

International evidence on driving down imprisonment rates: What Wales could be?

WALES GOVERNANCE CENTRE, CARDIFF UNIVERSITY

Preface

Acknowledgements

The authors would like to extend their thanks to Cian Sion for helping to design this report.

About us

The Wales Governance Centre is a research centre that forms part of Cardiff University's School of Law and Politics undertaking innovative research into all aspects of the law, politics, government and political economy of Wales, as well the wider UK and European contexts of territorial governance. A key objective of the Centre is to facilitate and encourage informed public debate of key developments in Welsh governance not only through its research, but also through events and postgraduate teaching.

About this project

Cardiff University's Wales Governance Centre launched the Justice and Jurisdiction project in July 2018. It brings together an interdisciplinary group of academic researchers consisting of political scientists, criminologists, constitutional law experts and political economists to investigate the operation of the legal and justice system in Wales. The project is funded by a combination of the Economic and Social Research Council, the Welsh Government and Cardiff University.

As well as producing high quality academic outputs, the project will generate a series of reports intended to inform the work of Commission on Justice in Wales as well as encourage an informed public debate on the organisation and operation of the legal and justice system in Wales. Whilst the research team continues to benefit from comments and suggestions from our external partners, the programme itself has been conceived of and is being delivered wholly independently of them.

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Executive Summary

This report is part of the Wales Governance Centre's *Justice and Jurisdiction* project. It raises the question of what Wales could and should try to do differently were criminal justice powers to be devolved to Wales, and seeks to provide at least a partial answer to that question by focusing on the issue of imprisonment. Given that Wales has the highest imprisonment rate in Western Europe, were different constitutional arrangements ever to be introduced, it is likely that the key priority for Welsh criminal justice policy would be to safely reduce prisoner numbers. Not least because of the opportunity that this would provide for diverting scarce resources to other priorities.

By means of a number of case studies, the report draws attention to the experiences of other jurisdictions that have introduced measures to reduce high levels of imprisonment. In doing so it seeks to demonstrate not only that change is possible, but that a sustainable long-term alternative to a high imprisonment society is a realistic (if challenging) goal for public policy in Wales. It seeks to draw together a number of common themes from these case studies as well as making nine recommendations.

Chapter One recaps the current situation with regards Wales' imprisonment rate pointing out that not only is it the highest in Western Europe, but that there is little to suggest that this rate will reduce in future unless determined action is taken. It also recaps the case for alternative approaches whilst also noting the methodology adopted in the production of the case studies.

In the introduction to Chapter Two we explain our choice of case studies, namely three US states – California, New York and Texas – and three western European countries – Portugal, Finland, and the Netherlands. Each case study goes on to provide an overview of developments in the jurisdiction that is its focus, drawing out key trends or initiatives relevant to changes in its imprisonment rate.

California

Having been at the centre of the US 'prison boom' from the 1980s onwards, in recent years California is one of a handful of states that has significantly reduced its reliance on custodial imprisonment. Although the numbers held in state prison and county jail remain very high by European standards, the very notable reductions made in California since 2010 offer a potential model for other 'high imprisonment' societies to follow. The main initiatives include reforms to sentencing and penal policy as well as changes to policing practices, all part of a seemingly 'whole-system' approach. Perhaps the most significant lesson from California's approach is that it almost certainly requires more than one round of policy initiatives to successfully reduce prisoner numbers.

New York

New York demonstrates the vital role that front-end initiatives and services can play in helping drive down imprisonment levels. These include steps to reduce the number of people first entering the criminal justice system and pre-trial diversion. The success of Alternatives to Incarceration programmes also showcase the importance of providing judges with credible and robust non-custodial alternatives. Although New York retains a rate of imprisonment that far exceeds any country in Western Europe, the initiatives rolled out across the state offer a possible route towards change elsewhere.

Texas

Of the three US states included as case studies in this report, Texas' alternative approach has yielded the most modest reduction in prisoner numbers. However, Texas' contribution to the debate on imprisonment rates is that it provides a clear example that alternative approaches can be achieved even in high imprisonment jurisdictions and by those ordinarily hostile to prison alternatives. The Justice Reinvestment Initiative and the successes enjoyed by conservative criminal justice reform groups in Texas show that it is possible to build cross-party movements aimed at reducing imprisonment levels.

Portugal

Portugal has had one of the highest average imprisonment rates in Europe and has faced a number of challenges in relation to prison overcrowding as well rates of death in prison. The country's move to decriminalise the use of illicit drugs, viewing drug use as a public health rather than a criminal justice matter, has elicited much international interest. There can be no doubt that this reform has diverted many thousands of drug users towards treatment thus reducing some of the burden on the criminal justice system. It is also worth noting that there is no evidence of a rise in drug use. That said, Portugal's imprisonment rate has been on the increase since 2008. To the extent that drug law reform was an attempt to reduce imprisonment rates then it can only to be considered – at best – a partial success. In considering the Portuguese experience in this regard, one key lesson is the need for consistent, standardised data collection and evaluation, particularly when potentially contentious reforms are being considered or introduced.

Finland

Finnish penal policy is celebrated throughout Europe and beyond. It has transformed the country's imprisonment rate from being among the very highest in Europe to one of the lowest. Despite a brief uptick in the size of the prison population between 1999 and 2005, it has managed to maintain its low imprisonment rate over several decades. Three factors would appear to be particularly important in helping Finland to achieve and maintain its currently low rate of imprisonment. The first is the existence of a strong welfare state that can offer credible and legitimate alternatives to prison. The second is a political culture that helps politicians, judges and civil servants ward off the

worst excesses of popular punitiveness. Third and finally, Finland has adopted an approach to policy making that relies heavily upon academic research and expertise.

The Netherlands

The Netherlands provides a fascinating case study of imprisonment in Europe due to the significant rise and fall in imprisonment rates over the 20th and early 21st centuries. But it is also a frustrating case study in that even whilst it demonstrates that reversing high imprisonment rates is possible, there is no consensus as to why this has occurred. Nonetheless there are number of features of the penal system in the Netherlands that might well be adopted or adapted for other jurisdictions. They include creation of mechanisms to help divert offenders to appropriate services that can both uphold public safety and provide an opportunity for rehabilitation, as well as the availability of robust, non-custodial options.

In the concluding Chapter Three we highlight a number of common themes that arise from the discussion of the case studies and make a number of recommendations:

1. High imprisonment rates are not inevitable

Welsh politicians, civil society organisations and, indeed, Welsh society as a whole, need to consider whether or not it is acceptable to allow the current situation to persist. In short, we need a national conversation about our imprisonment rate.

2. Criminal justice reform is not (necessarily) a left-right issue

Advocates of a national effort to reduce Wales' imprisonment rate should attempt to build a cross-party consensus in support of such a move rather than assume that support can only be found on one side of the political spectrum. The very substantial (direct and opportunity) costs of having Western Europe's highest imprisonment rate will be of concern to all who are interested in the country's future.

3. Driving down imprisonment rates is a multi-year, multi-phase process

Advocates of a national effort to reduce Wales' imprisonment rate must recognise that theirs would be a 'long game'. Robust institutionalisation as well as consensus building are pre-requisites for success rather than an 'optional extra'.

4. Driving down imprisonment rates requires a 'whole system' approach

Any future debate about the transfer of criminal justice powers to the National Assembly must recognise that any partial transfer will inevitably constrain the ability of devolved level politicians and civil servants to develop a 'whole system' approach to reducing Wales' high imprisonment rate.

5. The operation of welfare and justice systems are intimately interlinked

The Welsh Government has recently indicated its desire to initiate a debate about the future of the welfare system in Wales, and the Equality, Local Government and Communities Committee of the National Assembly is conducting its own enquiry into the subject. All this is occurring contemporaneously with the work and forthcoming recommendations of the Commission on Justice in Wales. Given inevitable intertwining of the welfare and criminal justice systems, the coincidence of these debates offers an opportunity for policy makers to think holistically the use of immediate custody in Wales.

6. Both 'front end' and 'back end' measures can play a useful role in attempts to reduce prisoner numbers.

Any attempt to develop a long-term strategy to reduce Wales' imprisonment rate will require much more detailed investigation of the approaches successfully adopted elsewhere than has been possible in preparing this report. Nonetheless it is clear that there exist a very wide range of potential policies that might be considered for emulation or adaptation, with actions focused on all stages in the criminal justice process. It is also noteworthy that some of these examples derive from jurisdictions that are not normally thought to offer a 'progressive' alternative. By confining our attentions to the 'usual suspects' only, there is a danger that we will miss out on useful experiences elsewhere.

7. Alternatives to Imprisonment

Developing robust and credible alternatives to imprisonment is *central* to any strategy aimed at reducing imprisonment rates. And, again, there are numerous examples of possible approaches that might be adopted or adapted should the political will and constitutional structures align in such a way as to facilitate a concerted attempt to address Wales' imprisonment crisis.

8. Data matters

Whatever the future constitutional configuration around the operation of the justice system in Wales, it is vital that reliable and robust data on the operation of that system is readily available. This is currently not the case. The requirement for data becomes even more imperative should there be a concerted attempt to reduce Wales' imprisonment rate. Not least because across what would inevitably be a multi-phase, multi-year, multi-agency process, honest evaluation of the success or failure of particular initiatives will wholly reliant on the existence of an adequate evidence base.

9. Academic research matters

Given the current lack of academic interest in the workings of the criminal justice system in Wales, there is clearly a need to consider how academic research and engagement with the subject can be encouraged, as well as how examples from other jurisdictions can be introduced into the Welsh debate. This will become even more important if an effort is to be made to reform that system and reduce the use of immediate custody in Wales.

We conclude by noting the way that popular punitiveness tends to drive up imprisonment rates and hinder attempts at reform, noting also that should an attempt be made to reduce Wales' imprisonment rate then there is every reason to believe that this will engender at least some popular/populist resistance. We suggest, however, that adopting these recommendations – on developing a political consensus in support of reform; on ensuring the availability of robust alternatives to imprisonment; on making available trusted data; on encouraging the generation and discussion of independent academic evidence; and so on – can play an important role in supporting transition away from a high imprisonment society. Conversely, failing to do so makes it very difficult to imagine any other outcome other than more of the same.

1

Sentencing and imprisonment in Wales

1.1 Introduction

We now know more than ever before about the operation of the criminal justice system in the unique constitutional circumstances found in Wales. This is largely thanks to the establishment of the Commission of Justice in Wales and the way in which that Commission has catalysed and provided a focal point for a wholly new discussion about a criminal justice system that remains part of a single England and Wales jurisdiction even whilst extensive powers over other aspects of Welsh public life have been devolved to the National Assembly for Wales. Evidence collected by the Commission provides insights into multiple dimensions of the criminal justice system encompassing everything from the operation of the police service to the state of legal education.¹ Cardiff University's Wales Governance Centre has sought to make its own contribution by publishing previously unavailable data (much of it obtained via Freedom of Information requests) as well as providing new analyses of patterns of public spending on the justice system and the state of the legal economy in Wales.² In addition, we have produced a detailed study of the challenges facing those operating the criminal justice system across the 'jagged edge' of devolved and non-devolved competences based on extensive interviews with key practitioners.³

Generating a better understanding how the criminal justice system works and doesn't work in and for Wales is a valuable contribution in itself, of course. But it cannot be overlooked that the Commission was established in a context in which the Welsh Government and a majority in the National Assembly support the establishment of a Welsh legal jurisdiction and the devolution of criminal justice powers. Which in turn raises the question of what Wales could and should try to do differently were this to occur? In this report we seek to provide part of the answer to that question by focusing in particular on the issue of imprisonment.

We could, of course, have chosen to consider alternative arrangements for many other elements of the current justice system. Indeed, it is to be earnestly hoped that others will do so. Yet we make no apologies for our focus on imprisonment as this is the proverbial elephant in the room. Wales has the highest imprisonment rate in Western Europe and there is currently nothing to suggest that

¹ Written evidence submitted to the Commission on Justice in Wales can be found here – https://gov.wales/publications?keywords=submissions&All_=All&field_external_organisations%5B1880%5D=1880&publication_type%5B10%5D=10&published_after=&published_before=&_ga=2.56979564.759380701.1556647149-2106152510.1556543322

² See Ifan (2019), Jones (2018), Jones (2019).

³ See Jones and Wyn Jones (2019).

that is about to change (Jones, 2019a; Jones 2019b).⁴ Speaking at the time of the establishment of the Commission which he now chairs, Lord Thomas made it clear that “the real problems facing the criminal justice system are those relating to the prison system and to reducing re-offending” whilst further pointing out that the “prison population is far too high for the resources that are, or realistically can be, committed to prisons”.⁵ Were different constitutional arrangements to be introduced then it seems highly likely that the key priority for Welsh criminal justice policy would be to safely reduce our imprisonment rate. Not least because of the opportunity that would provide for diverting scarce resources to other priorities such as health, housing and serving tackling substance misuse.

In this report, therefore, we draw attention to the experiences of other jurisdictions that Wales might learn from. By focusing on jurisdictions that have introduced measures to reduce high levels of imprisonment, the report aims to demonstrate not only that change is possible but that a sustainable long-term alternative to a high imprisonment society is a realistic (if challenging) goal for public policy in Wales. It also aims to draw attention to the legislative and policy changes that have helped secure this goal elsewhere. Of course, it would be naïve to believe that all of these policies can simply be transferred into the Welsh context. Even if the requisite powers were invested at the Welsh level, much more detailed consideration and research would be required before a new legislative and policy framework could be established. But that such different societies – with different legal traditions and social norms – have managed change and reform should surely give us confidence that Wales, too, could be different. A high imprisonment society is not a fate to which we are inevitably condemned. Wales could be different.

1.2 Wales and the highest rate of imprisonment in Western Europe

There has been a huge increase in the prison population in England and Wales since the 1990s. Even if numbers have fallen slightly since their peak in 2011,⁶ there were still an additional 39,000 people in prison in 2018 as compared to 1993. This increase in prisoner numbers reflects an increase in the imprisonment rate in England and Wales from 100 per 100,000 in 1995 to 140 per 100,000 in 2018. To accommodate rising number of prisoners, 37 new prisons have opened in England and Wales since 1985. Yet despite the UK Government’s major investment in prison building to help cope with increased prisoner numbers,⁷ figures from December 2018 suggest that 72 out of the total 118

⁴ It is telling that in evidence to the Commission on Devolution in Wales, an HMPPS official asked to respond to Wales’ imprisonment rate pointed to the imprisonment rate in Guernsey as being higher. The population of Guernsey is smaller than that of Ynys Môn/Anglesey.

See – [https://gov.wales/sites/default/files/publications/2019-](https://gov.wales/sites/default/files/publications/2019-03/Oral%20evidence%20to%20the%20Justice%20Commission%20from%20HMCTS%2C%20LAA%20and%20HMPPS.pdf)

[03/Oral%20evidence%20to%20the%20Justice%20Commission%20from%20HMCTS%2C%20LAA%20and%20HMPPS.pdf](https://gov.wales/sites/default/files/publications/2019-03/Oral%20evidence%20to%20the%20Justice%20Commission%20from%20HMCTS%2C%20LAA%20and%20HMPPS.pdf)

⁵ Lord Thomas, ‘The past and future of law in Wales,’ Speech at the Pierhead Building, 27 October 2017. Text available at https://www.cardiff.ac.uk/__data/assets/pdf_file/0010/1324756/The-Past-and-the-Future-of-Law-in-Wales.pdf

⁶ This decline has largely been achieved through the increased use of Home Detention Curfew.

