

# Sentencing and Penal Reform in Scotland:

A presumption against short prison sentences



# Introduction

I am a criminologist and social scientist.

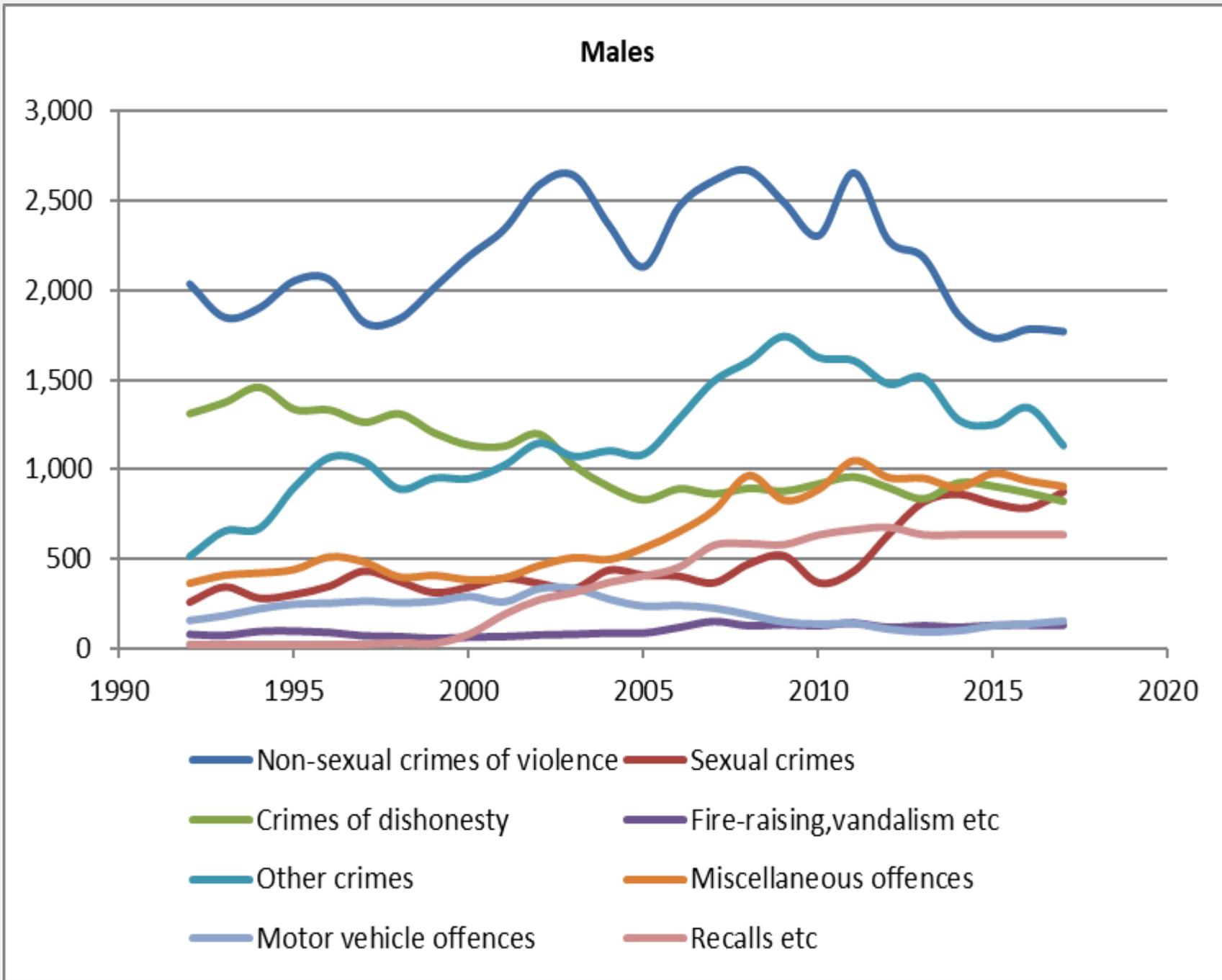
- I am employed as a Senior Lecturer in Criminology in the Scottish Centre for Crime and Justice Research (SCCJR) at the University of Stirling;
- I work with (not for) the Scottish Government;
- I work with (not for) the Scottish Parliament, including with Members of Scottish Parliament (MSPs) from across the five political parties and the Scottish Parliament Justice Committee. I am independent and not affiliated with any one party.



