

# Ending Short Prison Sentences:

An amnesty for prolific thieves and burglars?

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## Summary

Since the New Year, the Justice Secretary David Gauke MP and Prisons Minister Rory Stewart MP have been making the case for ending prison sentences shorter than six months – except for violent and sex offenders. The stated aim is to reduce the numbers going to prison by tens of thousands a year, with those otherwise receiving short sentences instead receiving non-custodial punishments.

This report uses the latest Ministry of Justice statistics to explore the implications. Can tens of thousands more criminals receive non-custodial sentences without compromising public safety?

The latest sentencing data suggests the government's proposals would mean:

- 34,000 mostly prolific criminals receiving non-custodial sentences each year, free to continue victimising their neighbours:

Offence type	Number of prison sentences below 6 months (2017)
Theft and burglary	16,036
Summary non-motoring offences	5,523
Public order offences	3,124
Summary motoring offences	3,012
Miscellaneous crimes against society	3,001
Possession of weapons	1,625
Drug offences	1,121
Fraud offences	650
Criminal damage and arson	160
<b>Total</b>	<b>34,252</b>

This 34,000 compares to just 4,289 who went to prison for a first-time offence for any length of time, once violent and sexual offenders are excluded.

- The effective decriminalisation of shoplifting. Already only one in five thefts from shops (21%) led to a custodial sentence in 2017. If those sentenced to less than six months had instead received non-custodial sentences, the proportion would have been just one in 200 (0.4%).
- A far more lenient approach to burglars, 44% of whom avoided prison in 2017. Under Rory Stewart's proposal, 58% would avoid prison. This is on top of Civitas analysis showing that already a burglar is more likely to receive a caution than a prison sentence of four years or more.
- What one central London magistrate called a get-out-of-jail-free card in the magistrates' courts: 'This policy will effectively give even serious offenders a get-out-of-jail-free card. They all know that the maximum that magistrates can give is six months. So as long as they plead guilty at the last minute, even the minimum 10% discount will always mean a non-custodial sentence.'
- The courts following an extremely misguided understanding of who is committing violent and sex offences. While the government implies that its policy will be tough on those committing these offences, in fact it is overwhelmingly the same criminals committing all types of offence. Burglars avoiding prison means violent offenders avoiding prison because it is the same criminals doing both. Those found guilty of offences that were neither violent nor sexual in 2017 were also responsible for 84% of all previous cases of violence against the person, 85% of previous sex offences and 90% of previous robberies.
- The effective end of any chance of prison for drug possession – a charge often used by police against drug dealers when more substantive charges seem unlikely to stick. 86% of custodial sentences for possession of class A drugs, 93% for class B, and 97% for class C, are under six months.
- An even more lax approach to driving under the influence of drink and drugs. Already, only one in 50 of the 42,000 convicted or cautioned for this offence received a custodial sentence in 2017. This would fall to just 0.05% – one in 2000 – if those receiving a custodial sentence below six months avoided prison.
- Non-custodial sentences for far more people carrying knives and firearms. For knife possession, the proportion avoiding prison would rise from 70% to 83% – with almost 1,200 more receiving a non-custodial sentence.

## Introduction

In February, the Secretary of State for Justice David Gauke MP declared that ‘there is a very strong case to abolish sentences of six months or less altogether, with some closely defined exceptions’.<sup>1</sup> In his major speech on sentencing, he was following on from comments by the Prisons Minister Rory Stewart MP.

In January, Stewart trailed the policy of ending prison sentences shorter than six months – except for violent and sex offenders. This was not a call for longer sentences for serious offenders. The stated aim is to reduce the numbers going to prison by tens of thousands a year, with those otherwise receiving short sentences instead receiving non-custodial punishments.<sup>2</sup> In explaining the policy, Mr Stewart painted a picture of relatively harmless, respectable individuals who go to prison and ‘lose their house, their job, their family, their reputation’ and ‘meet a lot of interesting characters’ who really teach them the ropes of crime.

This report uses official Ministry of Justice statistics to explore the type of offenders who receive the prison sentences the government plans to abolish. If Rory Stewart is wrong, the consequences for public safety could be enormous, with the government unleashing a crime wave on hundreds of thousands of citizens. A study of large scale pardons for prisoners in Italy over a 44-year period, for example, found the social cost of pardons from extra crimes committed to be billions of euros higher than the savings in the prisons budget.<sup>3</sup> The evidence from the United States is similar – when courts have ordered large scale prisoner releases to prevent overcrowding, there was a clear positive impact on the crime rate.<sup>4</sup>

Whether the crime rate in the UK will see the same effects depends on what type of criminals are currently receiving short prison sentences.