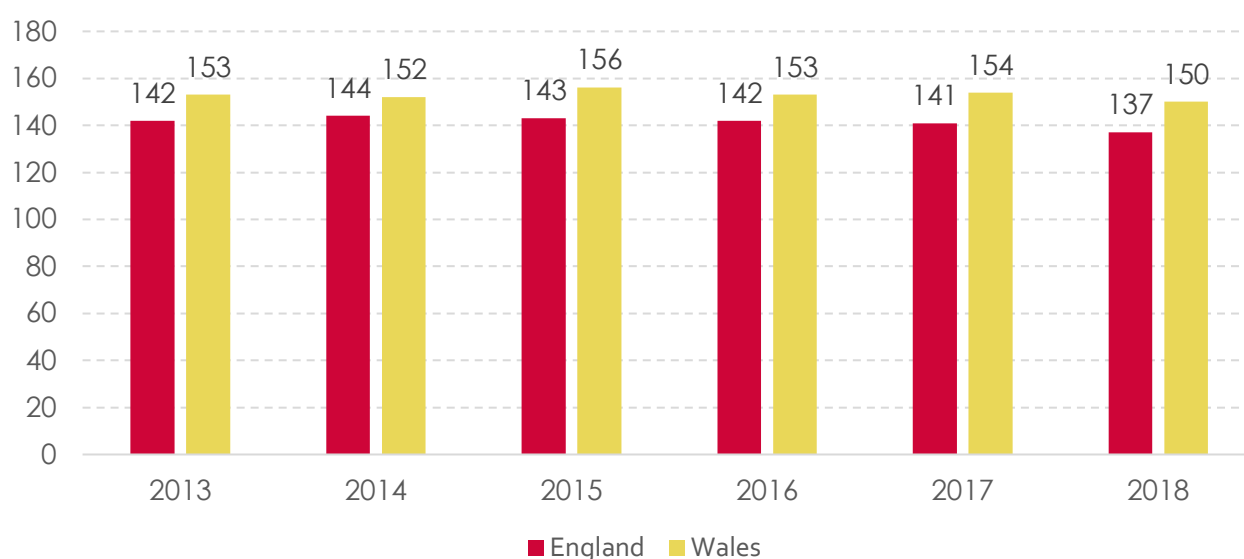
⁷ See – ‘Deaths in Custody 1978 to 2018 - Table 1.19: Dates of prisons opening/closing from 1978 and major re-roles of prisons from 1997’. <https://www.gov.uk/government/statistics/safety-in-custody-quarterly-update-to-september-2018>

prisons had a population that exceeded their in-use certified accommodation level (House of Commons Justice Committee, 2019).

Since 1999, England and Wales has had the highest average rate of imprisonment in Western Europe. When these figures are disaggregated, we find that Wales has consistently recorded an even higher rate of imprisonment than England (see Figure 1.1). Indeed, research published by the Wales Governance Centre showed that between 2010 and 2017 the use of immediate custodial sentences marginally increased in Wales (0.3 per cent) even as its use fell in England (16 per cent) (Jones, 2019a). Not only does Wales have the highest imprisonment rate in Western Europe, but there is little if anything to suggest that that rate will reduce in future.

Figure 1.1

Imprisonment rates per 100,000 in Wales and England using home address, 2013 to 2018



Source: Ministry of Justice

The increased prison population in England and Wales can largely be attributed to legislative and policy changes introduced by the UK Government and Parliament. These changes include the introduction of minimum sentences, an increase in maximum sentences and the creation of new criminal offences (Sentencing Council, 2018). An increase in the use of long-term sentences has been a major contributing factor in the rise of prisoner numbers. In 1993, 54% of the sentenced prison population in England and Wales were serving sentences of less than 4 years. By 2016, this rate had fallen to 34% of sentenced prisoners (Ministry of Justice, 2016). In Wales, those sentenced to 4 years or more represented 32.6 per cent of the Welsh prison population in June 2017; by December 2018 this figure had risen to 38.8 per cent.

Figure 1.2

Welsh prisoners broken down by sentence type in 2018

Sentence Type	
Remand	456
Less than 12 months	394
12 months - 4 years	1,115
4 years or more	1,817
Imprisonment for Public Protection	114
Life	295
Recall	466
Non-Criminal	5
Unknown	26
Total	4,688

Source: Ministry of Justice

Other legislative and policy factors include sentencing inflation caused by Sentencing Council guidelines as well as policies that have led to an increase in the number of individuals recalled to custody. The introduction of the Offender Rehabilitation Act 2014 extended statutory supervision to offenders sentenced to less than 12 months in custody. Almost 1 in 5 (18 per cent) of the recall population in September 2017 were in custody following a recall under the terms of that legislation (House of Commons Justice Committee, 2019). At the end of December 2018, 9.9 per cent of the Welsh prison population had been recalled to custody (see Figure 1.2).⁸

1.3 The case for alternatives

The soaring rate of imprisonment in England and Wales over the last three decades has fuelled calls for improved non-custodial alternatives (e.g. Heard, 2016; Howard League for Penal Reform, 2008; Prison Reform Trust, 2017). There are several dimensions to these calls.

First, the demand for enhanced options for sentencers has arisen in response to the declining use of community sentences. Since 2015, the number of community sentences handed out at courts in Wales has fallen by 18 per cent (Jones, 2019b). According to HMI Probation (2019:5) the declining use of community sentences reflects the lack of “judicial confidence” in non-custodial alternatives since the UK Government introduced its Transforming Rehabilitation agenda in 2015.

Second, calls for prison alternatives have emerged in response to the prison safety crisis in England and Wales. This includes record levels of assault and self-harm as well as self-inflicted deaths in prison (e.g. HMI Prisons, 2018; Ministry of Justice, 2019). Previous research published by the Wales Governance Centre has demonstrated that self-harm incidents in Welsh prisons increased by 435 per cent between 2010 and 2018. Over the same period, prisoner-on-prisoner assaults rose by 136

⁸ 466 Welsh prisoners had been recalled to custody at the end of December 2018.

per cent as assaults on staff increased in Welsh prisons from 72 in 2010 to 342 in 2018 (Jones, 2019b).

Heightened concerns raised over prison safety have served to accentuate a much longer standing set of concerns about the appropriateness of custodial sentences. Despite the intended aims of deterrence and rehabilitation, research continues to show that prisoners are likely to be exposed to multiple possible harms in prison as a result of institutional failings (e.g. Scott, 2018; Scraton, 2016). Prisons often fail to provide adequate health care (House of Commons Health and Social Care Committee, 2018). Drugs and alcohol are also widely available in prison (HMI Prisons, 2018). Moreover, research has consistently shown that prisons do little to reduce the likelihood of future offending. The most recent Ministry of Justice data show that almost 1 in 3 (29 per cent) offenders released from custody will re-offend in future. This figure climbs to 64.1 per cent for adult offenders sentenced to less than 12 months in prison (Ministry of Justice, 2019).

Finally, support for non-custodial alternatives has solidified in response to the UK Government's continued commitment to further prison expansion. While UK ministers may at the beginning of the year expressed support for plans to abolish the use of short-term custodial sentences (e.g. BBC News, 2019), the Ministry of Justice has since reiterated its commitment to provide for an additional 10,000 prison places in England and Wales.

1.4 Methodology

As already noted in the Introduction, this report explores and compares six case studies that span various examples of jurisdictions which have transitioned – or sought to transition – from high to low rates of imprisonment as well as examples of jurisdictions that manage to sustain low rates of imprisonment over the long term. These case studies are entirely the product of desk-based research by the report's authors and thus reflect the availability of existing analysis.⁹ Another key limitation of the current report is that space precludes very detailed analysis of what are (inevitably) a complex nexus of policies and broader social trends and traditions in some very diverse societies. As such, the lessons that we seek to draw out are necessarily provisional. Even so, this study serves to illustrate that there is nothing inevitable about high rates of imprisonment. Other jurisdictions have managed to successfully lower previously very high rates of imprisonment. Yet other jurisdictions *can and do* manage to maintain much lower rates of imprisonment over the long term. Taken together, they offer powerful examples of what Wales could be, were our nation's political will and constitutional structures to align differently.

⁹ The lead author also carried out empirical research on the 'alternatives movement' in California, New York and Texas in 2014.

2 Jurisdictions in transition

2.1 Introduction

In this chapter we investigate six case studies of jurisdictions that are attempting to transition from high to lower imprisonment rates. They are three US states, namely California, New York and Texas, as well as three western European countries: Finland, the Netherlands and Portugal. Before we present our analysis, we shall note briefly the rationale for our choice of case studies.

California, New York and Texas

It is well known that over four decades the US experienced an exponential increase in the number of people held in its jails, state prisons and federal institutions. Driven by a range of punitive, 'get tough' policies enforced by police and sentencers (Travis and Western, 2014) – including mandatory prison sentences and 'truth in sentencing' laws – the number of people held in state and federal prison increased by 425% between 1978 and 2010 (Bureau of Justice Statistics, 2019).¹⁰ Despite being home to just 4% of the world's population, the US criminal justice system is responsible for 20% of the world's prisoners (Walmsley, 2018). Unsurprisingly, the expansion of the US penal system has attracted considerable academic attention. This includes extensive research into the causes of mass incarceration (Garland, 2001a; Pratt et al, 2005; Tonry, 2004) as well as the consequences of what DeParle (2007: 33) describes as the "American prison nightmare" (Mauer, 2006; Pager, 2007; Wacquant, 2002).

Since 2010, however, the US has born witness to year on year decreases in the national prison population, with those states that had contributed so heavily to the rise in prisoner numbers actively seeking to reverse course. The efforts of state officials to drive down prisoner levels is now generating substantial academic interest (e.g. Gartner et al, 2011; Austin and Jacobson, 2013). In this report, we pay specific attention to the legislative and policy developments that have contributed to falling prisoner numbers and, in some cases, the closure of state prison facilities.

Given the fundamental differences in legal system and legal culture, it might be thought that these US examples are of little potential relevance to Wales. We disagree. First, the policy lessons: these jurisdictions have undertaken on-going, sustained and successful attempts at reform in 'high imprisonment societies', which means that there are specific policy initiatives from which we can

¹⁰ The number of people held in state and federal prison increased from 307,276 in 1978 to 1,613,803 in 2010. The national rate of imprisonment rose from 131 per 100,000 in 1978 to 500 per 100,000 in 2010 (Bureau of Justice Statistics, 2019).

learn. Second, the political lessons: this radical reversal in approach has taken place in what were previously some of the most punitive states in the US. Texas, for example, has not suddenly become some kind of 'progressive' oasis, nor has 'law and order' lost its status as a 'hot button' political issue. Rather, the determination to drive down prison populations appears to be overwhelmingly driven by the need to control public spending. Prison is very expensive – a fact that implies very substantial opportunity costs either in terms of resources diverted from other public services or, indeed, tax cuts. The US examples indicate that fiscal rectitude has the capacity to drive support for prison reform.

Finland, the Netherlands and Portugal

Among our European examples, Finland has successfully transitioned from having one of the highest imprisonment rates in Western Europe in the immediate post-war era to one of the lowest. This development is the result of deliberate and sustained attempt by policy-makers to drive down prison numbers, making Finland an obvious case for inclusion in this study. The Netherlands represents a useful case because of its experience of rapid changes in the prison population over recent decades. Historically having a low imprisonment rate, the decade after 1995 saw the country's imprisonment rate rise steeply to become one of the highest in Europe. Since then, however, there has been a very substantial reduction. Thus, the country offers itself as an example of a recent and rapid decline in the imprisonment rate.

Portugal's imprisonment rate – at least in western European terms – is high. Its recent, relatively 'liberal' approach to drug policy has garnered much international attention in a context in which there is now wide-spread recognition of the limitations of the punitive approach that underpinned the 'war on drugs'. It is included as a case study here, however, not simply because of the interest in its approach to the drugs crisis but also because – to the extent that this drugs policy was intended to reduce the prison population – Portugal is an example of a reform process that appears to have stalled. Here too there are lessons to be learned.

2.2 California

- **State Population:** 39,557,045 (2018)
- **Prisons:** 34 state prisons
- **State Prison Population:** 126,428 (2019)
- **Jail Population:** 72,496 (2018)
- **Imprisonment Rate:** 581 per 100,000 (2018)

California was at the epicentre of the US prison boom. During the 1980s, the state's prison population increased by a remarkable 296%. In just ten years, 72,740 prisoners were added to California's state prison population while its jail population – those institutions controlled and run by the counties – more than doubled.¹¹ No jurisdiction in the US has ever added as many prisoners to its prison population in just one decade. According to Gilmore (2007), California experienced seven times as much growth between 1980 and 1991 than in the previous three decades combined.

The prison population in California continued to rise from 1990 onwards (see Figure 2.1): 65,692 prisoners were added to the state prison population between 1990 and 2000. The state prison population reached its highest ever level of 175,512 in 2006. By this stage California's rate of imprisonment was 483 per 100,000 in 2006, having risen from 98 per 100,000 in 1980.

To accommodate the rise in prisoner numbers, California embarked on an unparalleled prison building programme. Having only built twelve prisons between 1952 and 1964, the state government completed the construction of 22 new prisons between 1984 and 2005 (California Department of Corrections and Rehabilitation, 2019).¹² The state also added thirteen smaller community facilities and five prison camps (Gilmore, 2007). As of 2019, California has 34 state prison facilities.

The driving force behind the explosive growth in California's prison and jail population was the introduction of a range of 'get tough' policies and initiatives. The 1977 Uniform Determinate Sentencing Act reflected the state's commitment to a more punitive approach. According to one critic, the 1977 Act reflected the state's "formal abdication of any responsibility to rehabilitate" in favour of an approach centred upon punishment (Gilmore, 2007: 91).¹³ The legislation also signalled

¹¹ The prison population largely consists of those convicted of felony-level offences sentenced to terms of more than one year in state custody (though less time may be served). The jail population consists of persons convicted of felonies and misdemeanours who are sentenced to less than one-year terms and those awaiting trial who are held in custody. From 28,946 people in jail in 1980 to 70,845 in 1990 (Zimring, 1994).

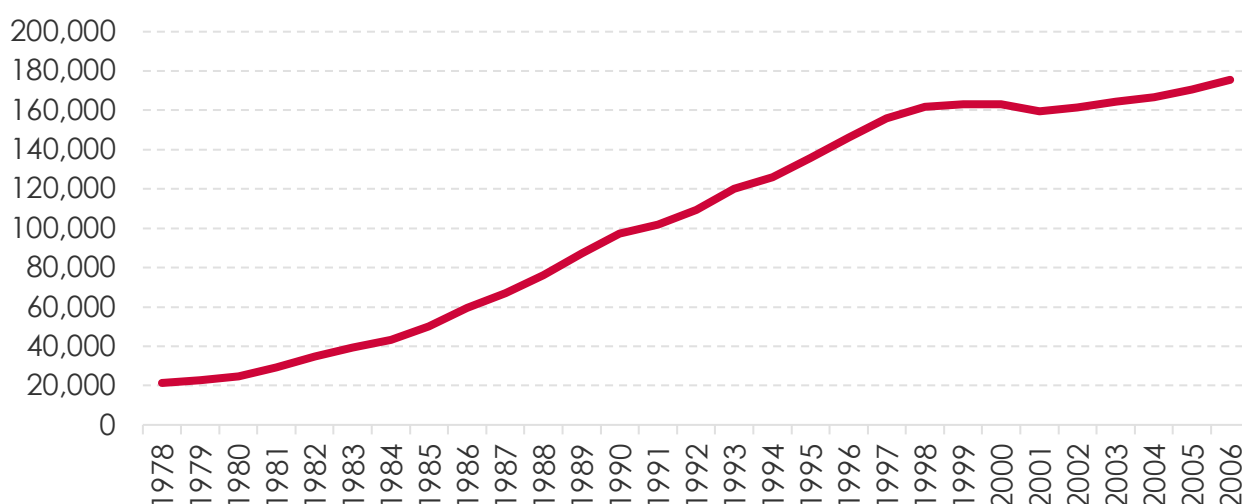
¹² Nine state prisons opened during the 1980s, twelve opened in the 1990s and one prison opened in 2005.