# Context: Sentencing and criminal justice powers and systems are devolved to Scotland

- Scotland is a nation of 5.4 million people.
- Scottish justice politics: fairly progressive.
- In Sheriff Courts (lower courts), dealing with summary cases (less serious cases), the maximum custodial sentence that Sheriffs can impose is 12 months in prison.
- Criminal justice social work (probation) services provided in 32 local authorities.
- 15 prisons, only one of which is an open/low security prison for men.
- Scottish prison population: 8,267 people.
- Incarceration rate: approx. 150 per 100,000.

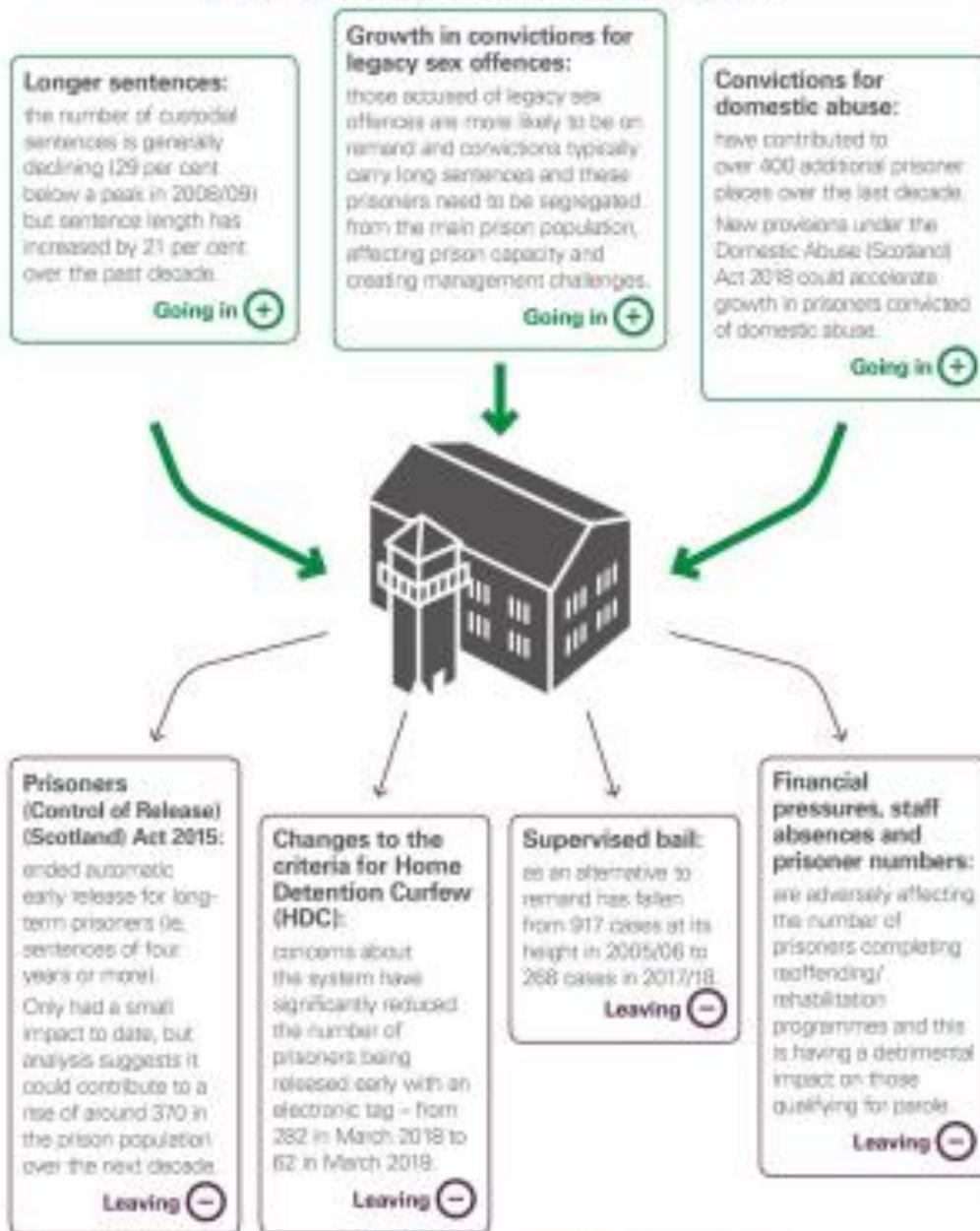




Trends in the male prisoner population, by crime type, in Scotland.

**Source:** Conlong, Scottish Government Justice Analytical Services (2019)

## Factors affecting numbers going into prison



## Factors affecting numbers leaving prison

Source: Audit Scotland

# Drivers of the Scottish prison population

- Longer sentences;
- Growth in legacy/historical sex offences;
- Growth in domestic abuse offences;
- Growth in organised crime offences;
- Lack of supervised and supported bail;
- End to automatic early release half-way through for long-term prisoners;
- Reduced use of electronic monitoring early release (home detention curfew with a tag);
- Financial pressures, staffing pressures.

Source: Audit Scotland (2019), Conlong (2019)

# What is the presumption against short sentences (PASS)?

- Scottish Government policy which has been passed into law by Parliament.
- A presumption in favour of using community disposals over custody, but it is not a ban on imposing short prison sentences. It is not mandatory. The court retains discretion to decide.
- If the judiciary want to impose a prison sentence shorter than the specified threshold (e.g., 3 or 12 months), they have to record their reasons for that.
