

The 'alternative to custody' myth

Helen Mills questions claims that community sentences cut prison numbers.

The term 'alternative to custody' has been a mainstay in thinking about criminal justice since at least the 1970s when it gained prominence in the growing decarceration movement of the time (see McMahon, 1992). Since then, providing better 'alternatives to custody' was a key stated intention of Labour's criminal justice reforms, an ambition the coalition government looks set to continue (Wintour, 2010). At the same time, demanding 'alternatives to custody' has been prominent in many penal reform organisations' campaigns. In this article I want to challenge some of the common

sense assumptions about 'alternatives to custody' and suggest it is a myth that community sentence reforms undertaken with the stated aim of offering an alternative to custody will necessarily achieve any fundamental reduction in the prison population.

Perhaps part of the reason for the popularity of the term 'alternative to custody' comes from its ambiguous application. It is a phrase that means very different things to different people. There are three positions about changing criminal justice where 'alternative to custody' has been used over the last decade, by those seeking to:

- **Extend the principles of prison to the community.** The desire to make, or to convince the public that, community sentences are more 'prison-like' in terms of how punitive and onerous they are.

- **Divert some people from custody.** Particularly those on short-term custodial sentences.
- **Decarcerate.** To make the case that the current use of prison is always a choice, not a fixed certainty, and that community based interventions can reduce the use of custody.

As should be clear, the distinction between these definitions is not mere semantics. Rather, 'alternative

Community sentence reform does not offer an effective solution to the record high prison population.

to custody' is a deceptively simple term which is in fact used to describe very different phenomenon. As such what is intended by proponents of 'alternatives to

custody' is not immediately obvious and can be easily misunderstood. The former Labour government was a prolific user of the term 'alternative to custody' to describe the intended impact of community sentence reform on reducing short-term custody. The use of short-term custody was considered undesirably high and various attempts were made to improve the use of community sentences as a diversion. Lord Bach, the former Parliamentary Under-Secretary of State for the Ministry of Justice, summarises Labour's approach, clearly articulating that making community sentences 'tough' and promoting this to the public and sentencers were key elements of reform:

[The Labour government] have ensured that the courts can use tough community punishments in

place of short custodial sentences where doing so is justified and proportionate ... Within this broader approach to the promotion of community sentences, we are doing some important focused work on seven intensive alternatives to custody pilot projects currently under way around the country. They are targeted at offenders who would otherwise receive short custodial sentences ... The projects, which are being evaluated, have engaged with the courts to build sentencer confidence in intensive community orders as a robust, demanding and effective alternative to short-term custody. (in Hansard Lords debates, 22 February 2010, cGC215, emphasis added)

The calls for tough community sentences and building sentencers' and the public's confidence in non-custodial interventions have been continued by the coalition (see Herbert, 2010). These proposals have enjoyed broad support from the penal reform sector, many of whom see community sentence reform as a common sense way to address the record demands being placed on prisons. Here are three reasons why this optimism about the capacity of community sentence reform to tackle the use of custody may be misplaced.

1. The overall size of the prison population is left reasonably untouched by community sentence reforms.

Changing the use of short-term custody is undoubtedly a valid ambition to want to achieve in its own right. But the desire to reduce short-term custody is not one and the same as the intention to tackle the overall use of prison as an institution. The nature of short-term custody is such that whilst it accounts for the majority of prison receptions, sentences of under 12 months constitute less than 10 per cent of the 83,000 people in prison. To achieve a reduction in the overall prison population by cutting short-term custody requires a disproportional change to occur. For example,

community sentences would have to replace 40 per cent of all custodial sentences of less than 12 months to achieve the Ministry of Justice's intended 3,000 reduction in the overall prison population by 2014/2015 (Herbert, 2010). This would be no less than a sea change in the use of short-term custody but a change that would not significantly undermine plans to extend the capacity of the prison estate.

2. Replacing a proportion of short term custodial sentences with community sentences will not necessarily produce substantial financial savings to invest in alternatives.

An economic case has been central to the promotion of community sentences by penal reformers. Much emphasis has been placed on making the case that community sentences are more attractive than prison on cost grounds. Whatever the other merits of community sentences, and leaving aside reservations about elevating cost in debates about the nature of a justice system we want over other concerns such as fairness or justice, there are two flaws in the economic case for alternatives to custody.

The first is simply that there is not an adequately sophisticated evidence base to enable meaningful cost comparison between sentences. The National Offender Management Service and the National Audit Office have both acknowledged that the paucity of detailed cost information about criminal justice sanctions inhibits the extent to which well informed conclusions about expenditure can be made (see Mills et al., 2010).

Secondly, to get a significant amount of money out of prison requires a reduction in required prison capacity. Closing down a prison, mothballing prison wings, halting future prison building plans would be moves that would seriously and immediately dent prison expenditure. As a change aimed at a proportion of population in short-term custody, it is reasonable to conclude that 'alternatives to custody' cannot bring about change on the scale necessary to release

meaningful sums of money from prison.