¹³ The legislative changes led to an initial decline in prisoner numbers as offenders sentenced to above average sentence lengths under the old system were handed reductions as part of the new system (e.g. Zimring and Frase 1980).

California's decision to abandon its indeterminate sentencing structure in favour of a range of mandatory prison sentences that led to longer prison sentences for those convicted of a range of different offences (Austin, 2016: 91). The spirit of the act was later visible in the introduction of the second- and third-strike laws.¹⁴

Figure 2.1

State prison population in California, 1978 to 2006



Source: Bureau of Justice Statistics

The best available evidence indicates that the rise in California's prison population was due to an increase in felony convictions leading to imprisonment. Zimring and Hawkins (1994) identified the rise in the number of people arrested, convicted and imprisoned for drug offences as largely responsible for the population increase at this time. The authors also conclude that crime rates and arrests for non-felonies were "not significantly related" to the rising prisoner population in California (Zimring and Hawkins 1994: 87).

Despite the state's gargantuan prison building programme, California's prison system was unable to keep pace with the relentless increase in the prison population. By 2006, the system was operating at 200 per cent of its design capacity (California Department of Corrections and Rehabilitation, 2006). In 2009, a federal court ruled that the level of medical and mental health care in California's prisons was unconstitutional *due to the level of overcrowding*. The court's ruling, which was upheld by the US Supreme Court in 2011, ordered California to reduce its prison population and its level of overcrowding.¹⁵ It is in response to this ruling that the California has subsequently managed to reduce prisoner numbers and, in a reversal of fortunes, has become one of the state's leading the charge to reverse mass incarceration (The Sentencing Project, 2014).

¹⁴ Other analyses of California's prison boom have questioned the relationship between rising prisoner numbers and the emergence of a profiteering 'prison industrial complex' in California (Davis, 2003; Gilmore, 2007).

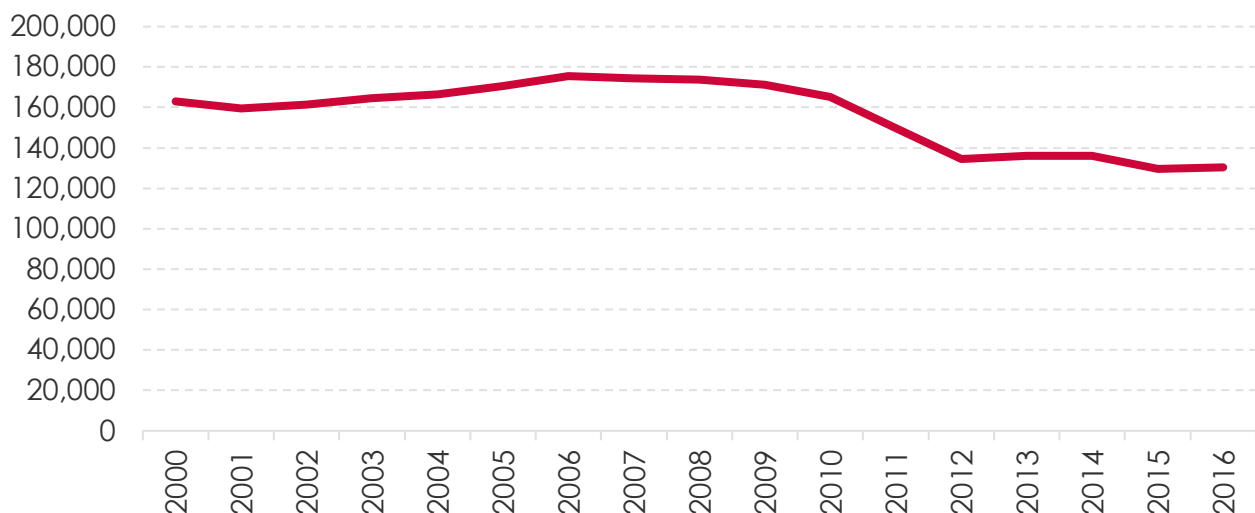
¹⁵ The Three-Judge Panel ordered the state to develop and implement a plan to reduce the prisoner population in its main prison facilities to 137.5 percent of design capacity.

California in Recovery: A Response to Overcrowding

Since its 2006 peak, the state prison population in California has fallen by a quarter (26%). In 2016, there were 45,122 fewer people in state prison than had been the case a decade before (see Figure 2.2).¹⁶ California's imprisonment rate fell from 483 per 100,000 in 2006 to 331 per 100,000 in 2016.¹⁷

Figure 2.2

State prison population in California, 2000 to 2016



Source: Bureau of Justice Statistics

This reduction followed the introduction of policies designed to help the state comply with the 2009 federal court ruling, policies which aimed to reduce both state prisoner numbers *and* the county jail population. The three major initiatives in this regard were the Adult Probation Performance Incentive Act, the Public Safety Realignment Act, and Proposition 47.

Senate Bill 678: The Adult Probation Performance Incentive Act

The state's first response to the federal court's ruling was to embark on a course of action designed to reform sentencing. The Adult Probation Performance Incentive Act, passed in 2009, offered financial incentives to counties to reduce the number of people being sentenced to state custody.¹⁸ More specifically, the Act aimed to financially reward counties that used probation over imprisonment with the policy largely targeted at those being recalled to custody for breaching the terms of their probation sentence.¹⁹ It was estimated that 40 per cent of all state prison admissions

¹⁶ The figures have fallen further in 2019 to 126,428. This reflects a drop of 49,084 since 2006.

¹⁷ The rate recorded in 2016 is similar to the rate in 1992.

¹⁸ Also known as the Community Corrections Performance Incentive.

¹⁹ The funding made available was designated for the development of 'evidence based programmes' (Austin, 2016).

in 2009 were accounted for by individuals who had violated the conditions of their probation sentence or had been arrested for a different crime (Austin, 2016).

By rewarding counties that reduced their probation revocation rate *and* those who had maintained a low level previously, the implementation of SB 678 helped to divert 27,000 probations between 2010 and 2013. According to the Administrative Office of the Courts (2012), the policy prevented 9,500 additional prisoners being held in state prisons. This reduction, however, fell far short of the state target as set by the federal court, leading to a second major initiative.

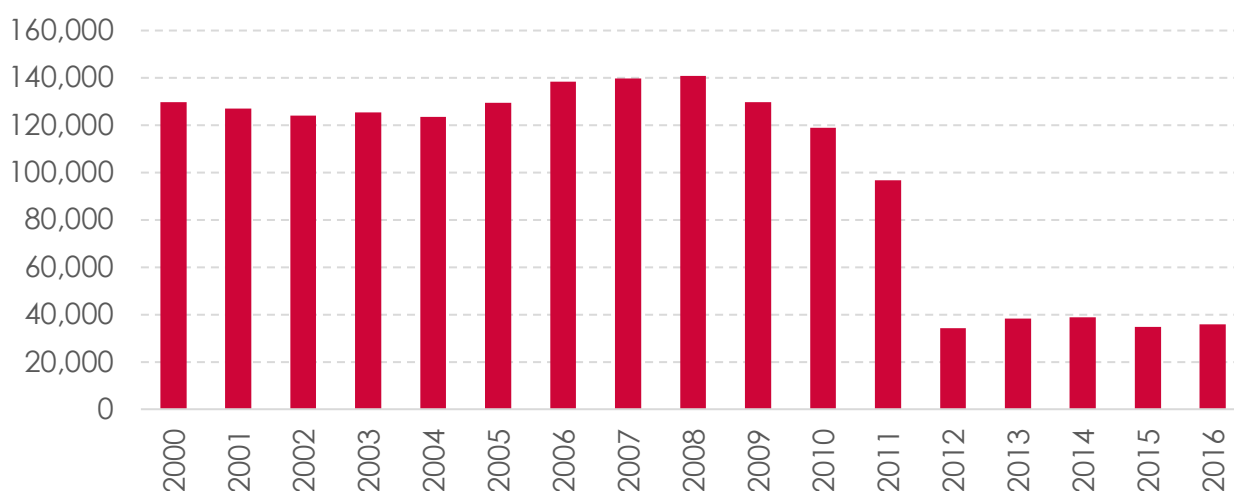
Assembly Bill 109: The Public Safety Realignment Act

Enacted in October 2011, California's Public Safety Realignment Act (cf. California Realignment) realigned responsibility for non-violent, non-sex-related and non-serious offenders from state to county governments. The policy also reduced post-release supervision periods for non-violent, non-sex-related and non-serious offenders as well as ensuring that offenders violating the terms of their probation or parole could only be sentenced to county jail and not state prison (The Sentencing Project, 2014).

In combination with the changes brought about by SB678, the Act California's realignment policy had a positive effect, precipitating reductions in the state's prison population of 18.5 per cent, 30,528 fewer prisoners, between 2010 and 2012. Importantly, this reduction was largely driven by a significant decrease in the number of prisoners being admitted to state prisons as opposed to county jails. The total number of admissions to state prisons fell by a staggering 71%, or 84,649 fewer prison admissions, between 2010 and 2012 (see Figure 2.3).

Figure 2.3

State prison admissions in California, 2000 to 2016



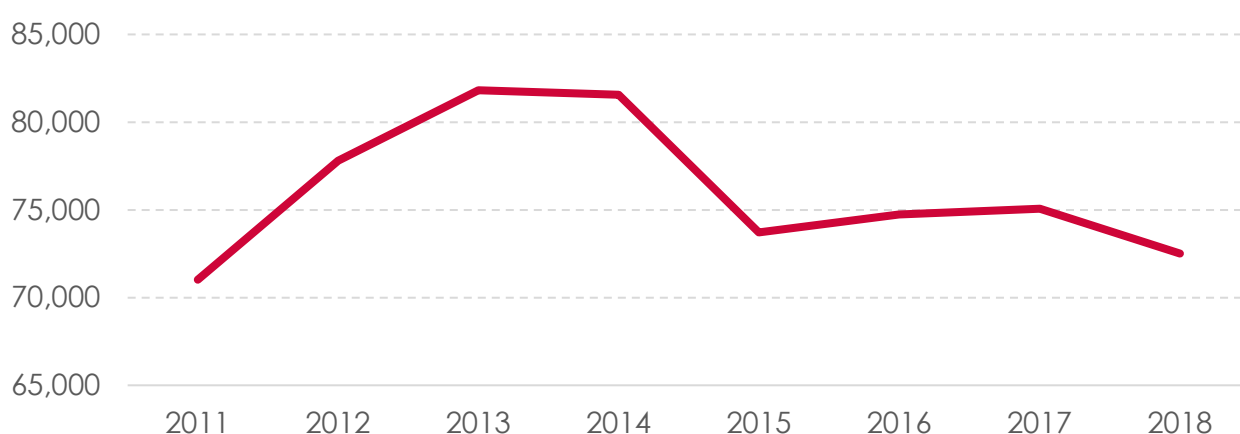
Source: Bureau of Justice Statistics

One of the central aims underpinning AB 109 was to shift responsibility for low level offenders to counties, ensuring that state prison was reserved for those convicted of the most 'serious offences'. As realignment was rolled out, observers noted that jail populations were being "significantly affected" by the change (Lofstrom and Raphael, 2013: 2). As the state prison population plummeted, the average daily population of California's county jails increased by some 8,600 people. For every three prisoners diverted from state prison one was added to the county jail population (The Sentencing Project, 2014), a rise that amounted to a 12 per cent increase in the number of those incarcerated in California's jails (Lofstrom and Raphael, 2013). As a consequence, in 2014, the state introduced a third major initiative to help ensure that it could meet the federal court's target, this time focusing on county jail numbers.

Proposition 47

Proposition 47 was introduced in November 2014, having been voted in by almost 60 per cent of voters in California. Viewed as the next stage in the state's effort to reduce the prison population, the law reduces the severity of sentences for a range of low-level offences including drug possession, shoplifting, theft, and receiving stolen goods. By reclassifying low-level offences from felonies to misdemeanours, the maximum sentence available has been lowered to less than one year in county jail. A central feature of Proposition 47 is that the law can be applied to offenders retrospectively. Since the policy was introduced those convicted of Proposition 47 offences held in prison or jail have been able to petition for early release or a reduction in their custodial sentence length.

Figure 2.4
County jail population in California, 2011 to 2018



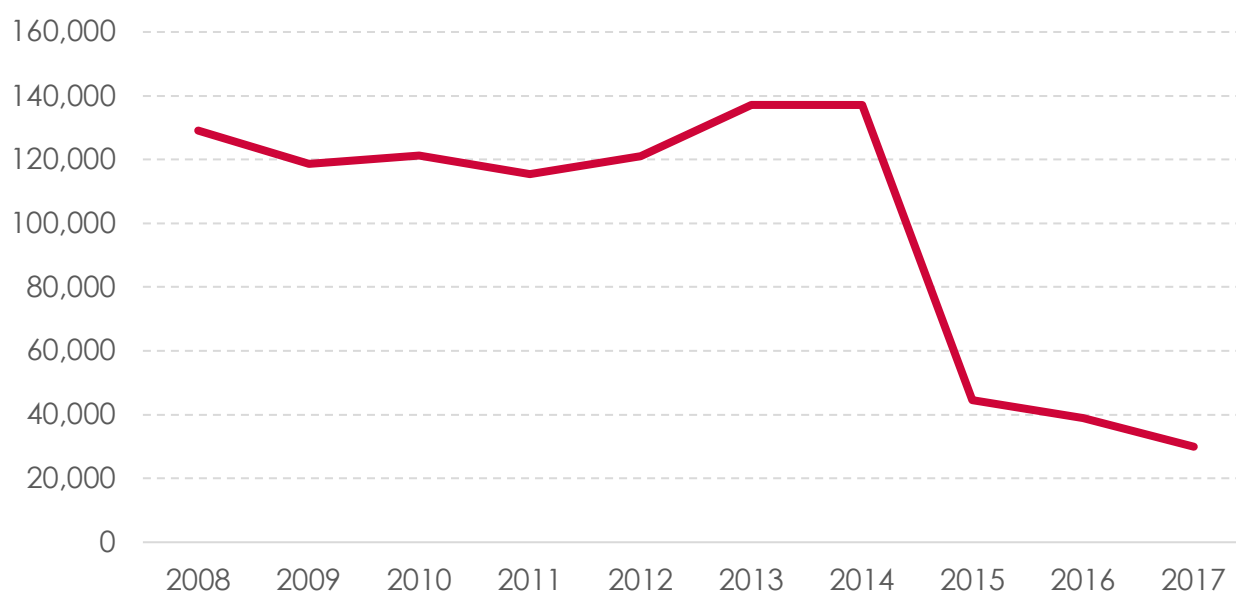
Source: California Board of State and Community Corrections²⁰

²⁰ See – http://www.bscc.ca.gov/m_data&research.php

According to Bird et al (2018: 20), Proposition 47 has “played a significant role” in helping the state ensure that prison and jail spaces are reserved for those convicted of the most ‘serious’ offences. Since 2014, state prison and county jail populations have “declined substantially” (Bird et al, 2018: 20). In the year immediately following its introduction, the county jail population fell by 7,851, a reduction of 9.6 per cent (see Figure 2.4). The state prison population also fell by 4.8 per cent with 6,492 fewer people incarcerated in 2015 than in 2014.²¹

This combination of policies has drastically reduced the number of people in contact with the criminal justice system. Bird et al (2018) discovered that the policy was responsible for a sharp decline in the number of arrests, jail bookings and reconvictions. In 2015, arrests for felony property offences fell by almost a quarter (24.4 per cent), as felony arrests for drug offences fell by 67.4 per cent in just one year (see Figure 2.5). In total, there were 23,836 fewer arrests for property offences and 92,425 fewer arrests for felony drug crimes in the year immediately following the new law’s introduction.

Figure 2.5
Adult felony drug arrests in California, 2008 to 2017



Source: Office of the California Attorney General

Proposition 47 has been central to California’s efforts to reduce the correctional population; it is only since its introduction that the state managed to get its prison population below the level mandated by the federal court in 2009.