- Presumption is overall, it's not offence-specific. No crime types are excluded.



# Timeline

- **2011:** Presumption against short prison sentences of under 3 months begins, legislated in the *Criminal Justice and Licensing (Scotland) Act 2010*.
- **2015:** Evaluation of the presumption (3 months).
- **2015-16:** Scottish Government consultation on extending the presumption further. Approx. 84% of respondents favoured extension -> 12 months.
- **2019:** Scottish Government introduce an order (secondary legislation) to the Scottish Parliament to extend presumption in the Act to 12 months. The Parliament Justice Committee held evidence sessions. The order was supported and passed into law by a majority of four out of five political parties in Scottish Parliament (one voted against).



Table: Judicial views on the presumption against short prison sentences (PASS) of 3 months and under (n) (Anderson et al., 2015)

	Strongly Agree / Agree	Neither Agree nor Disagree	Disagree / Strongly Disagree	Question not answered
PASS has led me to give some offenders slightly longer than I would otherwise have done.	20	11	35	6
PASS has made it more likely that I will give offenders a community sentence rather than a custodial sentence.	24	15	29	4
PASS has made little or no difference to my sentencing practice.	40	14	16	2

PASS = presumption against short sentences.

72 members of the judiciary took part in this national Sheriffs' survey.

# Evaluation of the presumption of 3 months and under

Anderson et al. (2015)

“It’s certainly pointed me away from a short sentence on a few cases, particularly where a good, skilled court practitioner will remind the Bench about that – and very proper that they should do that.”

(Interview, Sheriff)

“I don’t think the approach has been particularly different. The presumption against short sentences, it kind of reinforces the thought process a little...”