## Indictable offences

In 2017, almost 30,000 prison sentences below six months went to those who committed indictable offences – offences serious enough to be tried in the Crown Court.<sup>5</sup> If Stewart’s proposed policy had been in place,

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<sup>1</sup> ‘Beyond prison, redefining punishment: David Gauke speech’, David Gauke MP, Ministry of Justice, 18 February 2019 at <https://www.gov.uk/government/speeches/beyond-prison-redefining-punishment-david-gauke-speech>

<sup>2</sup> ‘Jail terms of six months or less should be scrapped, says Prisons Minister’, Eleanor Langford, PoliticsHome, 12 January 2019, at <https://www.politicshome.com/news/news/101049/jail-terms-six-months-or-less-should-be-scrapped-says-prisons-minister>

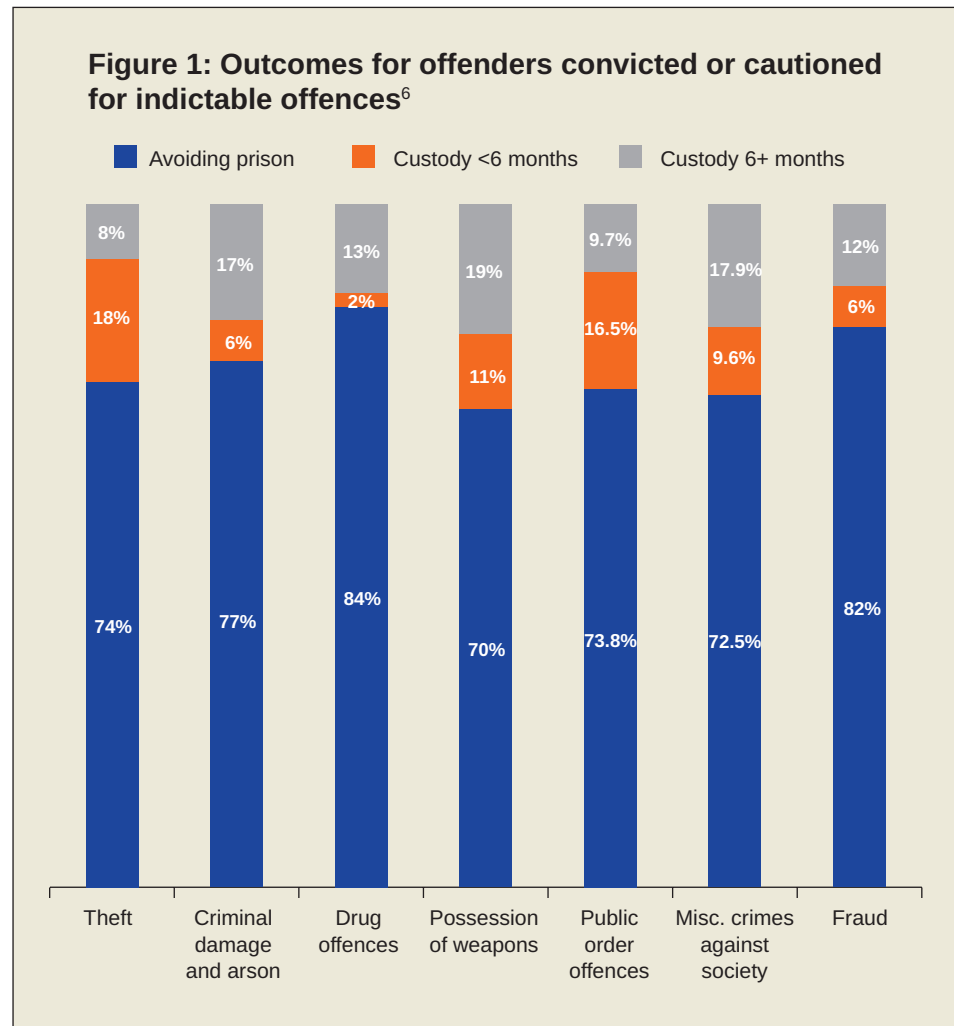
<sup>3</sup> ‘The Incapacitation Effect of Incarceration: Evidence from Several Italian Collective Pardons’, Alessandro Barbarino and Giovanni Mastrobuoni, Discussion Paper No. 6360, Discussion Paper Series, Forschungsinstitut zur Zukunft der Arbeit Institute for the Study of Labor, p.5, at <https://pdfs.semanticscholar.org/406b/e40c8cb03f182a0cbfea1ee133fdbb263157.pdf>