²¹ 65 per cent of all net state savings from the measure go towards grants and programmes for mental health and substance misuse (Bird et al, 2018).

Summary

Having been at the centre of the US prison boom from the 1980s onwards, in recent years California is one of a handful of states to significantly reduce its reliance on custodial imprisonment. Although imprisonment in state prisons and county jails remains very high by European standards, the very notable reductions made in California since 2010 offer a potential model for other 'high imprisonment' societies to follow. Arguably the most significant lesson is that reducing prisoner numbers may require more than one policy initiative. As well as reforms to sentencing and prison policy, this case study demonstrates that changes to policing practices are required as part of a 'whole-system' approach to developing alternatives at all stages of the criminal justice process. These issues are reflected upon further in the New York case study that follows.

2.3 New York

- **State Population:** 19,542,209 (2018)
- **Prisons:** 54 state prisons (2019)
- **State Prison Population:** 50,288 (2018)
- **Jail Population:** 22,828 (2018)
- **Imprisonment Rate:** 443 per 100,000 (2018)

As the US national rate of imprisonment soared at the end of the twentieth century, the state of New York underwent its parallel punitive turn. Between 1978 and 1999, the number of people held in state prison increased by 256% (see Figure 2.6).²² At its peak towards the end of the millennium, New York's prison population reached 72,899, reflecting a rise in imprisonment rate from 115 per 100,000 in 1978 to 386 per 100,000 in 1999. This rise was accompanied by an expansion in the prison estate, with the number of state and federal prisons in New York more than doubling during the 1980s and 1990s (Lawrence and Travis, 2004).²³

The distinct features of New York's punitive approach to penal policy included mandatory drug laws, limitations to parole and the introduction of 'truth-in sentencing' laws. In 1973, the enactment of the Rockefeller Drug Laws, named after Governor Nelson Rockefeller, led to the introduction of mandatory prison terms for non-violent drug offenders and minimum sentences of 15 years to life for possession and distribution of banned narcotics. Although widely regarded at the time as the toughest drug laws in the US,²⁴ the measures had only a modest effect on prisoner levels during the 1970s. In the following decade, however, aggressive police enforcement of these draconian drug laws (particularly in New York City) contributed significantly to the state's burgeoning prison population (Weiman and Weiss, 2009). During the 1990s, for example, an average of 20,000 prisoners a year were held in New York prisons because of the Rockefeller drug laws (Drucker, 2002).

New York also took advantage of federal government legislation introduced in the 1990s to incentivise states to expand their use of imprisonment. The Violent Crime Control and Law Enforcement Act 1994 (c.f. 1994 Crime Bill) authorised £12.5 billion in grants to help states offset the costs of mass imprisonment. The programme included financial incentives to states to introduce 'truth in sentencing' laws designed to limit opportunities for parole and ensure that prisoners serve at least 85 per cent of their sentences. New York received \$216 million in federal

²² From 20,459 in 1978 to 72,899 in 1999.

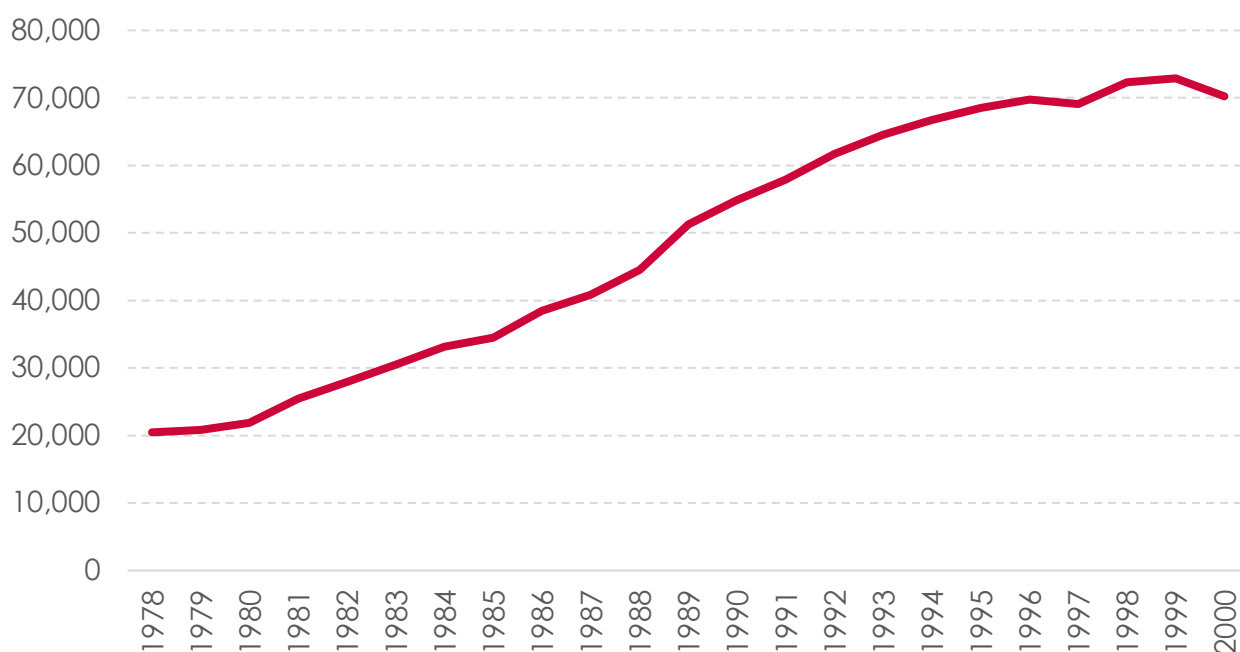
²³ From 30 to 65 prison facilities.

²⁴ Similar measures were later introduced by other states including Michigan.

funds when it introduced its own 'truth in sentencing' laws in 1995.²⁵ By 2000, the state prison population had increased by 28 per cent and more than 12,000 prison places had been added across the state (Eisen and Chettiar, 2015).

Figure 2.6

State prison population in New York, 1978 to 2000



Source: Bureau of Justice Statistics

The legislative and policy changes introduced during this period reflect the state's abandonment of rehabilitative ideals in favour of a more punitive stance. In more recent years, however, New York's approach has moved in an altogether different direction.

Transitioning to prison population reductions: The New York Approach

During the first decade of the twenty first century, New York "led the nation" in reducing its prison population at a time when the US national rate continued to rise (The Sentencing Project, 2014: 1).²⁶ By 2018, the state prison population was 31 per cent lower than the level reached in 1999, and unlike California, this decline in state prisoner numbers was accompanied by a fall in the county jail population. Indeed, such has been the decline in prison numbers that, since 2011, 24 prisons and

²⁵ The Sentencing Reform Act of 1995 increased sentences for first time offenders, removed parole for second time violent felony offenders, doubled the minimum sentences which must be served by offenders convicted of committing three violent crimes. In 1998, New York State introduced legislation to abolish parole and required that determinate sentences be handed out even to first-time violent offenders. The legislation also introduced longer periods of post-release supervision.

²⁶ Along with New Jersey.

detention centres have been closed. In February 2019, Governor Andrew Cuomo announced the closure of a further three state prisons in the new fiscal year (New York Governor's Office, 2019).

Although this reduction in prison population has taken place at a time of falling crime rates,²⁷ Austin and Jacobson (2013:19) argue that lower crime levels have not "produced" the decline in prisoner numbers. Crucially, according to New York City's Mayor Michael Bloomberg in 2013, the changes are "neither accident nor coincidence" but reflect a combination of legislative and policy developments across New York City.²⁸ Here we will focus briefly on changes relating to policing practices in the state's largest metropolitan area, as well as on sentencing reform.

Policing Practices

One of the primary factors in the reduction in New York's prison population has been changes in the approach to policing in the state's largest jurisdiction, New York City (Austin and Jacobson, 2013).²⁹ During the 1990s, the New York City Police Department (NYPD) reduced the number of felony arrests and increased the number of arrests for misdemeanours (see Figure 2.7)³⁰. This trend was driven by the NYPD's focus on 'broken windows' and 'quality of life' policing and its strategic focus on lower-level misdemeanour crimes (e.g. Greene, 1999; Zimring, 2011). Although the rise in misdemeanour arrests led to a slight increase in the number of people sentenced to custody for misdemeanour convictions in the 1990s, NYPD policy led to a reduction in the number of people being convicted and sentenced to prison for felony-level offences in New York City (Austin and Jacobsen, 2013).

Another major driving force behind the reduction in felony arrests has been the state's revised approach to drug enforcement. While the number of felony drug arrests in New York City exceeded 40,000 per year during the 1990s (The Sentencing Project, 2014), arrests have fallen significantly over the last two decades. In 2018, there were 11,245 felony drug arrests in New York City, a reduction of more than 56% since 2009.³¹ Furthermore, even when arrests for drug felonies are made in New York City, changes to the state's approach to drug treatment and sentencing have further contributed to a declining prison population.

²⁷ Between 1988 and 2008, the number of felonies reported by New York City fell by 72 per cent (Austin and Jacobson, 2013). The reduction in crime outside of New York City fell at a much lower rate (38 per cent) during the same period.

²⁸ See - <https://www1.nyc.gov/office-of-the-mayor/news/434-13/mayor-bloomberg-new-york-city-s-incarceration-rate-hits-new-all-time-low/#/o>

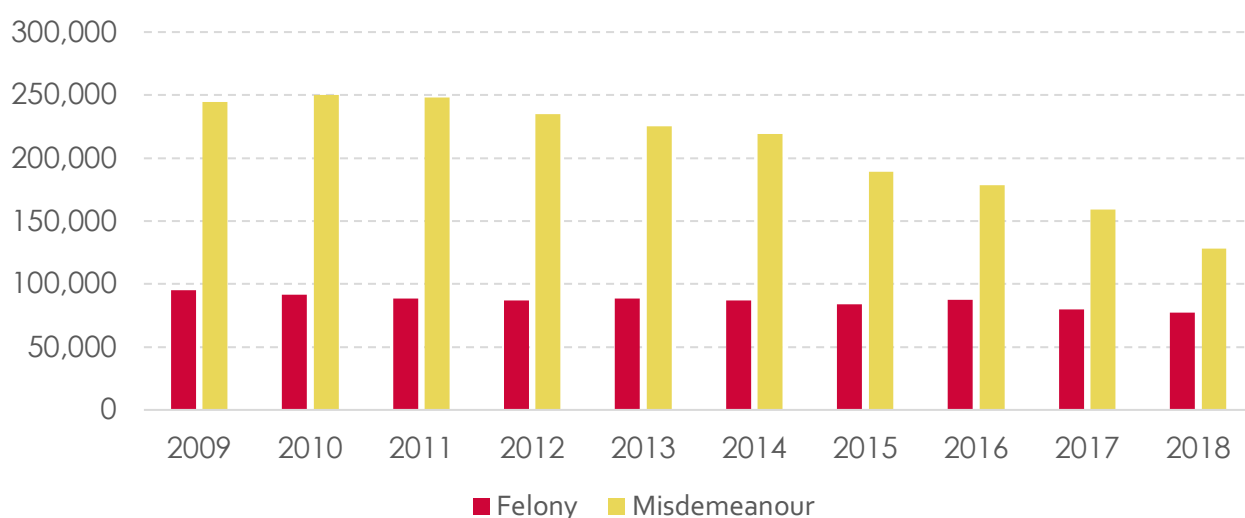
²⁹ Because of its size, policy changes in New York City are largely responsible for state changes. 44% of the entire state's population (19,542,209) live in New York City (8,622,698).

³⁰ The number of misdemeanour arrests have fallen since 2010. There were 48.8% fewer arrests by the NYPD for misdemeanours in 2018 than in 2010.

³¹ From 25,880 in 2009 to 11,245 in 2018. The number of misdemeanour drug arrests also fell by 71.9% from 83,058 in 2009 to 23,366 in 2018.

Figure 2.7

The number of adult felony and misdemeanour arrests in New York City, 2009 to 2018



Source: New York State Division of Criminal Justice Services

Another major driving force behind the reduction in felony arrests has been the state's revised approach to drug enforcement. While the number of felony drug arrests in New York City exceeded 40,000 per year during the 1990s (The Sentencing Project, 2014), arrests have fallen significantly over the last two decades. In 2018, there were 11,245 felony drug arrests in New York City, a reduction of more than 56% since 2009.³² Furthermore, even when arrests for drug felonies are made in New York City, changes to the state's approach to drug treatment and sentencing have further contributed to a declining prison population.

Sentencing and Alternatives to Incarceration

Sentencing reforms and the development of a "vibrant" Alternatives to Incarceration (ATI) network have played a major corresponding role in New York's declining prison population (Berman and Wolf, 2014: 36). Between 2003 and 2005, the state government introduced changes to the Rockefeller Drug Laws and effectively repealed these laws by reducing and eliminating the use of mandatory sentences in 2009.³³ These changes give judges greater discretionary power to send felony-level offenders to treatment rather than custody. Research by Waller et al (2013) found that in the year following the repeal of the Rockefeller Drug Laws, an additional 1,391 people were sentenced to court ordered treatment.

³² From 25,880 in 2009 to 11,245 in 2018. The number of misdemeanour drug arrests also fell by 71.9% from 83,058 in 2009 to 23,366 in 2018.

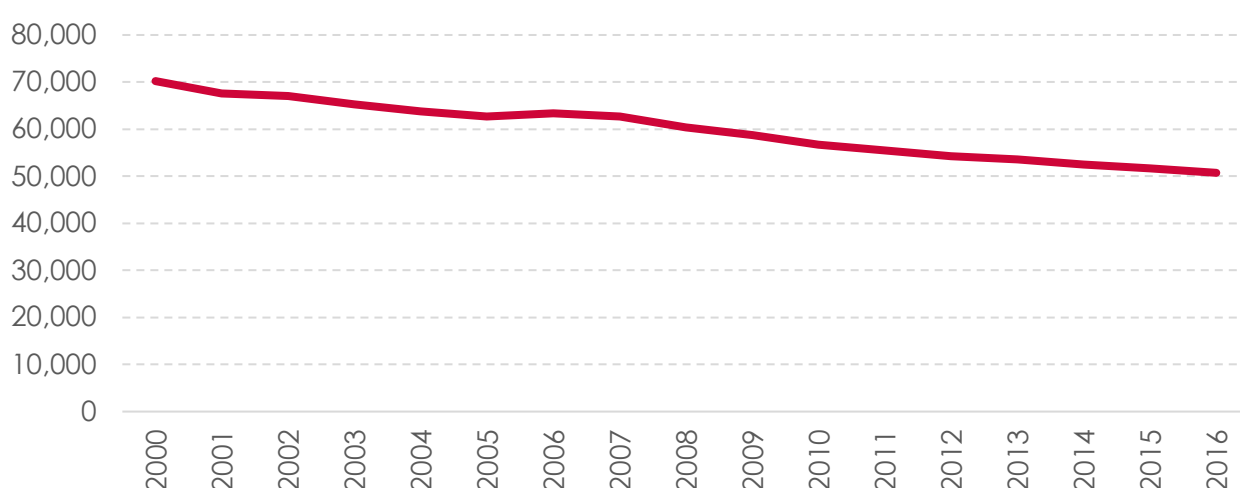
³³ The changes also applied retrospectively to those previously handed mandatory custodial sentences (The Sentencing Project, 2014).