(Interview, Sheriff)

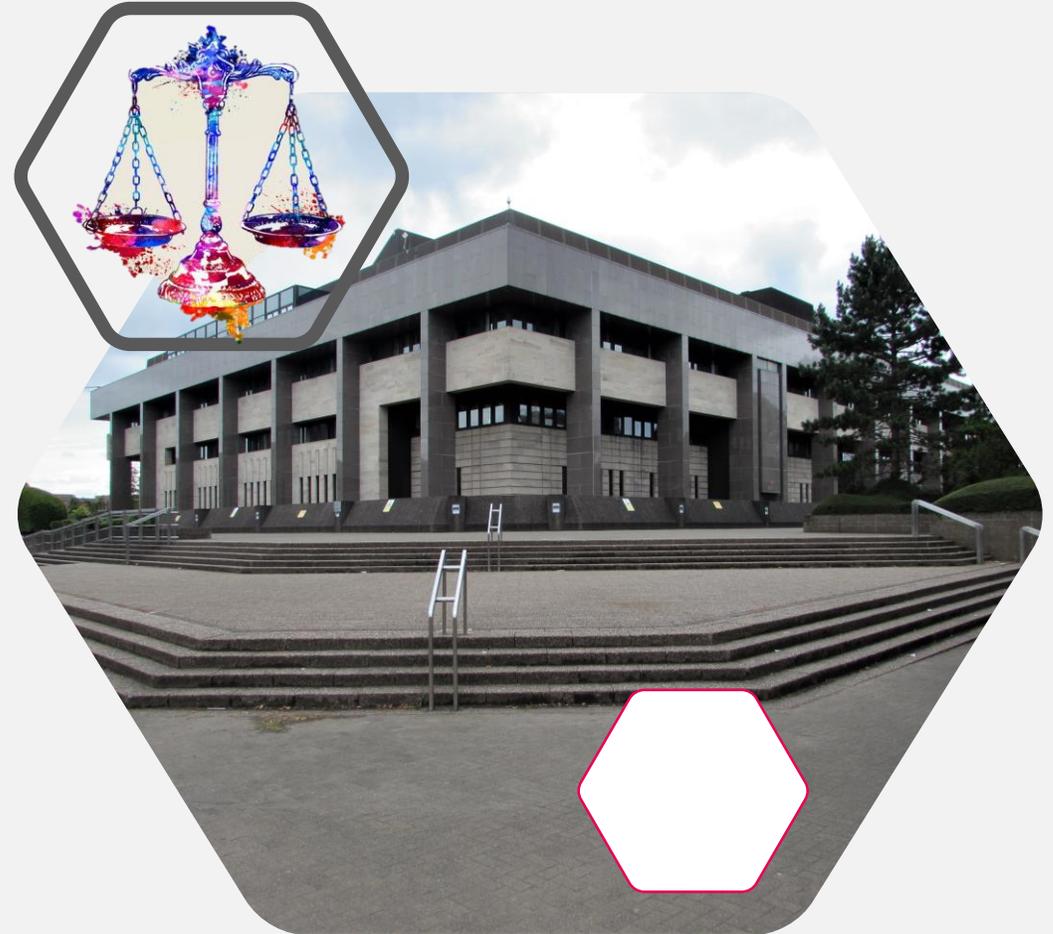


Table: People receiving a custodial sentence up to 3 months, by year (n)

Year	Up to 3 months
2008 – 2009	6914
2009 – 2010	5919
2010 – 2011	5332
2011 – 2012	4529
2012 – 2013	4339
2013 – 2014	4140
2014 – 2015	4103
2015 – 2016	4067
2016 – 2017	3502
2017 – 2018	3182

← Presumption against short prison sentences of 3 months and under is introduced in 2011.

BUT: Important contextual factors:

- Crime rates falling during this time.
- Reconviction rates falling during this time.

# Scottish Government Cabinet Secretary for Justice

## Humza Yousaf MSP on extending the presumption

“Extending the presumption is not a silver bullet, but must be seen as part of a broader evidence-led, preventative approach... The evidence is clear that short periods of imprisonment do not work. They disrupt the things that are most likely to help to reduce offending, such as family relationships, housing, employment and access to healthcare and support. People who are released from short custodial sentences of 12 months or less are reconvicted nearly twice as often as those who received a community payback order (Scottish equivalent of a probation order)... The evidence for progressive reform is absolutely overwhelming.”



