

# ARTICULATING THE CUSTODY THRESHOLD?

NEIL HUTTON\*

## I

### INTRODUCTION

There is no provision for the suspension of a prison sentence in Scotland. Courts have the option of either a custodial sentence or a community sanction.<sup>1</sup> This article addresses the gray area between custody and community sanctions—usually called the custody threshold.

When does an offense or a case become so serious that a custodial sentence is necessary? Scholarship on the custody threshold has focused on the lack of definitional clarity in statute and case law and has proposed a range of legal and jurisprudential reforms. This article suggests that the custody threshold is a social practice that distributes marginal cases to either custody or community sanctions. Drawing on two empirical studies in Scotland, this article argues that the custody threshold is produced by criminal justice professionals who share unarticulated understandings of deserved punishments.

## II

### COMMUNITY SANCTIONS AS AN ALTERNATIVE TO CUSTODY

Like many other jurisdictions, Scotland has addressed the problem of over-imprisonment by trying to encourage the courts to make greater use of community sanctions. In the early 2000's, during the first Scottish Parliament, the Parliament's Justice Committee published a report expressing concern at the ineffectiveness of short prison sentences.<sup>2</sup> The report reflected the evidence submitted to the review from a wide range of organizations and individuals and made a number of recommendations for reform.<sup>3</sup> Although no legislation emerged directly from this review, the proportionate use of community sanctions

---

Copyright © 2019 by Neil Hutton.

This article is also available online at <http://lcp.law.duke.edu/>

\* Scottish Sentencing Council Member, Retired Professor, Strathclyde Law School.

1. A custodial sentence is a sentence imposing imprisonment. A community sanction is an order consisting of community service, required treatment, required classes, or another non-custodial obligation.

2. JUSTICE 1 COMMITTEE, *INQUIRY INTO ALTERNATIVES TO CUSTODY*, VOL. 1 (2003).

3. Neil Hutton, *Toward a Sentencing Policy for the Use of Short Prison Sentences in Scotland*, 4 *JURIDICAL REV.* 313, 313–14 (2003) (stating that many parties, like the Scottish Consortium on Crime and Criminal Justice and Criminal Justice Forum, submitted evidence to the Justice 1 Committee expressing concern about the “limited effectiveness of short prison sentences” and that the report made “many recommendations, intended to increase the use of non-custodial sentences as alternatives”).

has increased steadily.<sup>4</sup> In 2008, for the first time, the proportionate use of community sanctions exceeded the proportionate use of imprisonment.<sup>5</sup> This trend has continued.<sup>6</sup> In 2008–09, custodial sentences accounted for 13% of penalties passed by Scottish Courts, and community sanctions for 14%.<sup>7</sup> In 2015–16, custodial sentences accounted for 14% of penalties and community sanctions for 19%.<sup>8</sup> So, although there has been a steady growth in the use of community sentences, the proportionate use of imprisonment by the courts has remained steady. Despite increases in community sentences, persuading those involved in sentencing decisions to use community sanctions as a direct alternative to short custodial sentences remains challenging. How can the custody threshold be shifted upwards?

The most recent attempt by the Scottish Government to reduce imprisonment was contained in the Criminal Justice and Licensing Act.<sup>9</sup> The Act introduced a statutory presumption against the use of custodial sentences of three months or less;<sup>10</sup> and the Act introduced a new community sanction, the Community Payback Order, that combined the punitive or reparative requirement of unpaid work, or both, with a range of other requirements designed to reduce illegal behavior.<sup>11</sup> The Scottish Government published an evaluation of these reforms in March, 2015.<sup>12</sup>

---

4. OFFICE FOR NATIONAL STATISTICS, SCOTTISH GOV'T, CRIMINAL PROCEEDINGS IN SCOTLAND, 2016–2017 59 (2017), <https://www.gov.scot/Resource/0053/00532010.pdf> [<https://perma.cc/BGR8-J6WN>] (last visited Oct. 2, 2018) (showing, in Table 7(b), a proportional increase in community sentencing from 2007–08 to 2016–17).

5. *Id.* (showing in Table 7(b) the Community Sentence proportion of 14% exceeding the 13% Custody proportion in 2008).

6. *Id.* (showing in Table 7(b) that the Community Sentence proportion has exceeded the Custody proportion for every year in the report since 2008).

7. *Id.*

8. *Id.*

9. See Criminal Justice and Licensing (Scotland) Act 2010, (ASP 13) § 17 (“A court must not pass a sentence of imprisonment for a term of 3 months or less on a person unless . . . no other method is appropriate.”).

10. *Id.*

11. See *id.* at § 14.

12. SCOTTISH GOV'T SOCIAL RESEARCH, EVALUATION OF COMMUNITY PAYBACK ORDERS, CRIMINAL JUSTICE SOCIAL WORK REPORTS AND THE PRESUMPTION AGAINST SHORT SENTENCES (2015) [hereinafter SCOTTISH CRIME AND JUSTICE EVALUATION].