The development of a strong alternatives movement in New York has transformed the sentencing options available to judges. In 1984, the state introduced the Classification/ Alternatives to Incarceration Act to help incentivise local counties to invest in non-custodial alternatives. The legislation requires each county to produce an annual service plan detailing how it intends to reduce its reliance on imprisonment as well as providing a summary of its existing alternatives network. The plans are developed by a local advisory board which is required to include a range of representatives, including a county court judge, the district attorney, a criminal court judge (in areas with a population of one million or more) the police, the county director of probation, a former offender, a victim of crime and a substance misuse service provider. If the plans are approved, the state provides 50 per cent funding for services designed to divert offenders from jail terms of at least 180 days.³⁴

The New York State Division of Probation and Correctional Alternatives (NYDPCA) currently funds around 165 ATI programmes across the state (NYDPCA, 2019). Described as a “coordinated set of programs to which judges may send criminal offenders instead of sentencing them to jail” (Porter et al, 2002: 3), ATI programmes require offenders to undertake counselling or treatment for a period of six months to a year in order to avoid being sentenced to jail or state prison. These programmes consist of pre-trial and post-adjudication services focused on mental health, drug and alcohol misuse, community service, specialised programmes and defender based advocacy (NYDPCA, 2019). ATIs are delivered by a range of non-governmental and non-profit organisations who have played a major role in their development and expansion, including the Women’s Prison Association, Osbourne Association, Centre for Alternative Sentencing and Employment Services, and the Fortune Society.

Figure 2.8

State prison population in New York, 2000 to 2016



Source: Bureau of Justice Statistics

³⁴ Changes introduced to New York’s penal code in 1996 further enhanced the discretionary powers given to judges.

The New York State Division of Probation and Correctional Alternatives (NYDPCA) currently funds around 165 ATI programmes across the state (NYDPCA, 2019). Described as a “coordinated set of programs to which judges may send criminal offenders instead of sentencing them to jail” (Porter et al, 2002: 3), ATI programmes require offenders to undertake counselling or treatment for a period of six months to a year in order to avoid being sentenced to jail or state prison. These programmes consist of pre-trial and post-adjudication services focused on mental health, drug and alcohol misuse, community service, specialised programmes and defender based advocacy (NYDPCA, 2019). ATIs are delivered by a range of non-governmental and non-profit organisations who have played a major role in their development and expansion, including the Women’s Prison Association, Osbourne Association, Centre for Alternative Sentencing and Employment Services, and the Fortune Society.

Research by Porter et al (2002: 66) found that ATI programmes have become a “valuable sentencing option” for judges, and their introduction has been supported by an increasing accumulation of evidence based policy and an emphasis on testing the effectiveness of treatment programmes. Research findings are widely shared with practitioners, legal professionals and the judiciary in order to ensure access to the best available evidence on desistance and offending as well as raising awareness of the options available to judges.³⁵

The judiciary has played a vital role in the success of the New York alternatives movement. It has offered support to the development of community based courts such as Red Hook Community Court in Brooklyn, as well as other problem-solving courts including drug and mental health courts (Berman and Wold, 2014). Judges have also benefited from the creation of new court positions such as resource managers who work to help prosecutors, attorneys and judges consider the full range of sentencing options (Berman and Wolf, 2014; Jacobsen and King, 2013).

Although concerns have been raised over the extent to which that ATI’s may actually lead to an increase in the level of state intervention and supervision,³⁶ there is widespread agreement that the ATI network has helped contribute to a reduction in New York City’s imprisonment rate. While that level increased throughout the rest of the state, in the City itself the prison disposition rate for felony convictions fell from 27% in 1993 to 13% in 2008 (Austin and Jacobson, 2013). The decreases in New York City were enough to ensure that the number of prison admissions across the state of New York as a whole fell by 23.6% between 2000 and 2016.³⁷

³⁵ The New York Association of Drug Treatment Court Professionals (NYADTCP) is a non-profit organisation whose membership includes judges, lawyers, court employees, treatment professionals, law enforcement officers and other professionals working in drug courts. NYADTCP arrange regular training programmes for members and helps to disseminate latest research and evidence of best practice. See – <http://nyadtcp.org/>

³⁶ Cohen (1985) warned that non-custodial measures may well lead to more people entering the criminal justice system through a process of ‘net-widening’.

³⁷ From 27,601 to 21,081 in 2016 (Bureau of Justice Statistics, 2019).

Summary

The New York case study demonstrates the vital role that front-end initiatives and services can play to drive down imprisonment levels. These include steps to reduce the number of people first entering the criminal justice system and pre-trial diversion. The success of ATI programmes also illustrates the importance of providing judges with credible and robust non-custodial alternatives, something which has been lost in England and Wales since the introduction of *Transforming Rehabilitation* in 2015 (HM Inspectorate of Probation, 2019). Although New York retains a rate of imprisonment that far exceeds any country in Western Europe, these initiatives offer a possible route to delivering change in Wales. A final source of relevance is the emphasis on local initiatives as well as state or national initiatives and policies in driving down imprisonment rates (Subramanian et al, 2014).

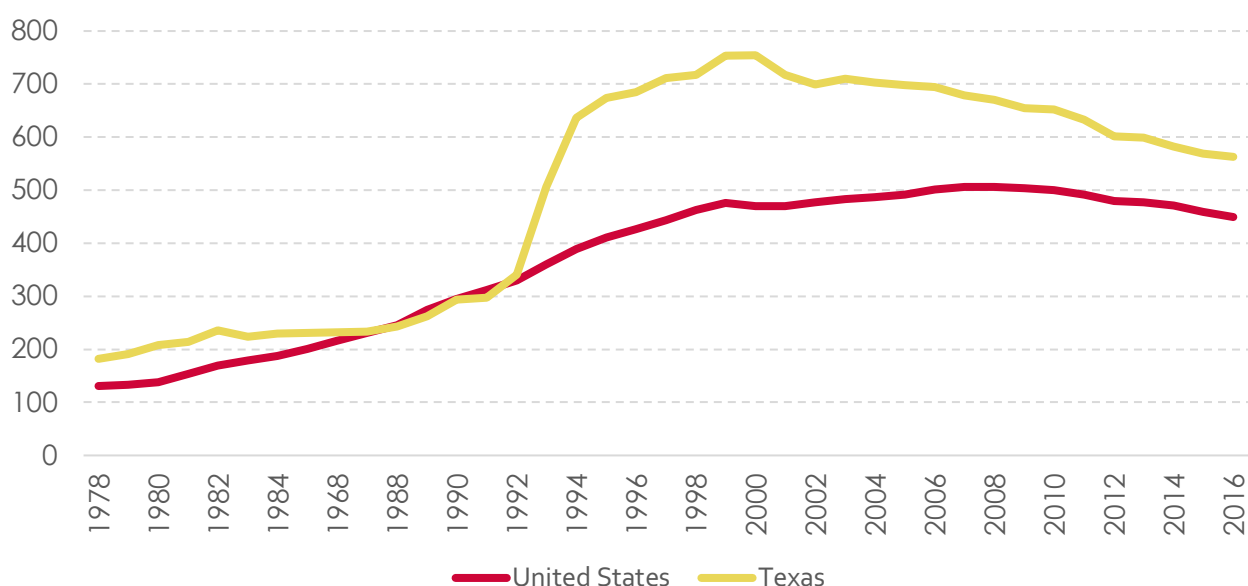
2.4 Texas

- **State Population:** 28,701,845 (2018)
- **Prisons:** 56 (only prisons and private prisons)
- **State Prison Population:** 163,703 (2016)
- **Jail Population:** 65,388 (2019)
- **Imprisonment Rate:** 891 per 100,000

If California spearheaded US prison growth in the 1980s, there can be no doubt that the mantle was passed to Texas in the decade that followed. Between 1990 and 2000, the Lone Star State was “leading the nation” in imprisoning its own citizens as its prison population increased by 233%. In 2000, there were 116,677 more people held in state prison than in 1990 as the imprisonment rate reached its highest ever level – a staggering 754 per 100,000.³⁸ According to Kaplan et al (2000), 1 in 5 of all new prisoners added to the US prison population during the 1990s were imprisoned in Texas (see Figure 2.9).

Figure 2.9

Imprisonment rates per 100,000 in the United States and Texas, 1978 to 2016



Source: Bureau of Justice Statistics

³⁸ This compared to a rate of 293 per 100,000 in 1990.

This prison population boom was underpinned by an enormous expansion in the prison estate. In 1980, following a lawsuit filed by a state prisoner about inhumane prison conditions in Texas, Judge William Wayne Justice ruled that the conditions inside state prisons equated to “cruel and unusual punishment”. Citing high levels of overcrowding as well as inadequate health care, security, sanitation and hygiene, Judge Justice ruled that the conditions inside Texas state prisons violated the Eight Amendment of the US Constitution and ordered the state to take action. The suit brought against the state became the largest prisoner suit in history at that time (Price and Coleman, 2011).

In stark contrast to the approach taken by California in 2009 (see 3.2), Texas officials in the early 1980s attempted to build their way out of the problem. Between 1983 and 1997, the state spent \$2.3 billion on expanding prison capacity adding no fewer than 108,000 new prison places (The Council of State Governments, 2007), constructing 70 new prisons in the 1990s (Price and Coleman, 2011). However, despite its enormous prison building programme, the state’s policy ultimately failed. Ten years later and the state prison population once again exceeded the number of places available. Compounding matters, official projections in 2007 forecast that prisoner numbers would rise by a further 14,000 by 2012. To meet this demand, the state estimated that an additional \$2 billion would be needed to build and operate new prison facilities (Justice Policy Institute, 2011).

Although faced with a similar dilemma to the one presented to officials in 1980, in 2007 the state decided to embark on an entirely different course of action. To avoid the costs associated with further prison building, the state decided to work with outside community organisations and embark on the Justice Reinvestment Initiative.

Prison Projections and New Directions? Justice Reinvestment

Research into the causes of Texas’ rising prison population between 1997 and 2006 identified three main contributory factors. First, a large number of people were being recalled to custody because of probation revocations. Second, an insufficient number of prisoners were being approved for parole. And third, a reduction in state funding for substance misuse and mental health services had contributed to a 2,000 place-shortfall in the number of treatment beds available in the community (The Council of State Governments, 2007).

In 2007, a bipartisan team of lawmakers developed a number of initiatives to address probation revocations, the low use of parole, and substance misuse and mental health treatment services. In response to these proposals, in May 2007 the State Legislature enacted four pieces of legislation that sought to reduce the number of people held in prison as well as those returning to prison following release.³⁹ This legislation helped to redirect state funds away from prison into outside treatment and diversion services, services which included 800 new beds for those under probation supervision with substance misuse needs; 1,400 new beds to divert probation and parole violators from prison; 3,000 slots for outpatient substance misuse treatment for offenders on probation supervision; and 300 new beds in a half-way house for offenders under parole supervision (The Council of State Governments, 2007). To address Texas’ law parole rate, the state established a

³⁹ House Bill 1 (2007); House Bill 1678 (2007); House Bill 3736 (2007); and Senate Bill 166 (2007).

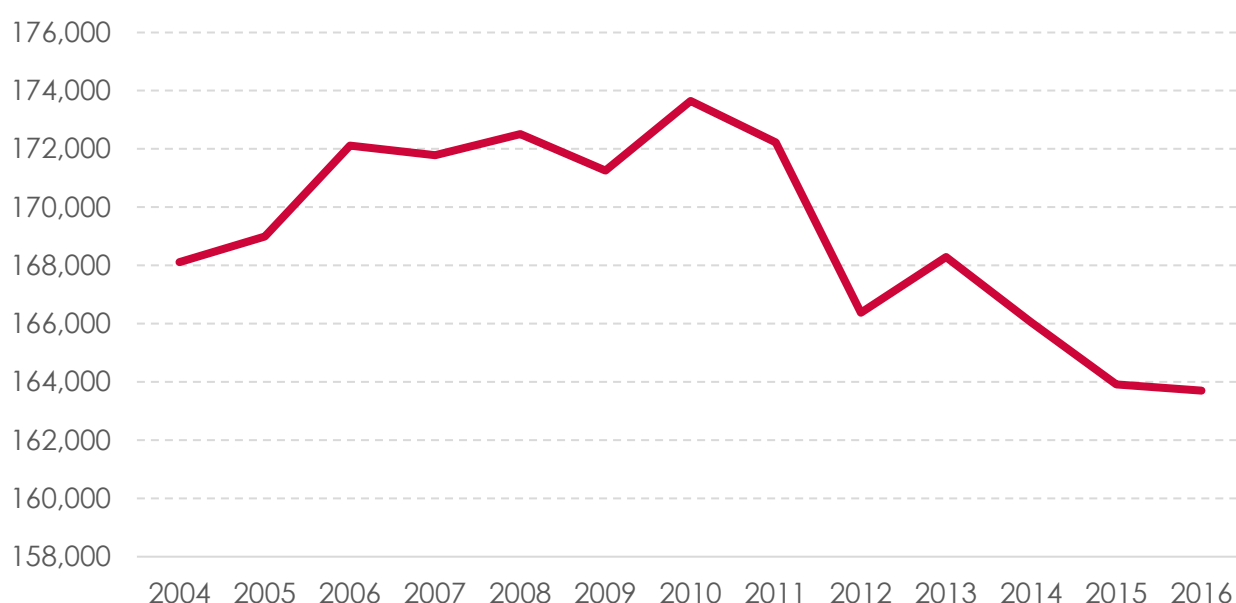
maximum limit for parole caseloads to ensure proper supervision arrangements; expanded the use of drug courts to help divert offenders convicted of minor crimes towards treatment; and reduced probation terms for drug and property offenders to ensure that they receive treatment and supervision (The Council of State Governments, 2007).

The changes made since 2007 have since been supported by legislation that has delivered “significant improvements” to the prisoner re-entry system in Texas (Smith, 2016: 1). In 2015, the legislature gave funding for additional re-entry case managers and expanded the level of intensive support available to offenders suffering from mental health issues (Smith, 2016).

Between 2005 and 2009, the number of pardons and paroles in Texas increased by 3 per cent (Justice Policy Institute, 2011). In addition, the number of offenders being returned to custody for parole violations has fallen by 20 per cent since 2010 and by almost 50 per cent since 2006 (Smith, 2016).

Figure 2.10

State prison population in Texas, 2004 to 2016



Source: Bureau of Justice Statistics

Overall the state prison population in Texas has seen a modest reduction since 2007. Since reaching its highest ever level in 2010, the state prison population has fallen by 5.7%.⁴⁰ The imprisonment rate declined during the same period from 678 to 563 per 100,000. This population decrease has led to the closure of a number of correctional facilities: 7 institutions were closed between 2011 and 2013 (Porter, 2014)⁴¹ and the closure of a further 4 state facilities was announced in 2017 (Texas State Senate, 2017).

⁴⁰ There were 8,087 fewer people held in state prison in Texas in 2016 than 2007.

⁴¹ Texas closed a state prison for the first time in its history in 2012.

Conservative Criminal Justice Reform

The policies introduced in 2007 represent the “most substantial redirection” in Texas’ correctional policy since the beginning of the prison boom (The Council of State Governments, 2007: 5). For some, the most intriguing aspect of the Texas ‘success story’ is that such a change occurred in such a deeply conservative state. Indeed, Texas has secured a Republican Trifecta since 2003 with majorities in the state senate, House of Representatives and the governorship. Central to the ‘rehabilitative turn’ in Texas was that the Republican controlled legislature was able to turn to conservative criminal justice reform experts. Having emerged in response to the neglect shown by conservatives to criminal justice reform, the *Right on Crime* initiative has played a crucial role in developing a conservative agenda around criminal justice reform and, perhaps unexpectedly, a campaign against further prison building.

The research evidence generated by the conservative criminal justice movement has been key to the reform efforts in Texas for two reasons. First, the evidence base helped state representatives identify what changes were required when faced with the prospect of a further rise in the prison population from 2007 to 2012 (Rosenberg, 2017). This included the need to tackle the state’s low parole rate and improve re-entry services. Second, and perhaps most importantly, the *Right on Crime* initiative helped to create a political space for conservative representatives and law makers to adopt a ‘smart’ rather than ‘tough’ approach to criminal justice. For example, polling research carried out by *Right on Crime* has been used to help Republican officials understand how conservative voters feel about reforming the criminal justice system. This research, alongside the work being undertaken by liberal organisations including the *Texas Criminal Justice Coalition*, has helped the reform movement to improve its messaging to conservative voters, the media and state officials.⁴² This has been key in allowing representatives the space in which to develop alternative approaches in Texas.