Table: Modelling potential impact of extending the presumption against short prison sentences (PASS) to 12 months and under (n)

Assumptions/Modelling of reduction of short custodial sentences	Sentences of six months or less	Sentences of six months or less	Sentences of 12 months or less	Sentences of 12 months or less
	Freed up prison places	Reduction in receptions/churn	Freed up prison places	Reduction in receptions/churn
10%	60	544	130	544 - 1098
20%	120	1088	260	1088 - 2196
50%	290	2720	660	2720 - 5498

PASS = presumption against short sentences. Source: Scottish Prison Service (2019) and Conlong (2019).

# Why is soft-touch SNP so determined to set crooks free?

It was the centrepiece of her 2017/18 Programme for Government. Under the SNP, Nicola Sturgeon declared to the Scottish Parliament back in September, there would now be a presumption against handing any criminal a jail sentence of less than 12 months.

She argued this would be a progressive step, and one that would reduce reoffending and make Scotland the envy of the justice world.

But the reality could not be more different.

As the Scottish Conservatives revealed today, had this plan been in place for the last year, more than 10,000 criminals would have walked free from court with either a fine or a community sentence instead of being placed behind bars.

And this doesn't just cover low-level offending.

Those statistics, which are sourced from the Scottish Government's own data, include two people who were given sentences of less than a year for homicide.

A further 35 individuals convicted of sexual assault would be walking the streets, and 99 criminals convicted of serious assault or attempted murder would right now be at liberty.

It doesn't stop there.

The figures show there were 279 housebreakers, 60 robbers, 285 people guilty of handling offensive weapons and 562 drug criminals, sent down for 12 months or less.

In total, we reveal that's 10,104 people currently deemed suitable for prison by Scotland's sheriffs and judges, but who under SNP proposals wouldn't have their liberty jeopardised.

There are those who argue that short-term sentences don't work and, by the time a criminal is released, they lapse straight into a life of crime.

But that's not the fault of the length of sentence. It's the fault of a Scottish Government which hasn't bothered to prioritise the idea of rehabilitation while people are inside.

It's very much a self-fulfilling prophecy being operated by an SNP government which is far too soft on justice.

If an inmate's time in prison was used wisely, they'd be put to work or education, and told to make the most of their



BEHIND BARS: Jails should be used for rehabilitation



**Liam Kerr**  
Scottish Conservative  
Shadow Justice Secretary

period in jail. Instead, too many are lying about their jail cells playing games or twiddling their thumbs. Rehabilitation could not be further from their minds.

And what hope is there of meaningful rehabilitation while drugs remain so prevalent behind bars – despite prison being a supposedly secure environment – and mobile phones are rife?

It's a slap in the face to victims of crime that the SNP is admitting defeat on prison sentences because it doesn't have the wherewithal to operate a proper system of rehabi-

**'Many never complete community sentences'**

community sentences, either because they can't be bothered or because the resources aren't there for them to finish their placement.

The result for dangerous criminals is no chance of being incarcerated, and instead being slapped with a fine they'll never have to pay, or a community sentence they'll never have to fulfil.

And what of the Scottish Government's stated priority – cracking down on domestic abuse?

**B**ECAUSE of the way crime figures are recorded it's impossible to assess exactly how many people convicted of domestic violence are sentenced to a year or less in jail.

But it's enough for domestic abuse charities to be deeply concerned about the consequences.

How can Police Scotland possibly deal effectively with domestic abuse when the perpetrators themselves are strolling into court, leaving with a negligible punishment, then often heading straight back to the home where the offence was committed?

There are four key pillars of the justice system; keeping the public safe, punishment, deterrence and rehabilitation.

The SNP's bid to empty prisons jeopardises each and every one of those.

It will immediately allow thousands of people back on to the streets before they're ready, many of whom will inevitably go straight back into a life of crime.