<sup>4</sup> Levitt, S.D., ‘The effect of prison population size on crime rates: evidence from prison overcrowding litigation’, *Quarterly Journal of Economics*, May 1996, pp. 319-51

<sup>5</sup> All statistics in this report, unless referenced otherwise, are taken from the ‘Outcomes By Offence Data Tool, Criminal Justice System statistics quarterly: December 2017, Ministry of Justice, 17 May 2018 at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/733981/outcomes-by-offence-tool-2017-update.xlsx](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/733981/outcomes-by-offence-tool-2017-update.xlsx)

almost 26,000 of them would have avoided prison (another 4,000 were for violence against the person, sexual offences or robbery).

This is not because of a high incarceration rate: even for indictable offences, prison is extremely unlikely. Figure 1 shows the penalties for indictable offences in 2017 (the last full year for which data is available). 70% avoided prison for possession of weapons, while the proportion was 74% for those convicted or cautioned for theft offences – which includes burglary. For fraud 82% avoided prison and for drug offences 85% did. Figure 1 also reveals – in orange – the scale of the changes proposed. Under Rory Stewart’s proposals, the percentage avoiding prison for theft offences would include the 18% who received a prison sentence below six months: 92% would avoid prison. For every one of the offence types above, the proportion avoiding prison would rise above 80% – including possessing knives and firearms.



<sup>6</sup> Ibid

As a previous Civitas paper revealed, within the minority of criminals who receive custodial sentences of any length are only tiny numbers of first-time offenders.<sup>7</sup> For the above indictable offences, fewer than 4,000 (7%) of the 56,000 receiving custodial sentences of any length in 2017 were first time offenders.<sup>8</sup> By contrast, 74% had at least 7 previous convictions or cautions.<sup>9</sup> Those going to prison for indictable offences are overwhelmingly experienced criminals. Below, these categories of indictable offences are explored in more detail.

### **Summary offences – curbing the power of magistrates?**

Summary offences – dealt with in the magistrates' courts – account for another 15,000 sentences below six months. Once the violent offence of common assault and battery is excluded from the figures, there remain 1,034,575 convictions and cautions for summary offences in 2017. 99.2% of them avoided prison and a hard core of 0.8% – 8,535 – received a prison sentence below six months. This means that in total, 34,000 would have avoided prison.

Magistrates' courts are limited to a maximum of six-month custodial sentences. Rory Stewart's proposal therefore means the power of magistrates to impose custodial sentences even on that most serious 0.8% would be almost entirely abolished. Only sentences of exactly six months would be possible.

However, offenders who plead guilty receive a reduced sentence, with the reduction greater the sooner they plead guilty. One Central London Magistrate explained the practical implications of this, in combination with the idea of ending sentences below six months:

This policy will effectively give even serious offenders a get out of jail free card. They all know that the maximum that Magistrates can give is six months. So as long as they plead guilty at the last minute, even the minimum 10% discount will always mean a non-custodial sentence.<sup>10</sup>

I put to this magistrate Rory Stewart's description of how short sentences impact the lives of offenders: 'Bring somebody in for three or four weeks and they lose their house, their job, their family, their reputation. They come here, they meet a lot of interesting characters to put it politely, and then you wop them out in the streets again.'<sup>11</sup>

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<sup>7</sup> 'Who goes to prison? An overview of the prison population of England and Wales', Peter Cuthbertson, Civitas, December 2017 at <http://www.civitas.org.uk/content/files/whogoestoprison.pdf>

<sup>8</sup> 'Offending History Data Tool: Sanction statistics', Criminal Justice System statistics quarterly: December 2017, Ministry of Justice, 17 May 2018, at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/707628/criminal-history-pivot-table-dec-2017.xlsx](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/707628/criminal-history-pivot-table-dec-2017.xlsx)

<sup>9</sup> Ibid

<sup>10</sup> Private conversation with the author, 12 February 2019

<sup>11</sup> 'Jail terms of six months or less should be scrapped, says Prisons Minister', Eleanor Langford, PoliticsHome, 12 January 2019, at <https://www.politicshome.com/news/news/101049/jail-terms-six-months-or-less-should-be-scrapped-says-prisons-minister>

He replied:

No one who said that could have spent any time in a Magistrates Court or met the average defendant. The typical person sent to prison by the Magistrates Courts is on benefits, not in work, and has a very substantial criminal record – crime is their job. When they have problems with family it is because of their criminality not prison sentences. They mostly live in council housing that they have no risk of losing. Councils almost never remove people who go to prison because they continue to have a duty to house them. As for reputation, these are people with dozens of criminal convictions.<sup>12</sup>

Stewart's department's own data supports this idea that it is prolific criminals that magistrates' courts send to prison, not relative innocents. For summary offenders sent to prison the figures are actually even more stark than for indictable offenders who go to prison. This is true for the simple reason that to go prison for a summary offence a criminal needs an especially long rap sheet.<sup>13</sup> Only 2% of summary offenders who went to prison were first time offenders. 79% had at least 7 previous convictions or cautions.

One of the most striking implications of the government's proposal is the end of any real chance of prison for those guilty of the summary offence of driving under the influence of drink and drugs. Already, only 2% of the 42,000 convicted or cautioned for this offence received a custodial sentence in 2017. This would fall to just 0.05% – 1 in 2000 – if those receiving a custodial sentence below six months avoided prison.

### **Violent and sexual offenders**

Even in its own terms, the government's proposals make little logical sense. If Rory Stewart sincerely believes that prison makes criminals more dangerous, why exclude violent and sex offenders? If it really fails to protect the public, what is the purpose of short sentences for these violent criminals?

Apart from logical problems, the policy also suffers from the misguided notion that violent and sexual offenders are a breed apart from other criminals. The reality is of the same criminals responsible for all types of crime:

- Those found guilty of offences that were neither violent nor sexual in 2017 were also responsible for 84% of all previous cases of violence against the person, 85% of previous sex offences and 90% of previous robberies.<sup>14</sup>

<sup>12</sup> Private conversation with the author, 12 February 2019

<sup>13</sup> 'Non-violent prisoners tend to be the most prolific criminals... Non-prolific criminals tend to have committed the most serious offences... [W]ith the overwhelming majority of prisoners serious or repeat offenders – or both – there are very few who are neither.' 'Who goes to prison? An overview of the prison population of England and Wales', Peter Cuthbertson, Civitas, December 2017 at <http://www.civitas.org.uk/content/files/whogoestoprison.pdf>

<sup>14</sup> Ibid

- Sex offenders with at least one previous conviction are actually more than twice as likely to have committed theft as a first offence than to have committed a sex offence.<sup>15</sup>
- Those guilty of robbery or violence against the person are more than three times as likely to have previous convictions for theft as for robbery or violence against the person.<sup>16</sup>
- Only 8% of offenders with 15 or more previous convictions committed violence against the person, sexual offences or robbery for their first offence.<sup>17</sup>

By drawing a sharp line between violent and sex offenders and the rest, the government is flying in the face of reality. Among those found guilty of offences that were neither violent nor sexual are almost all the criminals also responsible for violent and sexual offences.

### Theft offences

Of the more than 34,000 who would have avoided prison in 2017 if the proposed policy had been in place, 16,000 (47%) were convicted of theft offences, which includes burglary. Last month, the Prison Reform Trust's Andrew Neilson made the extraordinary claim that 'it is wrong to say that convicted burglars rarely get custodial sentences – they almost always do'.<sup>18</sup> In fact, 44% avoided prison in 2017, a figure that would rise to 58% if alternatives to prison had been used for those who received custodial sentences below six months.

A burglar is already more likely to receive a community sentence or suspended sentence (4,485 cases in 2017) than a sentence of one year or more (4,751). They are more likely to receive a caution (832 cases) than a custodial sentence of 4 or more years (781). But if Rory Stewart's proposals had been in place in 2017, there would have been more than 2,000 fewer cases of burglars going to prison at all.

Aside from burglary, there is theft from individuals, shops, vehicles and others. In 80% of cases, the perpetrator avoided prison – a figure that would rise to 98% under the government's proposals. This increase would account for 14,000 extra cases of thieves avoiding prison.

Retail crime in particular could be expected to explode. In 2017, 20.6% of thefts from shops resulted in a custodial sentence. If everyone given a sentence below six months had instead avoided prison, this would have been just 0.4%.

