁶⁹ High-quality research takes more time and costs more money than has hitherto been countenanced (see n 4). If the Department of Justice were to set aside the annual operating cost of five prison places (approximately €420k) for each of the next five years for a programme of empirical inquiry, this would prime the pump.

- What do judges feel about their power to punish and the breadth of their discretion?
- Why do they not avail of community sanctions and restorative justice more frequently?
- What determines the decision to impose – or suspend – a custodial sentence?
- How is an appropriate prison term – or period of suspension – chosen?
- How are legislative intent and judicial behaviour aligned?
- How do patterns of crime and prosecution affect the workload and decision making of the courts?
- How often are suspended sentences activated and are they suitable for prolific offenders whose chaotic life circumstances make repeat court appearances likely?
- What can be done with the individual who persistently offends, is wilfully non-compliant, and whose behaviour cannot be addressed through community-based approaches?
- Can a restorative process continue if the victim is adamantly opposed?
- Will the cost savings associated with using prison less often suffice to cover the associated expansion of community service and restorative justice?
- How can impediments to progress be identified and removed?

It is vitally important that any new initiatives are independently evaluated to ensure they are having the desired effect of reducing the flow of committals into prison rather than simply expanding the reach of the criminal justice system. The challenge is to understand the drivers of change and, once they have been isolated and their relative significance determined, to sustain them.

The title of this paper is deliberately provocative. However fervently one might wish to do so, it is too soon to write the obituary of the short prison sentence, which remains an entrenched part of the penal landscape in Ireland. But so too, until recently, was the annual committal to prison of a large tranche of fine defaulters and this apparently intractable problem, to which judges had become resigned, has dissipated without any apparent adverse consequences. A change in the law was required to address the over-incarceration of fine defaulters but if judicial practice shifted, this would lessen the need for legislative input to reduce the dependence on short prison terms.

Self-directed change has distinct advantages over legislative change. First, it can happen more quickly – laws take a long time to pass and implement and do not always have the intended effect. Second, it allows new conventions to emerge without the need to fetter judicial discretion which, as acknowledged above, is a vital component of a humane justice system. Third, it incorporates a measure of flexibility in that if unexpected or unwelcome consequences follow, practice can be revised accordingly, without the need for legislation to be amended. There are currently 70 District Court judges. A few are already open to the possibilities offered by community service and restorative justice. If the views of the minority became those of the majority, progress could be rapid.

No doubt concerns will be raised around the available services having the capacity to respond to an increase in demand, but if tens of millions of euro can be found for an unnecessary and predictably counterproductive expansion of prison places, it is difficult to imagine that any financial hurdle – which will almost certainly be lower – cannot be cleared.⁷⁰ The

⁷⁰ In a letter to *The Irish Times* on 26 June 2024, the veteran social justice campaigner Fr Peter McVerry described the government's proposal to build more prisons as 'lazy' and 'unimaginative' adding the ironic observation that 'Our prisons are the only public service available to the poor and vulnerable which does not have a waiting list'.

potential risks are low (these are minor offences after all and any change in practice can be reversed if necessary) and the potential rewards are substantial (in terms of proportionate punishment, financial savings and reduced recidivism). Surely this is a chance worth taking?

Postscript

‘Could a greater miracle take place than for us to look through each other’s eyes for an instant?’

Henry David Thoreau, *Walden*, 1854.

For twelve months beginning in April 2023, I met regularly with four people I first contacted in Mountjoy Prison in the context of a piece of qualitative research that I was conducting.⁷¹ I believe I got to know them quite well. All had received short sentences. None was sober when committing the crime that led to their incarceration. None of the offences involved violence or put the public at risk of harm. All were struggling with addiction and homelessness and had been imprisoned before, some on multiple occasions. All regretted the direction their lives had taken.

They were flawed and chaotic but also likeable and loyal; warm and funny as well as anxious and negligent. They were generous when flush and grasping when in the horrors of withdrawal. None denied having made poor choices, taken risks, or done wrong, but persistent misjudgement does not equate to wickedness or irredeemability. None was self-pitying. None blamed society for their predicament, as is often lazily assumed. If anything, they were hard on themselves and reluctant to attribute their life course to social adversity. On occasion, they exuded a sense of jaded fatalism. They were victims as well as perpetrators of crime; there is no neat distinction between the two categories. All could have been dealt with differently.⁷²

Hard drugs jolted each of my four interviewees onto a trajectory from which disengagement became increasingly problematic. Even if they managed to become drug-free, their lives continued to be shaped by the legacy of addiction whether by way of an ongoing medical condition, a daily dependence on methadone, or years in recovery. Whether active, intermittent, or terminated, drug use became the fulcrum around which life pivoted.⁷³

Experts by experience, they shared the view that short sentences were futile and told me that if they had an opportunity to speak directly to judges they would express the need for early intervention, residential drug treatment, employment, stable housing, counselling and an opportunity to repair the damage they had caused. Incarceration is not the solution for them or the many others who find themselves in a similar predicament. If the causes of minor offences lie in addiction, poor mental health, homelessness, poverty and adverse life events, then how can the solution be found in punishment?

⁷¹ This work was supported by the FitzPatrick Family Foundation Research Fund administered by the UCD School of Law.

⁷² For pen portraits of the individuals concerned – to whom I am very grateful for sharing their stories – see Ian O’Donnell, ‘Four prisoners’ (2024) 96 *The Dublin Review* 53-64.

⁷³ Ireland’s middle classes are enthusiastic consumers of drugs and alcohol. While their consumption might have adverse consequences for themselves and the people around them, they are less likely to come to notice insofar as they can satisfy their desires discreetly and without causing themselves undue financial distress. The Citizens’ Assembly on Drugs Use was told in 2023 that there are similar levels of drug consumption in the most deprived and least deprived areas, but that drug use, drug dealing, and intimidation are more likely to impact those living in deprived communities <<https://citizensassembly.ie/previous-assemblies/assembly-on-drugs-use/meetings/>> accessed 27 August 2024.

I told my interviewees that Irish judges are decent and humane and enjoy a wide margin of discretion and, if they were open to new ways of thinking, there would be no impediment to a move away from short prison sentences and all the associated costs. I explained that new laws would not necessarily be required to make this happen. I promised to write something in the judges' journal so that their concerns would be transmitted directly to the potential changemakers. Having discharged my debt I hope to be able to report back in due course that there may be grounds for optimism. Or, even better, in the event that one of my interviewees reappears in court, perhaps they will inform me that the response to their misconduct – if minor in nature – emphasised restoration rather than incarceration.