It completely undermines the idea that crime deserves to be punished at an appropriate level, something that risks worsening the mindset of dangerous offenders right across the country.

It will do nothing to deter would-be criminals – after all, what's there to fear if they know they won't be going to jail?

And arguably worst of all it will further damage efforts to rehabilitate Scotland's criminal community, which will ensure the cycle continues, reoffending will get worse, and the needs and feelings of victims of crime will continue to be put in the shadow by those of wrong-doers.

It's a disastrous policy, and one that needs to be abandoned immediately.

# Punitive populist attempts to undermine or stop the presumption did not work.

 **ScotConservatives** ✓  
@ScotTories

Follow

The SNP is about to ban prison sentences of less than a year, which would let almost 10,000 serious criminals back out onto the streets, potentially endangering the public.

It's time we stood up against their soft touch approach to justice:

[scottishconservatives.com/softtouchjusti...](http://scottishconservatives.com/softtouchjusti...)



- Incorrectly using the words 'ban', 'abolish';
- Scare-mongering, giving inaccurate estimates higher than the entire prison population;
- Framing prison as the only 'real' punishment;
- Framing presumption as anti-victims of crime.

4:13 PM - 15 May 2019

# Pragmatic plan and cross-party consensus

As Scotland's prison population spirals towards unenviable heights, passive acceptance of the status quo is increasingly at odds with notions of an effective and ethical justice system.

To try to address this, the Scottish Government are about to introduce plans to the Scottish Parliament of a presumption against prison sentences of up to 12 months.

This plan is likely to get cross-party backing at Holyrood, with the lone exception of the Scottish Conservatives opposing it.

Scottish Lib Dems Justice spokesperson Liam McArthur, MSP for Orkney, and Greens Justice spokesperson John Finnie – MSP for the Highlands and Islands – have championed penal reform, highlighting risks that crowded prisons pose and advocating better support for local authorities and charities to deliver community justice. Labour's Daniel Johnson MSP has done similar.

Scottish judicial independence from politicians and policymakers means they will retain all sentencing options, including prison, if the plan passes. The presumption is not a ban, but an expectation that community sentences are preferred over short prison sentences of under a year.

Short prison sentences for crimes that aren't serious are short-sighted. As a criminologist who researches and writes books on rehabilitation and justice, there's plenty of research I can point to showing that people are more likely to leave crime behind and address its contributing causes if supervised and supported in the community. Community-based approaches have better outcomes than custody.

What's the point of serving weeks or months behind bars for theft, vandalism or breaching bail by missing court only to be released to the

## Dr Hannah Graham

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Short prison sentences for crimes that aren't serious are short-sighted



same circumstances, exacerbated by the stigma and collateral consequences of a prison record? I'm not saying these crimes don't matter, they do. But whether they should be routinely imprisonable is a valid question for debate when there are credible community-based approaches.

A clear-sighted look at who cycles through prison sentences reveals lives often characterised by inequalities and vulnerabilities. People with addictions, mental illness and trauma, disabilities, chronic ill health, histories of unemployment, poverty, being a care leaver, and their own experiences of victimisation.

Let's consider the sentencing of people whose main crime is shoplifting. In 2017-2018, official statistics show that Scottish sheriffs sentenced 1,482 shoplifting cases to short prison sentences under 12 months. Over the past five years, the total is an eye-watering 9,020 prison sentences for shoplifting.

Arguably, this falls short of two oft-cited thresholds for imprisonment: shoplifting isn't in the league of serious crime, nor does it constitute a risk requiring imprisonment on grounds of public protection. It's hardly 'hardened' criminality.

Contrastingly, some short prison sentences are for violence, and judicial discretion for effective sentencing in these cases is important.

Opponents such as Scottish Conservatives MSPs have invoked deterrence-based arguments, suggesting the presumption will worsen crime, 'embolden criminals' and make them 'even less fearful of 'Scotland's soft touch justice system'. These are understandable concerns, but not necessarily sound predictions. Crime rates and imprisonment rates aren't directly causal of one another.