**Table 1:** Prison Sentences of up to Two Years Imposed in the Scottish Courts, 2010–2015<sup>13</sup>

	Total	Less than 3 months		From 3 months to less than 6 months		From 6 months to less than 2 years	
	n	n	% of total	n	% of total	n	% of total
<b>2010–2011</b>	15256	5324	35	5220	34	3436	23
<b>2011–2012</b>	15874	4516	28	6149	39	3908	25
<b>2012–2013</b>	14748	4334	29	5470	37	3804	26
<b>2013–2014</b>	14,079	4,126	29	5,214	37	3,539	25
<b>2014–2015</b>	13,977	4,092	29	5,225	37	3,587	26
<b>2015–2016</b>	13,724	4,066	30	4,850	35	3,730	27

The use of sentences of less than three months declined initially, but the use of sentences between three and six months, and between six months and two years both increased.<sup>14</sup> This pattern is consistent with longer-term trends that pre-date the reforms, but it appears likely that at least some sheriffs have imposed longer sentences as a result of the presumption against sentences of less than three months.<sup>15</sup> In any event, it seems clear that the reforms have not entirely shifted sentencing practices away from short prison sentences to community sanctions.<sup>16</sup> This suggests that the custody threshold remains stubborn and very difficult to shift.

Maybe the problem has something to do with the concept of the custody

---

13. This exhibit is comprised of data pulled from tables published Dec. 2011, Nov. 2012, Nov. 2013, Dec. 2014, Feb. 2016, and Jan. 2017, available at the listed URL. SCOTTISH GOV'T, DATASETS – CRIMINAL PROCEEDINGS IN SCOTLAND, <https://www.gov.scot/Topics/Statistics/Browse/Crime-Justice/Datasets/DatasetsCrimProc> [<https://perma.cc/7XND-4EGX>] (last visited Sept. 26, 2018).

14. *See id.*

15. *See id.* (showing that after the implementation of the presumption against three-month sentences, sentences greater than 3 months increased, while sentences of less than 3 months decreased).

16. *See id.* (showing the aggregate shift of sentences from less than three months to those greater than three months after the implementation of the statutory presumption); OFFICE FOR NATIONAL STATISTICS, SCOTTISH GOV'T, CRIMINAL PROCEEDINGS IN SCOTLAND, 2016–2017 59 (2017), <https://www.gov.scot/Resource/0053/00532010.pdf> [<https://perma.cc/DU3E-CCH9>] (last visited Oct. 2, 2018) (showing that the percentage of custodies compared to all penalties has remained roughly static despite the increase in community sanctions).

threshold itself. Von Hirsch and Ashworth have argued that the concept needs to be defined more clearly and precisely.<sup>17</sup> Padfield has argued that the concept of the custody threshold has itself hindered the greater use of community sanctions as a replacement for short prison sentences.<sup>18</sup> She suggests that the term should be abandoned.<sup>19</sup> This article takes another look at the concept of the custody threshold. What does this idea of a custody threshold mean in practice? What does the use of custody as a last resort mean to judges? Why is it so difficult to shift sentencing practices from custody to the community?

### III

#### THE CUSTODY THRESHOLD

Padfield locates the origins of the custody threshold concept in English and Welsh legal discourse.<sup>20</sup> The Criminal Justice Act of 1991 set out a principled approach to sentencing.<sup>21</sup> Proportionality was to be the primary rationale for sentencing; sentences should be proportionate to the seriousness of the offense.<sup>22</sup> Other aims of sentencing, such as deterrence, incapacitation, or reform, could continue to be pursued but only within the limits set by the principle of proportionality.<sup>23</sup> Commenting on the Act, Ashworth and Von Hirsch argued that sanctions should be seen as stacked in a pyramid, with thresholds that would have to be crossed to move from one type of sanction to another.<sup>24</sup> The custody threshold was one of these thresholds.

The concept of a custody threshold refers to a notional line in the sand. On one side lie sentences of imprisonment, on the other, community sanctions. While there are notional thresholds for both financial penalties and community sanctions, there is something distinctive about the custody threshold. A custodial sentence has some characteristics that differentiate it from a community sentence. Most importantly, it imposes unavoidable consequences. A custodial sanction deprives offenders of their liberty and excludes them from society. Contained in prison, the prisoner cannot avoid the consequences of the sanction. A community order may impose restrictions on liberty and require the performance of particular tasks, but offenders may choose not to comply with

---

17. Andrew Ashworth & Andrew Von Hirsch, *Recognising Elephants: The Problem of the Custody Threshold*, CRIM. L. REV. 187, 199–200 (1997) (critiquing the pre-Criminal Justice and Licensing Act judicial approach to the custody threshold).

18. Nicola Padfield, *Time to Bury the Custody "Threshold"?*, CRIM. L. REV. 593, 610 (2011).

19. *Id.* at 611–12.

20. *Id.* at 593–99.

21. See Criminal Justice Act 1991, c. 53, § 1(2) (UK) (repealed 2000) (“[T]he court shall not pass a custodial sentence on the offender unless . . . the offence . . . was so serious that only such a sentence can be justified for the offence; or . . . the offence is a violent or sexual offence, that only such a sentence would be adequate to protect the public from serious harm from him.”).

22. *Id.* at § 2(2)(a).

23. Padfield, *supra* note 18 (quoting Andrew Von Hirsch & Martin Wasik, *Section 29 Revised: Previous Convictions in Sentencing*, CRIM. L. REV. 409 (1994)).