<sup>15</sup> 'Offending History Data Tool: Previous offence statistics', Criminal Justice System statistics quarterly: December 2017, Ministry of Justice, 17 May 2018 at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/707626/criminal-history-first-all-pivot-table-dec-2017.xls](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/707626/criminal-history-first-all-pivot-table-dec-2017.xls)

<sup>16</sup> Ibid

<sup>17</sup> Ibid

<sup>18</sup> 'Daniel Hannan is right about one thing: Fiona Onasanya should not go to jail', Andrew Neilson, New Statesman, 30 January 2019, at <https://www.newstatesman.com/politics/staggers/2019/01/daniel-hannan-right-about-one-thing-fiona-onasanya-should-not-go-jail>

**Criminal damage and arson**

Criminal damage and arson are comparatively rare crimes, so they accounted for only 1,217 custodial sentences below six months (including the summary offence of criminal or malicious damage). This vandalism already means no custodial sentence in 96% of cases – a proportion that would grow to 99.5% if sentences under six months were abolished.

**Drug offences**

Drug offences lead to a non-custodial sentence 85% of the time – the highest of any category of indictable offence. Unlike most other offences, the large majority of custodial sentences imposed are longer than six months. Partly for this reason and partly because sentencing is already so lenient, the proposal would have a limited impact.

The exception to this is for possession of drugs – a charge often used by police against drug dealers when more substantive charges seem unlikely to stick. 86% of custodial sentences for possession of class A drugs, 93% for class B and 97% for class C are under six months.

**Possession of weapons**

Around 1,600 went to prison for under six months for possession of weapons. As per the graph above, the government's proposal would reduce the incarceration rate from 30% to 19%. Even for firearms possession, 55% avoid prison. The proposal would have meant 58% did.

For knife possession, the proportion avoiding prison would have risen from 70% to 83% – with almost 1,200 more receiving a non-custodial sentence.

**Public order offences and miscellaneous crimes against society**

Public order offences covers a reasonably broad range of crimes. The most common are breaches of criminal behaviour orders, non-molestation orders and anti-social behaviour orders.

This highlights one of the many risks of the proposal: that the kinds of offences that exist to help the police tackle serious criminals are among those targeted for softer sentencing.

This includes a number of others under the category of miscellaneous crimes against society:

- Failing to Surrender to Bail
- Absconding from Lawful Custody
- Handling stolen goods
- Remaining unlawfully at large after recall to prison
- Perjury
- Perverting the course of justice
- Assaulting, resisting or obstructing a constable or designated officer in execution of duty



Under the government's proposals, 3,000 guilty of public order offences and another 3,000 guilty of miscellaneous crimes against society would have avoided prison in 2017.

### **Fraud offences**

As above, 88% would avoid prison for fraud under these proposals.

The contentious issue of benefit fraud would also be impacted. Already 99% of cases result in a non-custodial sentence. Even within the remaining 1%, the incarceration rate for benefit fraud would have been 36% lower.

### **Conclusion**

Rory Stewart claims that ending sentences below six months would help respectable people to hold on to their jobs and reputations. In reality, his own department's data makes clear that it would mean tens of thousands more hardened criminals avoiding prison. It would mean far more victims of burglary and shoplifting, drink driving and knife crime.

In 2010, Alasdair Palmer wrote about the then Justice Secretary making similar proposals, and the mistake they make in comparing criminals whose crimes most obviously merit a prison sentence to those whose crimes result in non-custodial sentences:

When Mr Clarke says that the statistics show that non-custodial sentences are more effective than prison, he makes a claim that his department's figures reveal to be false. Of criminals released after spending less than a year in prison, 60 per cent reoffend within 12 months. So do 60 per cent of criminals with the same offending history who have community sentences.

The Justice Secretary's claim that community sentences are more effective than short prison sentences, because most of those who receive them reoffend at a lower rate, is based on a fallacy. It depends on ignoring the background of the offender – something which the Ministry of Justice's *Statistics Bulletin* explicitly insists should not be done.

Ken Clarke, along with most of the probation industry, makes the mistake of attributing the drop in reoffending to the effectiveness of community punishments – when it is actually down to the nature of the offenders who receive them. Generally, you have to have committed more crimes to get sent to prison, so those who go to jail are more dedicated criminals than those given community sentences. They therefore reoffend more. It's as simple as that.<sup>19</sup>

The government must now consider the evidence, rather than proceed any further with plans for an effective amnesty for burglars, shoplifters and other prolific criminals.

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<sup>19</sup>Ken Clarke is wrong about prison – just ask his department', Alasdair Palmer, *Daily Telegraph*, 3 July 2010

## **Author**

Peter Cuthbertson is founder of the Centre for Crime Prevention. This is the latest in a series of briefings he has written for Civitas on aspects of the criminal justice system.

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