Does prison deter re-offending? No, not

effectively, and this is well proven. Scots who serve short prison sentences of under a year have high reconviction rates. Half (52%) of those sentenced to three to six months in prison are reconvicted within one year. Facts are chieftains that winna ding, if only they'd be heeded.

The work of leading international experts, such as Professor Daniel Nagin and colleagues, demonstrate that people are more likely to be deterred by the certainty of getting caught (by police) and punished, than by the severity of the punishment itself (i.e. prison v community punishment).

Some may find comfort in imprisonment as a common punishment. But what might make the public feel better doesn't necessarily make us safer or better off in the long term. Deterrence doesn't fully justify routinely cycling people in and out of short stints in prison if stats indicate half will commit more crime.

Thoughtful scrutiny of the SNP Government's presumption and plans to shift further towards community justice should focus on 'what', 'how' and 'why' – granular details, guiding purposes, available evidence, and potential unintended consequences.

Such conversations should consider the extent to which local authorities, charities and communities have the resources and support needed to effectively implement it.

What's needed is a pragmatic, principled plan and cross-party consensus to shift towards communities over custody for cases that aren't serious crimes. It will take time, resources and a series of brave decisions and actions.

Dr Hannah Graham is a senior lecturer in criminology at the Scottish Centre for Crime and Justice, Stirling University.

May 2019.  
Article  
available  
online  
[here.](#)

# Most criminologists support the presumption, but not uncritically

In our evidence to the Justice Committee, myself and Fergus McNeill argued that:

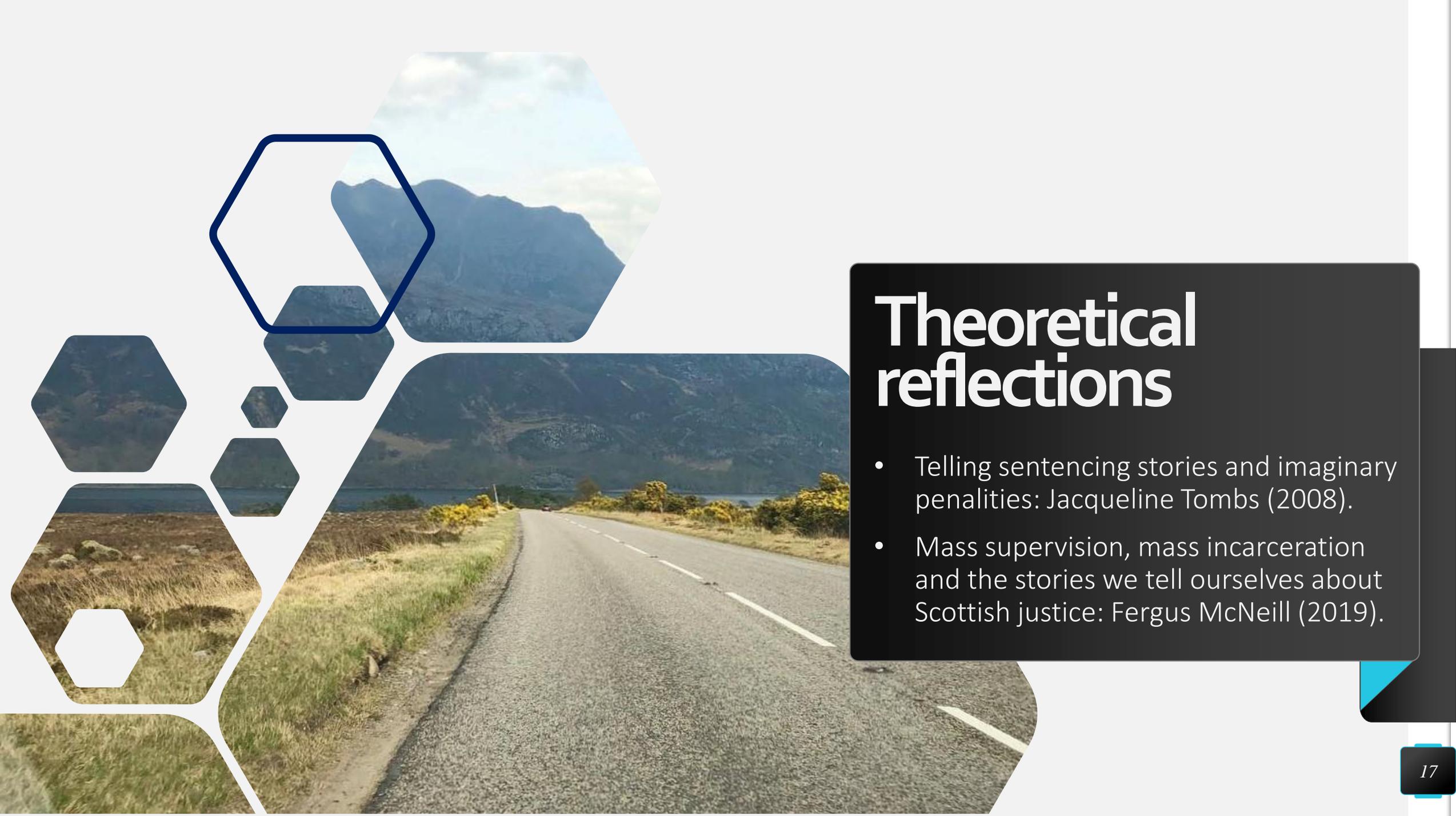
- Short prison sentences are short-sighted, they are not ethical or effective in achieving sentencing purposes.
- Imprisonment is linked to inequality and poverty.
- Imprisonment does not act as an effective deterrent.
- Access to rehabilitative programmes and opportunities in prison is limited for people serving short sentences.
- People are best supported to desist in the community.
- Community sentences are credible and have better outcomes than custody. They are also less costly.
- Community sentences can communicate censure.
- 12 months reduces risk of 'up-tariffing' to get around it.
- More funding and sustainable workloads for community justice services (including justice charities) is needed in light of the potential impact of the presumption.