24. Ashworth & Von Hirsch, *supra* note 17, at 197.

these requirements, albeit that monitoring procedures will call them to account and impose further sanctions. The consequences of a prison sentence are unavoidable. This may seem obvious, but the difference may help us understand more about how criminal justice actors conceive of the custody threshold.

#### A. Defining the Custody Threshold

The term “custody threshold” has become widespread in both court judgments and academic writing.<sup>25</sup> It has also been used in sentencing guidelines published by the Sentencing Guidelines Council and its successor, the Sentencing Council.<sup>26</sup> The 2004 guideline states that custody is to be reserved for the most serious offenses.<sup>27</sup> However, if the custody threshold has been crossed, the court should consider whether there are mitigating factors and only pass a custodial sanction if it is unavoidable.<sup>28</sup>

The custody threshold has also been incorporated into a number of Magistrates’ Courts’ guidelines. For example, the guideline on assault states that “[w]hen sentencing . . . offences, the court should also consider the custody threshold.”<sup>29</sup> Specifically, the court should consider whether the custody threshold has been passed, whether the imposition of a custodial sentence is unavoidable, and whether the sentence can be suspended.<sup>30</sup> The guidelines on handling goods and shop theft state that a persistent criminal record may cause the custody threshold to be crossed even though the seriousness of the offense alone might place the case below the custody threshold.<sup>31</sup>

Padfield argues that attempts to define the custody threshold in caselaw and guidelines are insufficiently precise.<sup>32</sup> Cases straddle the threshold, and decisions about whether custody or community sanctions are appropriate remain opaque and overly subjective.<sup>33</sup> Padfield argues that Court of Appeal decisions have not been helpful; “[a]ny number of practical examples could be offered from the case law to illustrate how little assistance is gained from the concept of the ‘custody threshold.’ . . . The precise position of the ‘threshold’ continues to confuse, because there is no such precise line.”<sup>34</sup> Padfield complains that there is no objective legal definition of the custody threshold that can be operationalized.<sup>35</sup>

---

25. Padfield, *supra* note 18, at 593.

26. *Id.* at 599.

27. *Id.*

28. *Id.*

29. SENTENCING COUNCIL, MAGISTRATES’ COURT SENTENCING GUIDELINES, COMMON ASSAULT/RACIALLY OR RELIGIOUSLY AGGRAVATED COMMON ASSAULT (2018), <https://www.sentencingcouncil.org.uk/offences/item/common-assault-racially-religiously-aggravated-common-assault/> [<https://perma.cc/FG6E-LGRP>].

30. *Id.*

31. Padfield, *supra* note 18, at 601.

32. *Id.* at 600.

33. *Id.* at 600–02.

34. *Id.* at 604.

35. *Id.* at 610 (“It is submitted that the ‘threshold’ does not help decide hard cases.”).

This may well be the case, but in the daily practice of the courts, offenders are sent to prison for short sentences because the threshold has ostensibly been crossed. The custody threshold may be vague but, at the same time, it is real and has significant practical consequences.

Statutes also provide an extremely vague definition of the custody threshold.<sup>36</sup> Although the courts have adopted the term and used it frequently, this has not clarified the definition.

Roberts and Harris have recently proposed a four step methodology for decisions about the custody threshold.<sup>37</sup> Step One reviews the harm and culpability of the offense to measure seriousness in line with the primary principle of proportionality.<sup>38</sup> Only when the offense is so serious that only a custodial sentence is appropriate will the custody threshold be deemed to have been crossed. Step Two considers aggravating and mitigating factors, including the absence of a criminal record, which is known as first offender mitigation.<sup>39</sup> After Steps One and Two, the court resolves whether the sentence is custodial or non-custodial; Steps Three and Four only “extend the term of custody or enhance the punitiveness of the non-custodial sanction.”<sup>40</sup> Step Three takes account of the criminal record of the accused. Step Four discounts for a plea of guilty.<sup>41</sup> Roberts and Harris argue that neither Step Three nor Step Four should be allowed to shift an offense across the threshold.<sup>42</sup> The presence of a criminal record should only alter the severity of the custodial or community sanction.<sup>43</sup> This is a significant change. Although it is not possible to provide exact quantitative evidence, Roberts and Harris argue that, from an analysis of theft sentencing, it seems highly likely that a significant proportion of offenders convicted of relatively less serious theft offenses receive a custodial sentence because of their criminal record.<sup>44</sup> A discount for a plea of guilty, having nothing to do with the proportionate seriousness of the offense, should also not bring a case below the custody threshold, but only reduce the severity of the custodial sentence within the guideline range.<sup>45</sup>

## B. Case or Offense?

Crossing the custody threshold requires an offense to reach a particular level

---

36. *See id.* at 604 (“[I]t is enough to suggest that the concept of ‘custody threshold’ does not appear to offer sentencers clarity or help.”).

37. Julian V. Roberts & Lyndon Harris, *Reconceptualising the Custody Threshold in England and Wales*, 28 CRIM. L. F. 477, 496 (2017).

38. *Id.* at 497.

39. *Id.*

40. *Id.*

41. *Id.* at 497–98.