The successes enjoyed by the *Right on Crime* initiative in Texas have spread to other states.⁴³ The movement has advocated for reforms in 38 states and has helped to pass youth justice reform legislation, overhaul civil asset forfeiture laws, close prisons, and encourage justice reinvestment programmes (Right on Crime, 2019). In 2015, the then UK Justice Secretary, Michael Gove, visited Texas to learn more about the ‘rehabilitative revolution’ and to explore the possible transfer of conservative reform efforts to the UK (Dart, 2015).

Summary

Of the three US states discussed in this chapter, Texas’ alternative approach has yielded the most modest reduction in prisoner numbers. Indeed, if the population continues to fall at the current rate it will take a further 65 years for Texas’ prison population to reach its 1990 level. However, Texas’ contribution to the debate on prison alternatives is that it provides a clear example that alternative

⁴² The research identified that support for criminal justice reform would come from social conservatives, fiscal conservatives and those interested in a ‘limited government’ philosophy.

⁴³ Including Georgia, Ohio, Kentucky, Mississippi, Oklahoma, and Louisiana.

approaches can be achieved even in high imprisonment jurisdictions that have been ordinarily hostile to prison alternatives. The Justice Reinvestment Initiative and the successes enjoyed by conservative criminal justice reform groups in Texas demonstrate the possibility of building bipartisan or cross-party movements to deliver alternative approaches to penal policy.

2.5 Portugal

- **Population:** 10,291,027 (2017)
- **Prisons:** 49 (2017)
- **Prison Population:** 12,900 (2018)
- **Imprisonment Rate:** 126 per 100,000 (2018)

Along with England and Wales, Scotland and Spain, Portugal has one of the highest average rates of imprisonment in Western Europe (see Appendix One). Over the past two decades, in response to criticism for a high number of deaths in prisons in 1997 as well as the high rate of imprisonment, the country has introduced several alternative sanctions and probation reforms. Initially, these reforms were associated with a reduction in the total number of prisoners (European Prison Observatory, 2015). More recently, however, prison numbers have returned to the levels observed at the start of the century. Portugal therefore offers an important case with respect to managing prison population rates, namely a case of stalled reform.

Prison Reform

In 2004, a report commissioned by the Portuguese government in response to growing concerns about prison conditions set out a 12-year action plan to align the Portuguese prison system with European standards. New legislation was introduced in 2007 for an Enforcement of Sentence Code. Alternatives to prison were also bolstered in 2007 (Law no.59/2007) to enhance sentencing proportionality, to promote rehabilitation, and to reduce reoffending (European Prison Observatory, 2015). At the same time, the former Institute of Social Rehabilitation was replaced with the General-Directorate of Social Rehabilitation to restructure the Portuguese Probation Department. In 2012, this became the General-Directorate of Social Rehabilitation and Prison Services (European Prison Observatory, 2015).

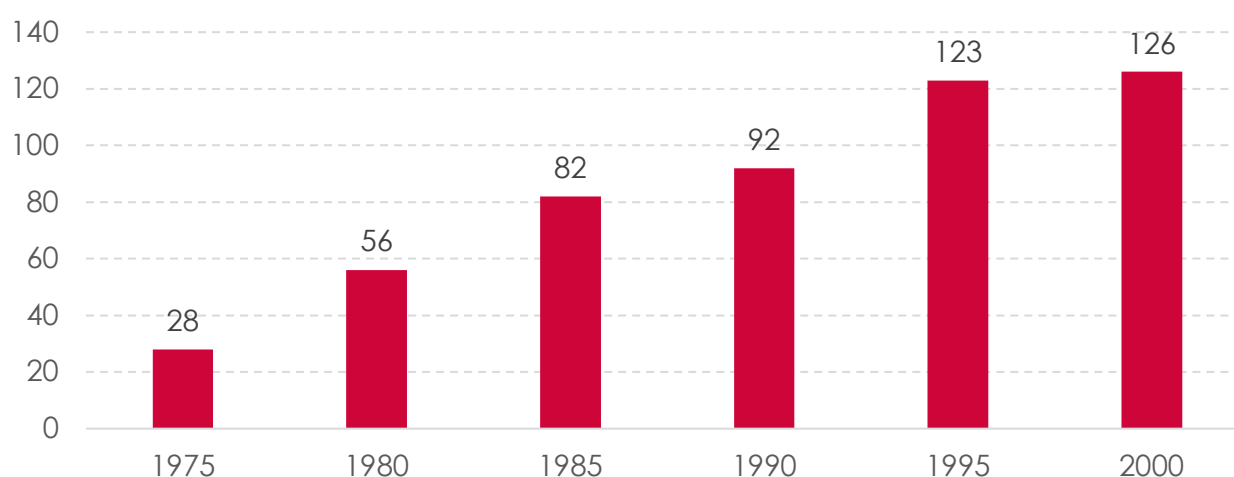
Despite institutional and measure reforms, the prison population rate increased to 130 per 100,000 in 2012 and then returned to the same level as the start of the century, 126 per 100,000, in 2018. The prison system has also been criticised for overcrowding issues with 113 prisoners for every 100 places (Aebi et al, 2018b).

The Portuguese system offers several alternative options to imprisonment including community service, suspended sentences, substitution of prison sentences of up to a year with a fine, house

arrest, incarceration by free days,⁴⁴ and semi-incarceration regimes (European Prison Observatory, 2015). However, the most widely recognised alternative approach associated with the Portuguese system is its policy on decriminalisation of illicit drugs. This case study will focus on that reform.

Figure 2.11

The imprisonment rate in Portugal, 1975 to 2000



Source: Institute for Criminal Policy Research

Decriminalisation of Drugs

From an international perspective, the highest profile reform introduced in Portugal was the decriminalisation of illicit drugs. At the end of the 1990s, Portugal had a notorious drug problem supposedly due to the open availability of heroin. This led to significant increases in infectious diseases, particularly HIV and AIDS, and drug related deaths with a peak of 369 in 1999 (Hughes et al. 2010: 1001; van Beusekom et al. 2002).

Following a government report by the Commission for a National Anti-Drug Strategy in 1998, a new approach was adopted. The Commission brought together legal, medical, and social professionals and recommended that decriminalisation of drug use and possession would allow the government to focus on prevention, harm reduction, treatment, and helping people to maintain their social connections (Domoslawski, 2011). Law enforcement and health experts viewed criminalisation as part of the problem rather than the solution because addicts were not ready to come forward for treatment due to the stigma of criminalisation (Hughes and Stevens, 2010). Although the ability to divert offenders towards treatment had existed since drug control

⁴⁴ Offenders sentenced to a maximum of one year in custody can served their sentences over weekends. Up to a maximum of 72 periods, with each period having minimum 36 and a maximum of 48 hours which are counted as 5 days of continuous incarceration (European Prison Observatory, 2015).

legislation was introduced in 1993 (Decree-Law n.15/93), the Commission recommended going further by removing as many users as possible from the ambit of the criminal justice system, ensuring that alternative sanctions for drug treatment were used effectively (EMCDDA, 2011).

A new National Strategy for the Fight Against Drugs was introduced in 1999, and this remains the main strategic document for drug control in Portugal (Resolution of the Council of Ministers n.46/1999).⁴⁵ It sets out five principles that underpin and guide the strategy: internationalisation of the drug problem, humanism, pragmatism, prevention, and community involvement in drug policy (EMCDDA, 2011). Decriminalisation was a part of a wider strategy that also put emphasis on reducing harm, extending treatment, prevention, and reintegration. This policy was aimed at demand reduction and supply reduction and was put into action through the first *National Action Plan of the Fight Against Drugs and Drug Addiction – Horizon 2004*.⁴⁶

Law n.30/2000 of November 2000

Law n.30/ 2000 gave force to the decriminalisation aspect of the strategy.⁴⁷ It sought to make the use of illicit drugs a public order-administrative violation rather a criminal offence, by moving users out of the criminal justice system. As such it represented a radical change from the preceding legal structure as well as the policies being pursued in other European states, including neighbouring Spain (van Beusekom et al. 2002). It should be underlined, however, that decriminalisation is not legalisation. The Portuguese approach is best understood as a focus on reducing harm and introducing proportionate punishment (Domoslawski, 2011).

The administrative violation is administered by Commissions for the Dissuasion of Drug Addiction that work regionally. Each Commission is comprised of three members that must include a legal member, a medical professional, and a third member who may be another medical professional or a social worker (Lei n.30/ 2000, Article 7). These Commissions have a range of options of penalties and sanctions available to them depending on whether or not the perpetrator is an addict. If this is the case, and the perpetrator agrees to treatment, the sanction process can be suspended and arrangement for treatment can be made (Lei n.30/ 2000, Articles 11-12). Commissions may also impose fines or impose restrictions on perpetrators such as restricting the areas they can visit (Lei n.30/ 2000, Articles 15-18). In coming to their decisions, the law states that Commissions need to consider the type of drug being used, whether or not it was taken in public, and how often the perpetrator uses drugs (Lei n.30/2000, Article 15). Penalties or accompanying measures can last between one month and three years (Lei n.30/ 2000, Article 24).

In 2017, 11,329 people were involved in litigation under Lei n.30/2000, representing a new high watermark since the offence was introduced and an increase of some 80% over the period of a decade. In 2017, around 10% were classed as addicts (SICAD, 2019). For those classed as addicts,

⁴⁵ The current strategy is the National Plan for the Reduction of Addictive Behaviours and Dependencies 2013-20. It is supported by two other strategic documents: National Plan Against Drugs and Drug Addiction 2005-12 and National Plan for the Reduction of Addictive Behaviours and Dependencies 2013-20.

⁴⁶ The current Action Plan 2013-16 is in force. New action plans were introduced in November 2005, May 2010,

⁴⁷ Harm and risk reduction measures were introduced through law no.183/2001.

the most common ruling was a suspension to allow the perpetrator to undertake treatment (67% in 2012) (SICAD, 2013: 117)⁴⁸. Between 2007 and 2012, around 4-6% of perpetrators were recidivists, and 88% of those only registered one relapse in a year (SICAD, 2013).

Figure 2.12

Litigation for Administrative Offences for Illicit Drugs (Lei n.30/2000)

Year	Number of Offenders
2007	6,268
2008	6,044
2009	7,122
2010	6,826
2011	6,507
2012	7,817
2013	7,900
2014	8,389
2015	9,620
2016	10,052
2017	11,329

Source: SICAD (2019)

For perpetrators that are not considered to be addicts, the majority of Commission decisions (67% in 2012) result in provisional suspension (SICAD, 2013). Laqueur (2015) highlights the way in which Commissions are increasingly being required to deal with younger non-addicted perpetrators for cannabis-related offences which amounted to 76% of cases in 2009. She notes the strain on scarce resources created by such cases as a result of the rules on Commission composition.

Strain on resources has been identified by others as a factor impeding the work of the Commissions (Pinto, 2010). An evaluation of the 2008-2013 action plan identified that a lack of quorum was responsible for delays in the system (SICAD, 2013; Laqueur, 2015). Pinto (2010) also highlighted that perpetrators being referred for treatment were often already undergoing treatment or re-starting treatment. In 2012, only a fifth (21%) of perpetrators who were sent for treatment had not received any form of treatment in the past (SICAD, 2013).

Offenders convicted of having more than 10 days-worth of drugs available for consumption fall under the ambit of Decree-Law n.15/93 and the courts system, rather than Law n.30/2000. There has been a substantial increase in the numbers falling into this category (if from an initially low level) from 24 in 2006 to 388 in 2012. These were mostly sanctioned with a fine (SICAD, 2013).

The effects of decriminalisation

⁴⁸ Serviço de Intervenção nos Comportamentos Aditivos e nas Dependências (SICAS)

The decriminalisation of illicit drugs has seen a 60% reduction in the number of people sent to a criminal court for drug offences (Drug Policy Alliance, 2015). The proportion of drug related offenders in Portuguese prisons had also decreased from 44 % in 1999 to 22% in 2008 (Hughes et al. 2010: 1010; Laqueur 2015). Writing in 2010, Hughes and Stevens highlight the way in which the number of offenders being dealt with via the administrative offence rather than the criminal offence route appeared to be relatively consistent (between 6,000-8,000) with no overall increase in the rate of contact between drug users and the police. The available (English) literature does not yet offer an explanation for the proliferation in numbers since 2014.

Initially at least, it was possible to discern a direct impact of decriminalisation on incarceration rates in Portugal. Between 2000 and 2008 there was a fall in the imprisonment rate from 126 per 100,000 to 102, and the number of offenders who reported using heroin before entering prison also fell from 27 per cent in 2001 to 13 per cent in 2007 (Hughes and Stevens, 2010). Since 2008, however, there has been a notable rise in the imprisonment rate with levels returning to their pre-reform era (see Figure 2.13). Again, the extant English language literature does not seem to offer an explanation for this trend.

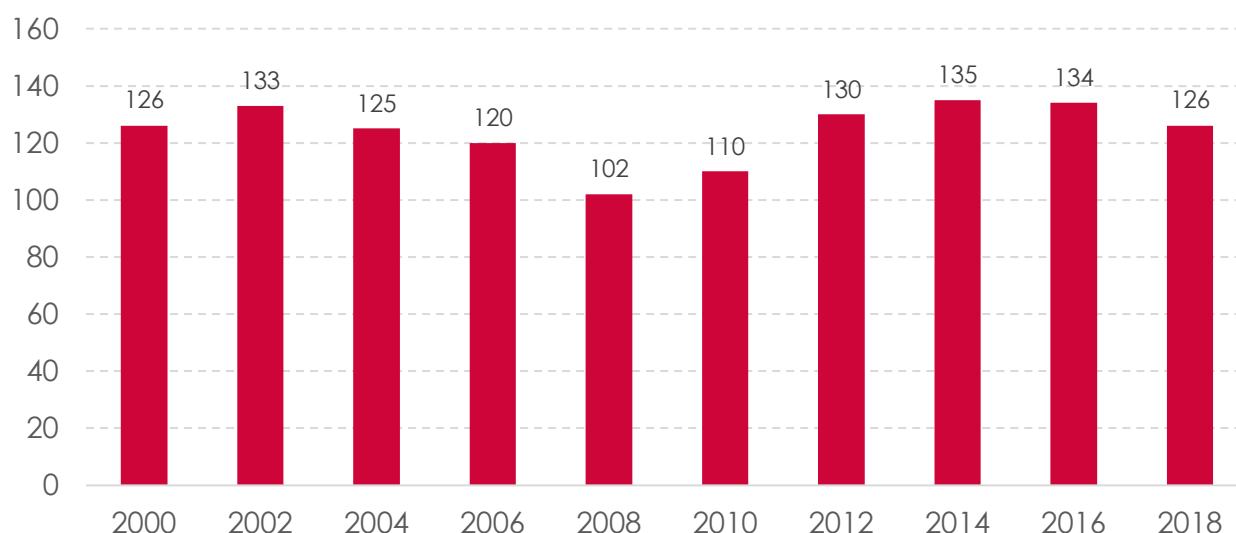
Beyond the use of immediate custody, decriminalisation has been linked to tangible benefits in terms of public health.⁴⁹ Most notably, new cases of HIV among drug users decreased from 1,575 to 78 between 2000 and 2013. The number of drug-induced deaths also declined from 80 to 16 between 2001 and 2012 (Drug Policy Alliance, 2015), and there have been reported decreases in infections such as hepatitis B and C (Greenwald, 2009).