# Decarceration and penal reform: the need for more courage and action

- **Decriminalisation and diversion** to treatment and support (e.g., drug use, fine defaulting). Increase use of out-of-court disposals and diversion from prosecution, as well as diversion from prison to community justice.
- **Reform bail laws, bail supports, restrict use of remand.**
- **Use problem-solving justice approaches** in courts and community justice to boost diversion and compliance.
- **Justice re/investment** to local communities, social justice.
- **Commute short prison sentences to be served in the community** using probation, electronic monitoring, etc.
- **Use temporary/day and early release mechanisms** and have a presumption of release from prison at first opportunity.
- **Reform breach and revocation rules.** Set thresholds so a person only be recalled to custody for a new offence or for major non-compliance, not for technicalities.
- **Sentencing reform** to reduce length of sentences.
- **Encourage innovation and intrapreneurship** where trusted people and collectives can innovate for change.





# Theoretical reflections

- Telling sentencing stories and imaginary penalties: Jacqueline Tombs (2008).
- Mass supervision, mass incarceration and the stories we tell ourselves about Scottish justice: Fergus McNeill (2019).



## Key contacts and resources on the presumption against short sentences:

Scottish Government Justice Directorate Policy:  
David Doris, email [david.doris@gov.scot](mailto:david.doris@gov.scot)

Scottish Government Justice Analytical Services:  
Peter Conlong, email [peter.conlong@gov.scot](mailto:peter.conlong@gov.scot)

Scottish Parliament Justice Committee report on the presumption (2019): [available online here](#).

Link to presumption statutory instrument 2019:  
<http://www.legislation.gov.uk/sdsi/2019/9780111042281/contents>



# Thank You

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 <https://www.stir.ac.uk/people/257422>