42. *Id.* at 498.

43. *Id.* at 497–98.

44. *Id.* at 491–92.

45. *Id.* at 497–98.

of seriousness. One of the issues identified by Padfield<sup>46</sup> and more recently by Roberts and Harris<sup>47</sup> is that it is not clear whether the custody threshold is properly defined in terms of the seriousness of the offense or in terms of the seriousness of the case as a whole. For desert theorists, seriousness is defined by the harm caused and the degree of culpability of the offender.<sup>48</sup> Thus, the criminal record of the offender should, strictly speaking, not form part of the assessment of the seriousness of the offense. In practice, however, the offender's criminal record will almost always factor into the seriousness of the offense.<sup>49</sup> Thinking of the custody threshold as a line in the sand defined by only the seriousness of the specific offense is thus unlikely to be a realistic approach.

In *R. v. Bradbourn*, Lawton L.J. famously argued that the “courts can recognise an elephant when they see one, but may not find it necessary to define it.”<sup>50</sup> In response, Von Hirsch and Ashworth set out a case for a more principled definition of the “elephant” that is the custody threshold.<sup>51</sup> They argue that assessing seriousness is an unavoidably comparative process.<sup>52</sup> Cases are more or less serious than other cases. Treating cases as unique and deciding each case on its own facts and circumstances leads to “virtually unreviewable discretion.”<sup>53</sup> They instead suggest following the existing practice of the Court of Appeal by thinking about “standard cases.”<sup>54</sup> A standard drug case might be characterized by the amount of drugs, a rape case by the presence of a shared set of common factors, et cetera.<sup>55</sup> The court then examines the case at hand to assess whether the case is more or less serious than the standard case by considering aggravating and mitigating factors relating to the offense and the offender.<sup>56</sup> In assessing whether a case crosses the custody threshold, Von Hirsch and Ashworth argue that the custody threshold “ought to operate chiefly to keep cases out of custody unless there are aggravating factors that take a case above the threshold.”<sup>57</sup> They give examples of cases of property offending, burglary (housebreaking), and also less serious sexual offenses that they argue should normally, that is in standard

---

46. See Padfield, *supra* note 18, at 611 (suggesting that judges do not rely on fixed ideas of seriousness of offenses that cross the threshold because the threshold is unclear, but instead judges rely on the specific factors of the case).

47. Roberts & Harris, *supra* note 37, at 488.

48. See *id.* at 489 (stating that the statutory definition of seriousness of the offense focuses on culpability and harm and that the statutory definition reflects a desert-based approach).

49. See *id.* at 490 (explaining that in some criminal cases, the gravity of the offender's crime is insufficient to move the case across the custody threshold, but consideration of his prior convictions leads to a custodial sentence anyway).

50. *R. v. Bradbourn* (1985) 7 Cr. App. R. (S) 180, 182.

51. Ashworth & Von Hirsch, *supra* note 37.

52. *Id.* at 192–93.

53. *Id.* at 193.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* at 198.

cases, not cross the custody threshold without the presence of significant aggravating factors.<sup>58</sup>

#### IV

##### THE CUSTODY THRESHOLD IN SCOTLAND

There has been little academic attention given to the concept of a custody threshold in Scotland. However, although the concept is not commonly studied, the issues about how to define the boundary between custodial and community sanctions remains relevant. In Scotland “[a] court must not pass a sentence of imprisonment for a term of 3 months or less on a person unless the court considers that no other method of dealing with the person is appropriate.”<sup>59</sup> Custody is thus the sanction of last resort. There is, however, little jurisprudence attempting to define what the last resort means in practice. The definition is not based on offense seriousness alone. The focus is on the appropriateness of the sanction, but for what purpose or purposes? There is no statutory statement of sentencing purposes in Scots law, although the familiar purposes of retribution, rehabilitation, protection of the public, reparation, and others are generally held to serve as appropriate justifications for sentencing.

##### A. The Custody Threshold as a Shared Justice System Cultural Understanding

Studies in England and Wales and in Scotland involved reporting the findings of interviews with individual judges about their perceptions of the custody threshold.<sup>60</sup> Both studies found that judges claimed to use custody only as a last resort when cases were so serious that no other sanction was suitable.<sup>61</sup> The term custody threshold thus appears to refer to a notional stage in the sentencing decision-making process when the sentencer somehow becomes aware that a custodial sentence may be unavoidable. This conception is based on a particular way of thinking about the sentencer decision-making process. Sentencing is conceived as a decision made by an individual judge who deploys cognitive processes in unspecified ways to analyze the facts and circumstances of the case.

I have recently argued elsewhere that sentencing should be understood as a process involving a number of criminal justice actors and not just individual judges.<sup>62</sup> Judges formally make the authoritative decision in court, but that does not mean that they can be held solely responsible for the series of practices by criminal justice actors that contribute to a final sentencing decision. This is not to

---

58. *Id.* at 198–99.

59. Criminal Justice and Licensing (Scotland) Act 2010, (ASP 13) § 17.

60. Andrew Millie et al., *Borderline Sentencing: A Comparison of Sentencers' Decision Making in England and Wales, and Scotland*, 7 CRIMINOLOGY & CRIM. JUST. 243, 251–54 (2007); Jacqueline Tombs & Elizabeth Jagger, *Denying Responsibility*, 46 BRITISH J. CRIMINOLOGY 803, 814–818 (2006).