3. Sentences introduced as explicit alternatives to custody have failed to act as like-for-like replacements of prison sentences.

The *Criminal Justice Act 2003* has been the most far reaching community sentence reform in this period. Implemented in 2005, the Act restructured community sentences into one community order with 12 requirements and introduced the suspended sentence order, a sentence aimed at those who had crossed the custody threshold, but who could serve a custodial sentence in the community. A key stated intention of these reforms was to provide credible community alternatives to custodial sentences of less than 12 months.

Four years on from their implementation, the courts handed down suspended sentence orders for 10 per cent of all indictable offences. This far outstrips the Home Office's

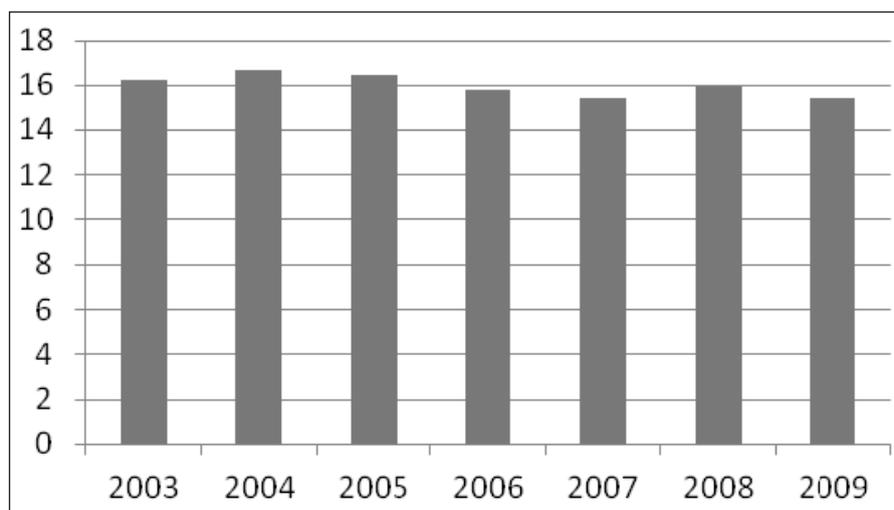
predictions for the sentence (in Mair et al., 2007). To precisely assess the impact of these reforms on the courts' use of custody is impossible. There are no statistics that distinguish the community-based sanctions given by sentencers instead of custody and the community sentences given to people who would not have received custody anyway. However, all indications suggest these reforms have not had the desired overall effect of reducing the use of short-term custody. Courts' proportional use of custody for indictable offences is precisely unchanged in 2009 from that which it was before the community sentence reforms were introduced in 2004 (see Figure 1). Figure 2 demonstrates that the rate of short-term custody for indictable offences for this same period has reduced by 1 per cent.

This combination of the high use of the suspended sentence order, and the smaller reduction in short-term custody than in the reductions in

Figure 1: Sentencing outcomes for indictable offences pre- and post-community sentence reforms (%)

% given	2004	2009
Immediate custody	25	25
Suspended sentence	1	10
Community sentences	35	33
Fines	21	17
Other disposals	18	16

Figure 2: Indictable offences sentences to short term custody (%)



lower tariff sentences (community sentences, fines and other disposals) suggests that, rather than significantly impact courts' use of prison, 'alternatives to custody' reforms have been more effective at displacing other non-custodial sentences. What's more, the reforms have resulted in some people who would have previously received a lower tariff disposal of a community order, fine or other discharge, receiving a suspended sentence order, a higher tariff and more onerous intervention.

The precise intentions of community sentence reform are difficult to unpick and may be pursued primarily for reasons other than the potential effect on the use of custody. For example, to improve public confidence in criminal justice, to reduce criminal justice costs, or to try to improve criminal justice effectiveness. But it is clear that

reforming and introducing new community sanctions under the guise this will impact on the size of the prison population is a misapprehension. Community sentence reform does not offer an effective solution to the record high prison population nor will it address the overall scale and scope of the current demands placed on the criminal justice system. Those concerned with identifying credible, long-term strategies for addressing the use of prison and criminal justice will not find answers working only within the limited confines of the 'alternatives to custody' debate. ■

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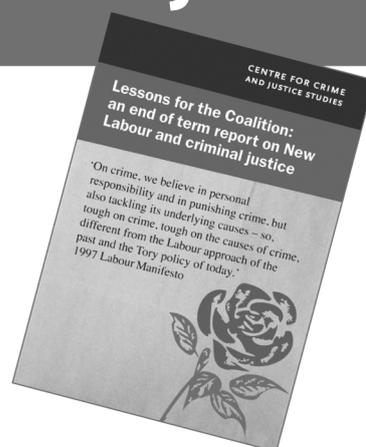
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