Despite these public health benefits, researchers remain divided in their assessment of the overall impact of Portugal's drug law reform. In part this is due to researchers adopting fundamentally different starting points for their analyses. Pinto (2010), for example, argues that drug dependency should be understood as a psychological rather than a medical issue and so requires a different approach to the decriminalisation implemented in 2001. Hughes and Stevens (2012) have cautioned against overemphasising the decriminalisation reform per se, insisting that it must be viewed and evaluated as one part of a wider national drugs strategy. They have also, quite rightly, highlighted the inherent difficulties in attributing societal change to a single policy innovation. Another key issue – and source of contention – is data. Beusekom et al (2002) and Hughes and Stevens (2010, 2012) emphasise the requirement for robust data, in particular where policy areas being analysed are characterised by highly polarised views. Portugal's *National Plan for the Reduction of Addictive Behaviours and Dependencies 2013-2020* now prioritises investment in standardised data collection and indicators, as well as promoting research and evaluation, in order to help identify trends and ensure effective knowledge application in future policy making (EMCDDA, 2018).

Figure 2.13

The imprisonment rate in Portugal, 2000 to 2018

⁴⁹ Support for the national drug policy comes from the Directorate General for Intervention on Addictive Behaviours and Dependencies (SICAD) which is part of the Ministry of Health.



Source: Institute for Criminal Policy Research

Summary

Portugal has had one of the highest average imprisonment rates in Western Europe and has faced a number of challenges in relation to prison overcrowding as well rates of death in prison (Aebi et al. 2018b). The country's decision to decriminalise the use of illicit drugs, viewing drug use as a public health rather than a criminal justice matter, has elicited much international interest. There can be no doubt that this reform has diverted many thousands of drug users towards treatment thus reducing the burden on criminal justice agencies. It is also worth noting that there is no evidence of a rise in drug use (Hughes and Stevens, 2010). That said, Portugal's imprisonment rate has been on the increase since 2008. To the extent that drug law reform was an attempt to reduce imprisonment rates, it can only to be considered – at best – a partial success.

In considering the Portuguese experience in this regard, one key lesson is the need for consistent, standardised data collection and evaluation, particularly when potentially contentious reforms are being considered or introduced. This lesson would seem particularly germane in a Welsh context in which even basic data is at a premium.

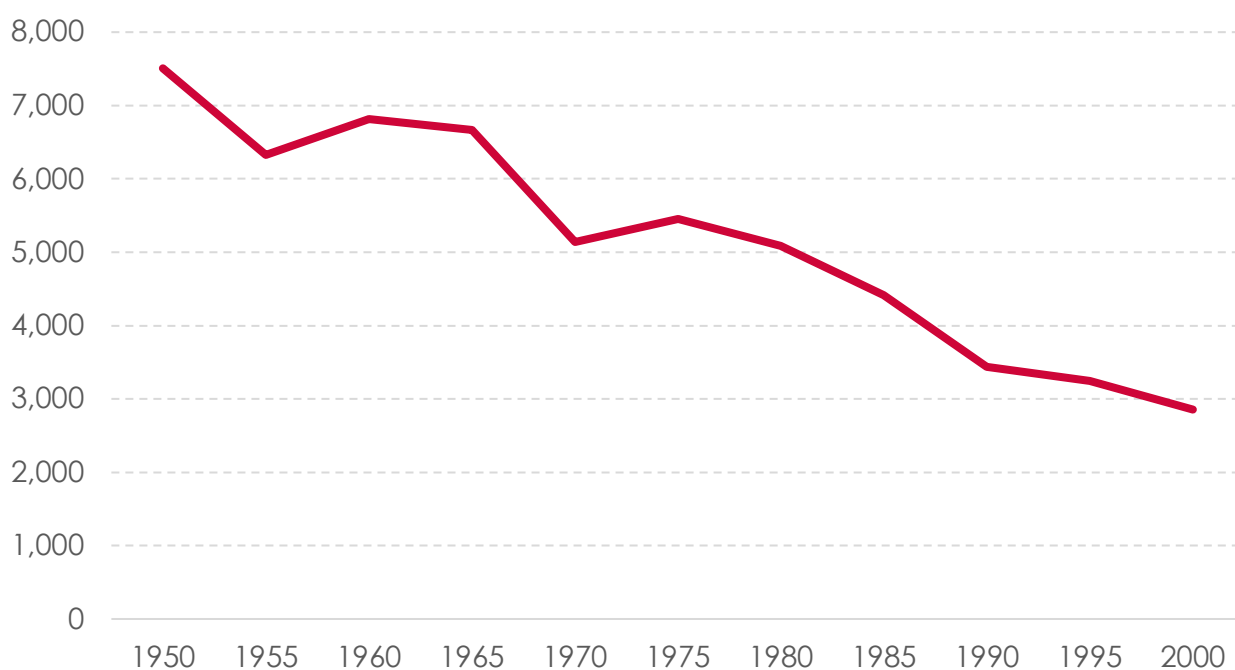
2.6 Finland

- **Population:** 5,518,371 (2017)
- **Prisons:** 26
- **Prison Population:** 2,842
- **Imprisonment Rate:** 51 per 100,000 (2018)

In 2018, Finland recorded an imprisonment rate of 51 per 100,000 people, an extremely low rate bettered only by Iceland, Liechtenstein and Faeroe Islands in the whole of Europe (Walmsley, 2018). What makes the Finnish case particularly interesting is that this was not always the case. Rather, for most of its post-second world war history, Finland recorded far higher imprisonment rates than many other European countries. Indeed, in 1950, its imprisonment rate was 187 per 100,000 and remained amongst the highest in Europe into the 1970s (Lappi-Seppälä, 2007).

Figure 2.14

The prison population in Finland, 1950 to 2000



Source: Institute for Criminal Policy Research

To help drive down its use of imprisonment, Finland embarked on a deliberate policy of decarceration beginning in the mid-1960s (Lappi-Seppälä, 2012a).⁵⁰ Between 1966 and 2006, 33

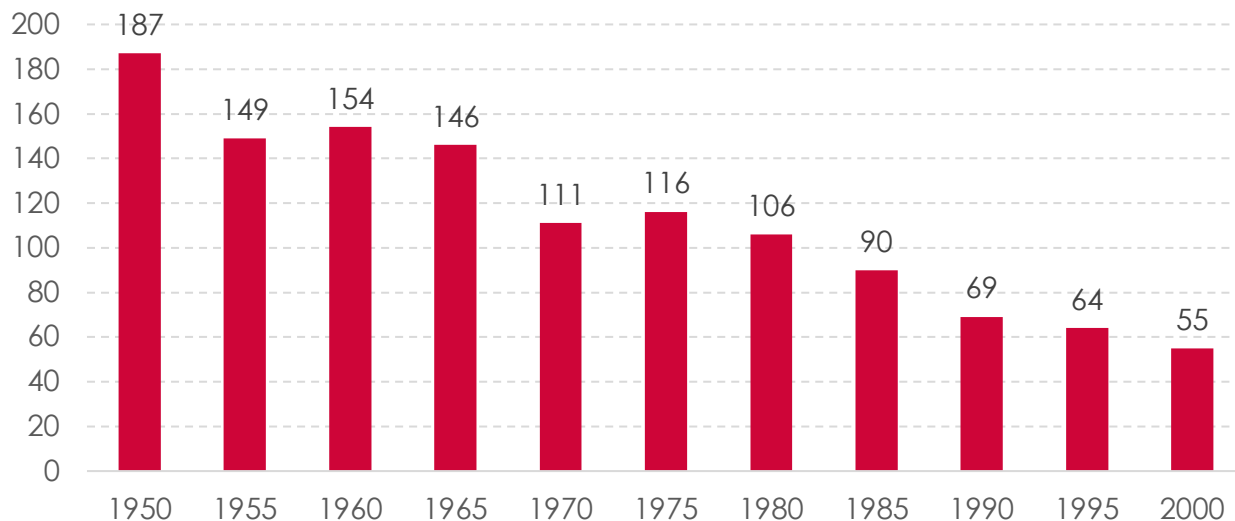
⁵⁰ The country reached considerably lower levels in the 1990s which have broadly been maintained to date.

legislative changes were made affecting the imprisonment rate, with no fewer than 24 of these reforms purposively introduced to reduce prisoner levels. During this period, decreasing the prison population and reducing reoffending were two of the main goals of Finnish criminal justice policy (Tourunen et al, 2012)

The aim of decarceration has remained central to Finnish penal policy for four decades, defined by “systematic and thorough reforms to sentencing legislation” aimed at aligning criminal justice policy with the government’s general social policy (Lappi-Seppälä, 2012a). In practical terms, reforms included upper limits of proportionality in sentencing (accompanied by reductions in sentences), the eventual replacement of short custodial sentences with fines, an increase in the use of suspended sentences, and the introduction of community service in the early 1990s. By 2012, community service had replaced 35% of short-term prison sentences (up to eight months) (Lappi-Seppälä, 2012a). Crimes such as drink driving, property offences and defaulting on fines were no longer punished by imprisonment, and tools such as parole and early release were expanded in order to further drive down the prison population.⁵¹ According to Lahti (2017), the values underpinning Finland’s approach can be characterised as a combination of a rational pragmatist calculation around the costs-benefits of incarceration, and a liberal desire for a ‘humane’ criminal justice system.

Figure 2.15

The imprisonment rate in Finland, 1950 to 2000



Source: Institute for Criminal Policy Research

A ‘bump in the road’?

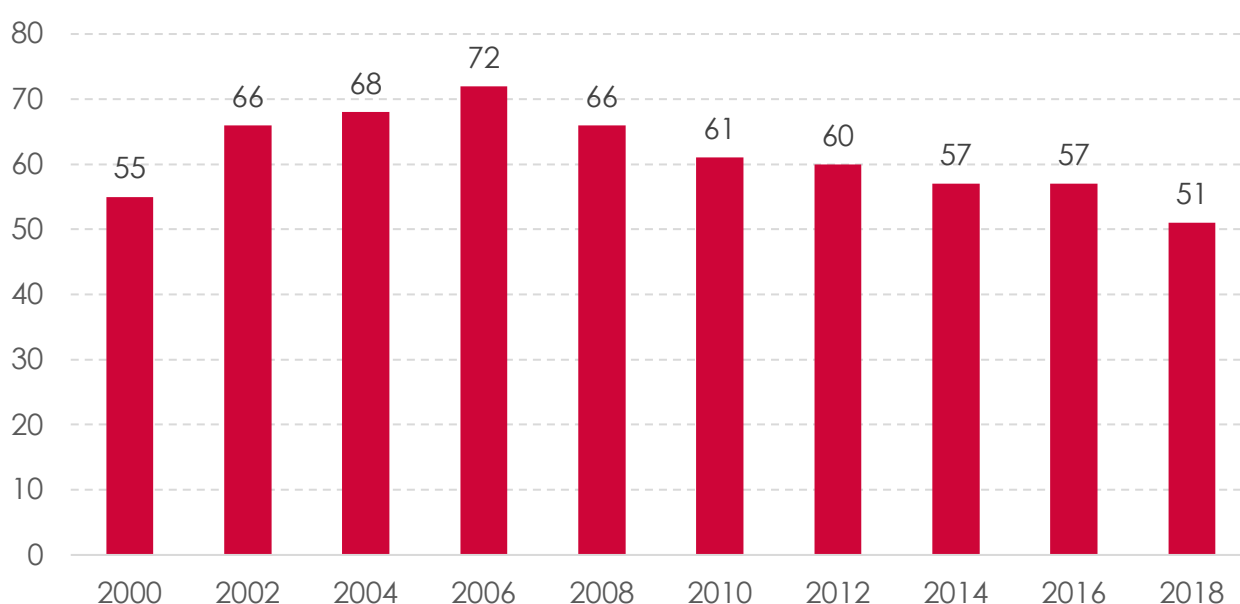
Despite Finland’s previous successes in reducing its prison population, between 1999 and 2006 prisoner levels increased for the first time in decades (see Figure 2.16). Lappi-Seppälä (2012a)

⁵¹ The use of imprisonment for young offenders also became restricted to exceptional cases from the late 1980s onwards.

attributes the increased use of imprisonment to a general sense of insecurity in a Finnish society emerging from the economic recession of the 1990s. Even though recorded crime levels remained stable, fear of crime increased with a concomitant rise in support among the judiciary for a tougher approach to those convicted of particular offences. Tougher sentences were introduced for crimes including domestic violence, rape, human trafficking and child abuse, as well as drug offences and aggravated assault. The average custodial sentence length doubled during this period (Lappi-Seppälä, 2012a).

Figure 2.16

The imprisonment rate in Finland, 2000 to 2018



Source: Institute for Criminal Policy Research

However, in 2007 the Ministry of Justice again decided to embark on a course of action aimed at reducing prisoner numbers by shifting away from offence specific legislation towards a whole system approach. The package of measures introduced by the government included 'fairer' sentences, the development of local crime prevention networks, the expansion of community sentences, and greater use of substance misuse programmes instead of criminal sanctions (Lappi-Seppälä, 2012a). Although the policy shift was responsible for a reduction in the annual prisoner caseload (between 2005 and 2010) for those convicted of fine defaults, property offences, drink driving and drug offences, longer and tougher sentences were retained for those convicted of sexual offences.

Embedding change – the role of politics and society

The overarching story of Finnish penal policy is one of gradual liberalisation of sentencing practice and of increasing commitment to alternatives to imprisonment. It is an approach that has seen the

imprisonment rate fall to one of the lowest levels in Europe. Finland has been able to accomplish this because of the existence of cross-party political support for change as well as a societal consensus about the purpose and role of the criminal justice system (Lappi-Seppälä, 2012a). There are three other factors to which it is worth drawing specific attention to, all of which have either reinforced or coincided with the decline in the Finnish prison population.

First, Finland adopted the Scandinavian welfare state model during the same decade that the country's imprisonment rates began to fall. This was characterised by substantial growth in public spending, a reduction in economic inequality, the development of a comprehensive social security system and public services, and a dramatic growth in overall GDP. Lappi-Seppälä (2012a) argues that the existence of a strong welfare state – and the positive social indicators that might be expected to accompany it – helped to create practical welfare-grounded alternatives to imprisonment that were seen as legitimate by the judiciary, criminal justice practitioners, and the rest of society. The reverse argument has been used to explain higher rates of imprisonment in the United States (Reiman and Leighton, 2010; Wacquant, 2009).

A second factor supporting Finnish criminal justice reform has been the country's political culture and media. Finland's consensual political culture is not without inter-party antagonism, but contains structural features such as proportional representation and coalition governments that serve to ameliorate tensions, thus helping to maintain a relatively settled consensus on maintaining low prison rates while ensuring that crime does not become a central issue in election campaigns (Lappi-Seppälä, 2007). Relatedly, the role of the media has been crucial. Lappi-Seppälä (2007: 211) suggests that the Finnish media has often adopted a "relatively sober approach" to the reporting of crime. This has helped ensure that the country has avoided some of the policy changes associated with popular punitiveness (e.g. Newburn, 2007; Pratt et al, 2005).

The third factor which has buttressed Finnish penal reform is the role played by academic research. If Finland's political system is in general one that "appreciates expert knowledge" (Lappi-Seppälä, 2012a: 220), penal policy is "exceptionally expert led" (Ekunwe and Jones, 2012: 176). While the approach in England and Wales may be described as "politically opportunist and ad hoc" in nature, the emphasis on research based policy in Finland has allowed for an altogether different approach to flourish (Pratt, 2008: 134). The influence of academia in shaping penal policy can be traced back to the time immediately preceding the first reforms, "when academics in the 60s argued criminal policy should be part of social policy" (Lappi-Seppälä, 2012b).