61. *Id.* at 819.

62. Neil Hutton, *Visible and Invisible Sentencing, in MODERNISATION OF THE CRIMINAL JUSTICE CHAIN AND THE JUDICIAL SYSTEM* 145 (Annie Hondeghem et al. eds., 2016).

argue that judges play no part in the decision-making, nor that judges do not exercise discretion. However, they do so as one of a number of actors engaged in generating sentencing decisions, not as the sole decision-makers. Sentencing decision-making should not therefore be conceived of as a series of cognitive functions performed by an individual judge.

In particular, social workers writing pre-sentence reports play an important role in sentencing.<sup>63</sup> The responsibility for presenting Community Payback Orders and Restriction of Liberty Orders at sentencing options rests with social workers. They are responsible for presenting the court with sentencing options. While social workers do not normally recommend a sentence, as this is seen as a formal judicial function, they clearly play an important role in sentencing. For instance, one sheriff interviewed stated:

You can defer sentence for good behaviour for a person for a short while, with a bad record, and say, 'Well, if you are of good behaviour, I may consider a CPO'. If he comes back, and has been of good behaviour. . . but if the criminal justice team come back and say, 'No. We can't actually work with this man,' then . . . there's very little to go on.<sup>64</sup>

Research on writing social enquiry reports suggested that social workers are well aware that they are not supposed to recommend a sentence but are often very careful in their use of language to try to communicate their preference for an option without an overt recommendation. Equally, social workers can also use language to suggest to the court that there is no viable community sanction available, which is a euphemistic way of recognizing that a short custodial sentence appears inevitable.<sup>65</sup>

Report writers therefore play an important role in identifying the custody threshold; it is not only a judicial task. Report writers experience tension between their professional commitment to the welfare of their clients and their role as providers of information to the court. This can usefully be understood as a form of "edgework."<sup>66</sup> In the absence of any rules specifying the criteria that lead to either a community sanction or a custodial sentence, report writers are sometimes unsure whether the court will perceive a community sanction as realistic.<sup>67</sup> An element of risk-taking is unavoidable; yet, the desire to achieve the best outcome for their client might compromise report writers' reputation in the eyes of the

---

63. See *id.* at 149 ("The account provided [by the social worker] in the [pre-sentencing report] performs a significant part of the work of sentencing. It is a further translation of the prosecution case into a . . . relatively narrow range of potential sentencing outcomes.").

64. SCOTTISH CRIME AND JUSTICE EVALUATION, *supra* note 12, at 128 (quoting a Sheriff Judge interview).

65. See Fergus McNeill et al., *Risk, Responsibility and Reconfiguration: Penal Adaptation and Misadaptation*, 11 PUNISHMENT & SOC'Y 419, 428 (2009).

66. Anne Worrall, *Grace under Pressure: The Role of Courage in the Future of Probation Work*, 54 HOW. J. CRIM. JUST. 508, 512 (2015).

67. Cf. Simon Halliday et al., *Shadow Writing and Participant Observation: A Study of Criminal Justice Social Work Around Sentencing*, 35 J. L. & SOC'Y 189 (2008) ("By developing a reasonably coherent narrative about the offender they attempted to lead the judge as reader to the narrative's logical conclusion.").

court. Experienced social workers thus develop a sense of what the custody threshold means in practice that, it seems, is broadly shared by judges and other regular court actors. Hawkins<sup>68</sup> describes this unarticulated, unthinking professional knowledge as “mutuality”; Bourdieu<sup>69</sup> describes it as “habitus.” Worrall argues that probation workers share an occupational culture that includes shared values and a sense of “how things are done around here.”<sup>70</sup> The work by Halliday, et al. provides some evidence that a common working culture is shared by different professionals working in the criminal justice system.<sup>71</sup> Although social workers and judges may have competing interests and viewpoints, each party considers the other party’s perceptions and seeks to reach an outcome consistent with their common understanding of the overall criminal justice system.

I think there’s . . . traditionally been a disparity in approach. Social Workers think Sheriffs want to send people into prison, and Sheriffs think Social Workers will say anything to keep them out of prison. And so you . . . go in with that allowance perhaps. . . . So you have a slightly different reference point, but, again, you take that on board and you carry on. It doesn’t mean you can’t come to a view. It’s just a factor in the whole decision-making process.<sup>72</sup>

Sudnow described the “institutionalized . . . common orientation [towards] allowable reductions” that developed between district attorneys and defense lawyers to facilitate plea bargaining.<sup>73</sup> Sudnow’s practitioners share broad narratives of “typical” cases—those with which they deal in some quantity day after day.<sup>74</sup> While practitioners will say that they “know” what these typical cases are, they are not able to provide objective definitions of typical cases. Thus, within these typifications, there is a scope of variation. It is often easier to identify an unusual case than to accurately define a typical case. As Sudnow points out, the cases that cause difficulty do not fit a type or occur so rarely that there is insufficient data to construct typifications.<sup>75</sup> Sheriffs, social workers, and other

---

68. See Keith Hawkins, *Order, Rationality and Silence: Some Reflections on Criminal Justice Decision-Making*, in EXERCISING DISCRETION: DECISION-MAKING IN THE CRIMINAL JUSTICE SYSTEM AND BEYOND 186 (Lorraine Gelsthorpe & Nicola Padfield eds., 2003).

69. PIERRE BOURDIEU, OUTLINE OF A THEORY OF PRACTICE 72 (1977) (“The structures constitutive of a particular type of environment . . . produce *habitus*, systems of durable, transposable *dispositions* . . . objectively adapted to their goals without presupposing a conscious aiming at ends or an express mastery of the operations necessary to attain them and . . . collectively orchestrated without being the product of the orchestrating action of a conductor.”).

70. Worrall, *supra* note 66, at 514.

71. See Halliday, *supra* note 67, at 212 (concluding that social workers acted with professional sentencing judgment, typically only expected of judges, beyond their regulatory responsibilities within the criminal justice system by developing influential reports for the judges to understand “the basic thrust of a social worker’s narrative”).

72. SCOTTISH CRIME AND JUSTICE EVALUATION, *supra* note 12, at 131 (quoting a Sheriff Judge interview).

73. David Sudnow, *Normal Crimes: Sociological Features of the Penal Code in a Public Defender Office*, 12 SOC. PROBS. 255, 258 (1965).

74. *Id.* at 260.

75. *Id.* at 261.

court practitioners share an understanding of typical cases where, although the seriousness of the offense does not appear on its face to require a custodial sentence, other considerations such as criminal record, homelessness, or substance abuse mean that a custodial sentence is unavoidable.

The traditional judicial account of individualized sentencing conceives of a judge attaching notional weights to facts and circumstances, both aggravating and mitigating, and drawing up a balance sheet that ascribes a measure of seriousness to the case and thus indicates the appropriate sanction. On this account, the custody threshold is crossed when this series of imaginary calculations produces the appropriate level of seriousness. While this makes logical sense, it remains an untested hypothesis based on the assumption that sentencing decision-making can be characterized as a series of cognitive processes undertaken by an individual actor. The difficulty is that researchers have no access to these internal processes. Nor are there visible traces of these practices. Researchers can ask judges to describe how they reached their decisions, but they cannot directly trace the processes through which the decision was made and measure the relative impact of various factors on the final outcome. This is one explanation for the difficulty in articulating what exactly is meant by the custody threshold. From a legal perspective, Padfield has reached a similar conclusion.<sup>76</sup> Padfield argues that the courts have explicitly avoided providing an objective definition of the custody threshold and thus it is time to stop using the concept.<sup>77</sup> It may well be impossible to provide an objective or legal definition of the custody threshold. However, that does not mean that the term has no significance in sentencing practice or in the perceptions of criminal justice actors.

The idea of a threshold that must be crossed appeals to a common sense idea of sentencing. We imagine a scale of seriousness where, at some point on this scale, a custodial sanction becomes the only appropriate sanction (at least according to the legislative definition).

My argument here is that the custody threshold is more helpfully conceptualized as a shared cultural understanding, rather than a point on a scale. Criminal justice actors share an understanding of various types of case that require a custodial sanction, even though the headline offense in itself would generally be insufficiently serious to require custody. These cases fit somewhere in between a set of cases for which custody is inevitable—and any questions are about the length of prison sentence—and a set of cases where custody would normally be seen as inappropriate and unnecessary. The problem with a cultural understanding is that it is not explicit; it is performed through the actions of court practitioners but it is not defined or articulated. Providing an objective definition of any of these typical case is difficult, arguably impossible, however the custody threshold is performed daily in the practices of courtroom actors. So, while the custody threshold might be difficult to define objectively, it is a performed reality.

---

76. Padfield, *supra* note 18, at 610–12.

77. *Id.* at 612.

The challenge is to find a way of articulating the shared cultural understanding of the threshold.

The argument here is that court practitioners share a broad understanding of cases that require a short prison sentence. There will not be complete agreement between practitioners. The relative impact of the practices of different professionals on the production of custody threshold decisions is, of course, an empirical question. Stunz has argued that, in the United States of America, prosecutors often have a more significant impact on sentencing practices than judges.<sup>78</sup> The evidence from the empirical studies here suggests that, in Scotland too, the charging decisions of the Crown play an important part in framing cases on one side or the other of the custody threshold.<sup>79</sup>

There will be differences in judgment about whether a particular case fits or does not fit the typical case, but this does not challenge the existence of a broadly shared understanding. As Hough et al. note,

It was evident from the ways in which the sentencers described their cusp cases that sentencing is not so much a technical or value-neutral process as a value-laden process of constructing and exploring the narratives of the lives of the people in the dock.<sup>80</sup>

Judges interviewed in a study evaluating the introduction of the Community Payback Order were reluctant to define the “custody threshold” but were able and willing to reflect on what it meant in practice.<sup>81</sup> In one recurring type of case, custody was thought to be unavoidable because of the criminal record of the offender and, in particular, because of repeated failure to comply with the requirements of a community sanction.<sup>82</sup> Judges felt that they had to be concerned about compliance. Judges saw the persistent breach of community sanctions as something that should not be tolerated.<sup>83</sup> The public had a right to expect that an order of the court would be carried out and that there would be consequences for breach of requirements.<sup>84</sup> For some judges, this was also a matter of asserting the authority of both the court and their personal judicial authority. For others, this was a matter of ensuring efficient use of public resources. It was seen as wasteful to place an offender on a community order where there was little chance of compliance. This was not just a judicial

---

78. See William J. Stunz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 595–99 (2001).

79. See JULIA FIONDA, PUBLIC PROSECUTORS AND DISCRETION: A COMPARATIVE STUDY 595–99 (1995) (discussing research that found that the charge prosecutors presented to magistrates often affected their sentencing practice).

80. MIKE HOUGH ET AL., THE DECISION TO IMPRISON: SENTENCING AND THE PRISON POPULATION 39 (2003).

81. Cf. SCOTTISH CRIME AND JUSTICE EVALUATION, *supra* note 12, at 141–42 (“Although there was consensus that a custodial sentence remains a ‘last resort’, there is clearly variation in when Sheriffs consider that threshold to have been crossed.”).

82. See *id.* at 128–29.

83. *Id.*

84. See *id.* at 132.

perspective but one shared by social workers.<sup>85</sup> Based on the social workers' practices of reporting pervasive non-compliers to judges for further action, there may be little to be gained by recommending a community sanction for an offender who had demonstrated a repeated inability to comply and where there had been no change in circumstances to suggest that a change in behavior was likely.<sup>86</sup>

Breaches were classified into two main categories: willful non-compliance and feckless non-compliance, but both categories would normally result in a custodial sentence.<sup>87</sup> Willful non-compliers were typically young men who chose not to comply with requirements despite being given additional chances to do so. The court eventually ran out of patience with offenders who failed to comply. Of course, some judges had more patience than others. One Sheriff noted:

I impose a sentence that I think is apt for the individual offender in the circumstances of the crime in the particular moment that I impose it. And if you have somebody who has committed even a relatively minor offence, and has been given three opportunities to do something else, and has not done it, then you have to sanction them in a way that has an impact upon them and on others who might be in that situation. And that doesn't justify sending that individual to prison for six months or more because I'm told that a short sentence has no impact. I'm not at that stage trying to engage in the process of rehabilitation . . . I'm saying, 'You were told to do a variety of other things as an option. You have not done it. Here is the inevitable consequence.'<sup>88</sup>

The feckless non-compliers are typically offenders with chaotic lives, which might include homelessness, drug or alcohol addictions, mental health problems, or lack of intimate relationships or community ties.<sup>89</sup>

[I]f you've got people with a transient lifestyle, and we know from history they're not going to be able to respond to a community-based disposal, and . . . the agents are generally inviting you to take the view of 'there's nothing else we can do.' . . . That's where a short sentence comes in . . .<sup>90</sup>

These offenders were seen not as deliberately choosing to fail to comply with requirements, but as being unable to comply.<sup>91</sup> They are seen as lacking control of their lives. A community payback order is therefore inappropriate because it is wasteful. The risk of non-compliance is very high and the consequence is

85. *See id.* at 110 (stating that judges needed to have confidence in social workers reporting breaching people when necessary and that social workers felt "pressure to be seen as tough on non-compliance").

86. *Cf. id.* (indicating that social workers would report breaches non-compliers to the court when a continued pattern of refusals to comply signaled that compliance was not possible and warranted "more decisive action" by the court against the non-compliers).

87. *See id.* at 129.

88. *Id.* (quoting a Sheriff Judge interview).

89. *Id.* (stating that Sheriffs gave examples of serial non-compliance "rooted in complex and overlapping individual problems" instead of willful non-compliance and that, despite greater sympathy for the non-compliant party, the short prison sentence is "inevitable" and even "beneficial in the absence of appropriate facilities elsewhere").

90. *Id.*

91. *Id.* (stating that the serial non-compliance was "rooted in complex and overlapping individual problems, such as homelessness, mental ill-health and alcoholism" that prevented compliance).

significant extra work for CPO supervisors, social workers, and the court, which could and should be avoided.

Although custody is seen as a last resort for both willful and feckless non-compliers, the rationale is very different for each.

A social worker might write a Criminal Justice Social Work Report suggesting that despite a poor record of compliance with previous community orders, an offender has presented evidence of a new relationship that gives cause to think that the offender is now likely to comply with the requirements of a community order.

If you see somebody in that context saying, 'Yes, we know all of this. We know about all of these breaches, but . . .' And sometimes it can be for all sorts of reasons. It can be they've done a little bit and they've got contact with their family member, they've got contact with their child again, they've got some other . . . something.<sup>92</sup>

However, another judge may consider that, notwithstanding the evidence for potential change, the record of breach is too serious to risk another community order. Judges hold different views on the extent to which the judicial role is to enforce compliance or to take what is presented as an opportunity to pursue desistance.

Some sheriffs . . . I think feel much more responsibility or have much more of a . . . not a feeling that they're actually a social worker, but a feeling they're part of that process; whereas other sheriffs feel that they're not part of that process, that they're part of a different process.<sup>93</sup>

## B. Sheriff Court Pilot Study

While data on sentencers' perceptions of the custody threshold shed some light on the nature of the custody threshold, it would be helpful to have more data on the cases that receive short prison sentences. Unfortunately, published court statistics are not very helpful because they link sentence with principal offense, but not with criminal record nor with other information about an offender contained in a Criminal Justice Social Work Report. However there was a recent, small study in a Scottish Sheriff Court that provides some useful insights.<sup>94</sup> The research was conducted by the court to provide information for the Judicial Institute and has not been published.

Sheriffs in the study were asked to complete a form for each case where they imposed a prison sentence of less than twelve months. The form was a single page and contained information about the gender of the offender, the length of sentence(s), and the sentencing discount that was granted where relevant. Judges were also asked to list their reasons for using a custodial sentence, in order of importance. There were five options, and judges were asked to list all that were relevant. The provided options were (1) not likely to comply with non-custodial

---

92. *Id.* at 128.

93. *Id.* at 131 (quoting a Sheriff judge interview).

94. Neil Hutton, Sheriff Court Pilot Study (Sep. 16, 2016) (unpublished manuscript) (on file with author).

sentence; (2) accused's previous convictions; (3) incarceration necessary to protect the public; (4) suitable community sentence not available; and (5) other factors considered by the sentencing judge.<sup>95</sup>

There were 31 cases in the two-month period of the research. Just under half the offenders were already serving prison sentences; fourteen of the offenders were in prison or on license.<sup>96</sup> These offenders were being sentenced for offenses committed before they entered prison to serve their current sentence. If an offender is already in prison, a community sentence is not an option. The court will almost always impose a custodial sentence to run consecutively after the end of the current sentence or, more commonly, to run concurrently alongside the current sentence. The assumption shared by most regular court practitioners would be that a prison sentence is highly likely for offenders who are appearing from prison.

A further six offenders were in breach of a court order; one case was a CPO and the others were bail orders.<sup>97</sup> Where an offender has a significant criminal record, custody is highly likely.

Of the remaining 11 cases, most were for multiple offenses rather than a single offense.<sup>98</sup> In all of these cases, except in the case involving drug production, criminal records were listed by the sentencing judge as a reason for custody (usually alongside other reasons).<sup>99</sup>

It is difficult to summarize from such a small sample, but one striking factor is the high proportion of offenders being sentenced who are already serving a prison sentence or are in breach of a bail order. In the remainder of the cases, judges identified the presence of criminal record as a reason for the imposition of a custodial sentence.<sup>100</sup> None of this will come as a surprise to anyone familiar with the work of the summary courts.

The findings provide some support for the interview data. Courts resort to the use of short prison sentences in cases where the offender has a significant criminal record, much of which relates to non-compliance with various orders of the court. Many of these offenders will also have other challenges, mental health issues, alcohol or drug misuse, unstable accommodation, unemployment, et cetera.<sup>101</sup> They find themselves caught up in the criminal justice system that is not designed to provide the sorts of welfare provisions that many would argue these offenders need.

---

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. See SCOTTISH CRIME AND JUSTICE EVALUATION, *supra* note 12, at 129 ("Sheriffs gave examples of serial non-compliance rooted in complex and overlapping individual problems, such as homelessness, mental ill-health and alcoholism. . . . [A] short prison sentence can not only come to be seen as inevitable, but even beneficial in the absence of appropriate facilities elsewhere.").

In the criminal court, there comes a time when an unavoidable consequence is seen as necessary. For many of these cases, the seriousness of the offense alone would not require a custodial sentence. Defining the custody threshold in terms of offense seriousness is thus unlikely to have much impact on sentencing practice.

## V

### CONCLUSION

Regular summary court practitioners share an unarticulated understanding of what the custody threshold means in practice. The question is: what is the most appropriate way to articulate the custody threshold? It might be that there are too many subjective judgments involved across too many factors to allow courts to provide generally applicable descriptions of the threshold. However it is still both possible and desirable to provide more useful accounts of when short prison sentences are necessary for particular sorts of cases. Rather than drop the term custody threshold, sentencing policy should articulate it more clearly.

The Scottish Government is currently considering raising the presumption against short sentences from three months to twelve months.<sup>102</sup> This might be taken as a clear indication of the government's desire to reduce the prison population in Scotland. It is difficult to predict the impact this will have on sentencing practices. It is unlikely to address the perceived need for a custodial sentence in certain cases. The government should ask the Scottish Sentencing Council to consider developing a guideline to articulate the custody threshold. This would raise the interesting issue of whether defining the custody threshold should be seen as an attempt to formalize existing practices or develop a new policy designed to change existing practices.

---

102. SCOTTISH GOV'T, DELIVERING FOR TODAY, INVESTING FOR TOMORROW: THE GOVERNMENT'S PROGRAMME FOR SCOTLAND 2018–19 17 (2018) ("In the year ahead the presumption against short sentences will be extended to 12 months, once additional safeguards for victims in the Domestic Abuse (Scotland) Act 2018 are in force. We will issue revised guidance and provide additional funding for supervised and supported bail to ensure that remand is only used where necessary and appropriate.").