The key criminological research centre in Finland is the Institute of Criminology and Legal Policy, extant in some form since 1963. The institute is hosted by the University of Helsinki but was originally established by the government and is regulated by statute. The law sets out the institute's tasks and ensures that its research meets the needs of the Ministry of Justice.⁵² Other institutions supporting the development of Finnish criminal justice policy include the Scandinavian Research Council for Criminology, which is funded by the Ministries of Justice of Denmark, Finland, Iceland, Norway and Sweden, and provides research and advice to those governments.⁵³ Each

⁵² See – Institute of Criminology and Legal Policy (2019).

⁵³ See – Scandinavian Research Council for Criminology (2019)

country, with the exception of Iceland, hosts a Nordic Crime Prevention Council or equivalent agency which (in Finland) brings together the civil service, local government, academia and other civil society actors within a single agency accountable to the Ministry of Justice.⁵⁴

Summary

Finnish penal policy is celebrated throughout Europe and beyond. It has transformed the country's imprisonment rate from being among the very highest in Europe to one of the lowest. Despite a brief uptick in the size of the prison population between 1999 and 2005, it has managed to maintain its low imprisonment rate for several decades. Three factors would appear to be particularly important in helping Finland achieve and maintain its currently low rate of imprisonment. The first is the existence of a strong welfare state that can offer credible and legitimate alternatives to prison. The second is a political culture that helps politicians, judges and civil servants ward off the worst excesses of a popular punitiveness. Third and finally, Finland has adopted an approach to policy making that relies heavily upon academic research and expertise.

⁵⁴ See – National Council for Crime Prevention in Finland (2019)

2.7 The Netherlands

- **Population:** 17,125,417 (2019)
- **Prisons:** 38 (2019)
- **Prison Population:** 10 464 (2017)
- **Imprisonment Rate:** 61 per 100,000 (2018)

The Netherlands is an example of a country that has, in recent times, seen very significant fluctuation in its imprisonment rate with rapid increases followed by a substantial decline. As a result, it is a particularly fascinating case study which helps us to understand the political and legal factors underpinning changes in international imprisonment rates.

Between the end of the second World War and the mid-1970s the 'Dutch Model' of imprisonment was characterised by a non-punitive approach focused on rehabilitation and prisoners' rights. According to Christie (2000), this approach, centred upon tolerance and leniency, was in part the result of the personal experience of post-war political leaders many of whom had been incarcerated during the war years (Downes and van Swaaningen, 2007). The 'Utrecht School' of criminologists, lawyers and psychiatrists were also influential in setting an agenda that focused above all on rehabilitation and resocialisation (Downes and van Swaaningen, 2007).

During this period, the Netherlands' 'reductionist' penal philosophy established a series of 'shields' designed to prevent the expansion of imprisonment (Downes and van Swaaningen, 2007: 32). These 'shields' included practices such as the waiver of prosecutions, a waiting list for prison places, the use of pardons, and generous home leave. Although the existence of waiting lists and a lack of prison capacity might be interpreted as casting doubt on the reliability of the published imprisonment rates during this period (Tak, 1999), Downes argues that these 'shields' were consistent with the general approach to imprisonment in the Netherlands at the time (Downes, 1988). The subsequent forty years to the early twenty-first century, however, saw the country's imprisonment rate change from being one of the lowest in Western Europe during the 1960s and 1970s, to become one of the highest.

Dismantled Shields and Rising Prisoner Numbers

Declining faith in the previously liberal approach led to a significant shift in the principles underlying principles of Dutch penal policy in the 1990s. The first International Crime Victims Survey in 1989 – followed by a wider survey in 1992 – found that the Netherlands had one of the highest crime rates in the developed world. According to Downes and van Swaaningen (2007: 52-54), this rate served to erode public trust in the traditional liberal approach that had previously "commanded respect". According to Downes and van Swaaningen (2007: 31), former commitments to resocialisation and

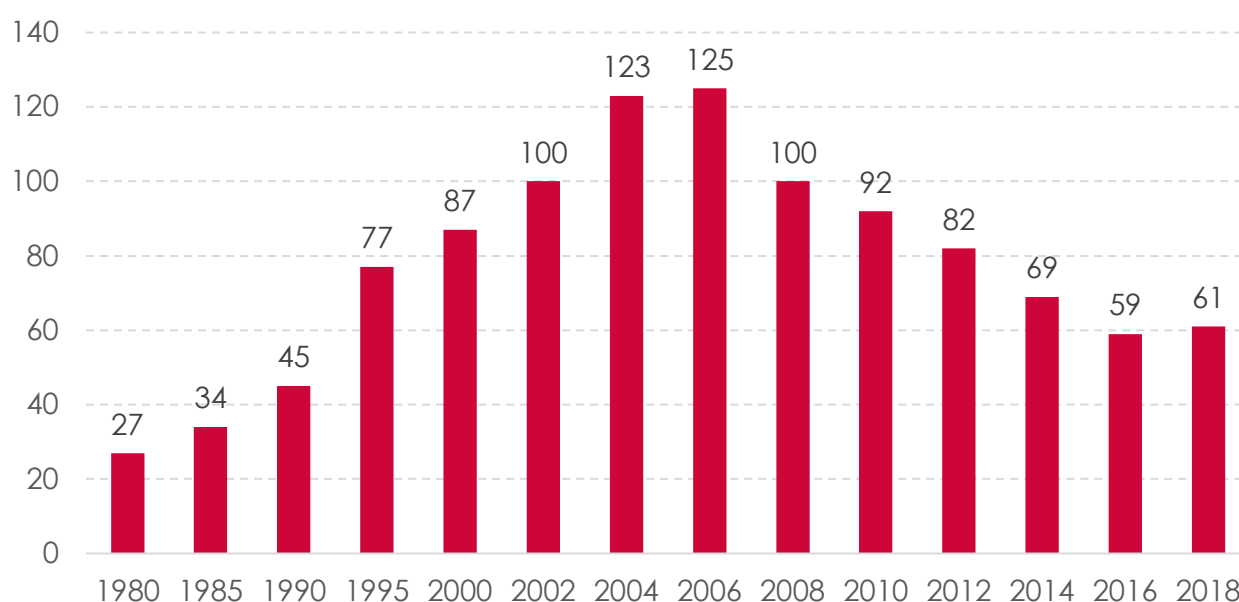
restorative justice were replaced by “managerial, instrumental, and incapacitative measures” underpinning a far more punitive approach. By 2006, the Netherlands had one of the highest rates of imprisonment across Western Europe (see Figure 2.17).

One explanation for the increased use of imprisonment in the Netherlands was the rise in serious and violent crime experienced during the 1990s and early 2000s (Allen, 2012; van Swaaningen, 2013). Between 1970 and 1985, the number of crimes recorded by the police increased from 265,000 to over a million. Violent crime also rose from 15,800 incidents in 1979 to 90,900 in 2000; the latter rate equivalent to 700 violent crimes per 100,000 people (Allen, 2012: 12). As a result, this period saw an increase in the custody rate for violent crime with 21 per cent of those convicted of violent offences sentenced to custody in 1995 compared to 16 per cent in 1985. The custody rate for drug offences also rose during this period from 22 per cent in 1985 to 34 per cent ten years later (Allen, 2012: 12). In some quarters this was seen as reflecting the way that, by the 1980s, the Netherlands had become a key node in the international drugs trade and had secured a reputation as being something of a haven for organised crime. This perception led to increasing international pressure on the Netherlands to reform its drug policy (Christie, 2000: 58).

The removal of some of the traditional “shields” opened the door to an increase in the prison population and a considerable programme of prison expansion. A key development was the overturning of the principle of one prisoner to a cell, which immediately increased the capacity of the prison estate (Downes and van Swaaningen, 2007: 60). According to Downes and van Swaaningen (2007: 60):

Figure 2.17

The imprisonment rate in the Netherlands, 1980 to 2018



Source: Institute for Criminal Policy Research

The one to a cell principle was arguably the most important shield against undue expansion of imprisonment, and the fear of losing its relatively humane character, explains the stubborn resistance of prison governors and staff to its attenuation, a resistance that has now evidently been overwhelmed.

The state's response to drug trafficking was an important contributory factor to the rise in prisoner numbers. Tighter screening at Schiphol airport, for example, resulted in a significant increase in imprisonment for drug trafficking offences. The Emergency Law Drug Couriers in 2002 enhanced the state's power to detain drug couriers and led to the construction of new detention centres (Downes and van Swaaningen, 2007). Although the government would later roll back this policy, these detention centres became part of the prison estate and led to a "permanent loss in quality of the regular prison system" across the Netherlands (Downes and van Swaaningen, 2007: 65).

Cuts to the welfare state also contributed to rising prisoner numbers. A lack of capacity in the welfare system meant that social problems were increasingly picked up and dealt with by the criminal justice system (van Swaaningen, 2013: 344). The government's previous approach to drug offences – which emphasised "harm reduction" and public health – was also replaced during the 1990s with a more punitive stance (van Swaaningen, 2013: 344).

According to Christie (2000), the same period also saw a decline in the intellectual tradition that had once characterised Dutch criminology's strong cultural and humanistic bent. A different type of penal expert emerged, including statisticians, risk-analysts, and managers, whose narrower agenda focused on providing advice, and emphasising targets and control, rather than exploring broader sociological questions (van Swaaningen, 2013). Alongside this change, the focus of policy-making moved away from a reliance on the views of criminologists and criminal justice professionals towards a focus on the views of the public, including an increasing emphasis on crime surveys and victims of crime (Christie, 2000; van Swaaningen, 2013). As has been persuasively argued elsewhere (e.g. Garland, 2001b; Pratt et al, 2005), such approaches are often associated with a more punitive set of state responses to crime.

Declining prisoner numbers and prison closures: 2005 and beyond

This second phase was, however, short-lived. Since its highpoint in 2006, there has been a remarkable reduction in the Dutch prison population. Between 2006 and 2018, the prison population in the Netherlands has halved (49 per cent), and the imprisonment has fallen from 125 per 100,000 to 61 per 100,000 (Walmsley, 2018). Unsurprisingly, this development has resulted in many empty prison spaces, prison closures, and a 22% reduction in custodial staff between 2005 and 2015 (Aebi et al. 2018a). In 2018, estimating that the prison estate will only require 9,810 spaces in 2,023, the Dutch government announced the further closure of 4 prisons, entailing a reduction of some 1,500 spaces. The government have also begun renting prison spaces to other European

states. Belgium sent prisoners to Tilburg Penitentiary, after 2010 although that agreement came to an end in 2016.⁵⁵

According to van Swaaningen (2013), the reduction in the Netherlands prison population was largely unexpected, as there had not been any concerted effort by the Dutch government to bring down prisoner levels. Although the relationship between crime rates and prison populations is hotly contested, Allen (2012: 13) identified a clear correlation between prison rates and changes in the seriousness of crimes committed in the Netherlands. Van Swaaningen (2013) identifies a relative reduction in the seriousness of the offences being perpetrated as having had the most significant impact on declining prisoner numbers. Between 2005-2015, for example, there was a decrease in the total number of registered crimes (-28.6%), a corresponding reduction in the number of settled court cases by judges (-22.7%), as well as a reduction in the number of (partial) unconditional sentences to imprisonment for adults (-22.5%) (Aebi et al. 2018a). Just as the increase in the crime rate was a catalyst for the increase in the rate of imprisonment between 1985 and 2004, there is a correlation between the decreasing rate of crime and the decreasing rate of imprisonment since 2005 (see Figure 2.18).⁵⁶

Changing policing practices have also played a crucial role. Van Swaaningen (2013) has highlighted the shift towards prevention through policing and community safety ('zero tolerance policing') which has served to increase the focus on low level anti-social behaviour offences.⁵⁷ It has also been reported that the decrease in the number of people addicted to hard drugs has contributed to the fall in crime (van Swaaningen, 2013: 350).

Treatment programmes and rehabilitation measures have also played a role in reducing prisoner levels. For example, offenders with addiction problems can be directed towards the Addict Supervision Section (VBA), prisoners displaying aggressive behaviour towards the National Isolation Section (LAA), or the special care section for those detained with special needs (Downes and van Swaaningen, 2007). Non-custodial sanctions also help to divert offenders from custody with the Public Prosecutor able to impose non-custodial penalties (transactions) such as fines and community sentence orders (van Swaaningen, 2013). Fines are the lowest available sanction and were originally intended for minor crimes only (Tak, 1999: 62). However, since the Financial Penalties Act in 1983, all offences can be sentenced with a fine. The Act also makes clear that fines should be preferred to prison sentences (Tak, 1999: 62-63).

In 2001, the Community Service Order, also known as a Task Penalty (taakstraf), was reformed to be a distinct penalty in itself which can be imposed, if thought appropriate, in combination with other sanctions (Allen, 2012: 10). This penalty requires a combination of up to 240 hours of work and training to be completed within 12 months. It can be applied to all offences, except for sexual offences and other serious offences as defined in the Criminal Code or if the offender has been

⁵⁵ Recent headlines have declared a 'Dutch Prison Crisis' due to the shortage of prisoners. See – BBC News (2016).

⁵⁶ Other reforms may also have had some effect on the imprisonment statistics. For example, in 2007, around 27,000 asylum seekers were given a general pardon which removed them from remand centres (van Swaaningen, 2013: 352).

⁵⁷ According to van Swaaningen (2013: 354), despite the low imprisonment rate, Netherlands should not be truly considered as non-punitive but "it is rather a case in which welfare provisions have been actively deployed in the fight against nuisance and insecurity."

given a community sentence for a similar offence in the previous five years (Netherlands Criminal Code, Part II, section 22b-k). There was a significant rise in the use of the Task Penalty throughout the last decade, from fewer than 20,000 in 2001 to over 36,000 in 2009 (Allen, 2012: 13). Even if the Task Penalty approach has played only relatively minor role in the overall reduction of the imprisonment rate, Allen (2012: 13) notes that it has nonetheless proven to be an effective replacement for short-term custodial sentences.

Figure 2.18

The number of Registered Criminal Cases, Decisions by the Public Prosecution Service, and decision by the district courts

Year	Registered Criminal Cases	Decisions Public Prosecution Service	Total Settlement by a Judge	Convictions
1994	273,200	161,100	96,500	91,700
1995	257,800	147,500	102,300	97,200
1996	250,700	133,800	104,600	99,600
1997	250,900	130,800	106,400	101,200
1998	242,500	120,200	105,000	100,200
1999	234,700	114,500	111,300	105,800
2000	233,300	118,400	111,000	105,400
2001	236,000	259,600	113,300	107,100
2002	251,300	275,400	118,800	112,800
2003	270,300	292,600	137,400	130,200
2004	274,000	293,600	136,100	128,800
2005	266,900	285,800	136,300	127,800
2006	267,700	287,200	137,800	127,600
2007	272,700	281,600	131,100	121,000
2008	263,000	275,900	131,500	120,000
2009	232,700	268,200	131,000	119,600
2010	212,900	222,200	113,500	102,400
2011	232,500	239,400	109,400	97,900
2012	226,900	240,400	104,200	92,800
2013	210,600	224,300	104,600	92,800
2014	212,300	221,800	102,100	89,700
2015	191,500	203,900	106,400	92,200
2016	190,900	202,500	94,400	82,500

Source: CBS (2017)

Summary

The Netherlands provides a fascinating case study due to its significant rise and fall in its imprisonment rate over the 20th and early 21st centuries. But it is also a frustrating case study in that even whilst it demonstrates that reversing high imprisonment rates is possible, there is no consensus as to why this has occurred. And as van Swaaningen warns (2013: 355), the danger is that if a decline in imprisonment rates “just happened” there is no obvious reason why it could not, equally unexpectedly, reverse itself yet again. Nonetheless there are number of features of the penal system in the Netherlands that might well offer inspiration for Wales. They include creation of mechanisms to help divert offenders to appropriate services that can both uphold public safety and provide an opportunity for rehabilitation, as well as – once again – the availability of robust, non-custodial options.

3 Recommendations and conclusions

We noted at the outset of this report some of its limitations. It is a desk-based study and, as such, is completely reliant on pre-existing academic work and official data. The case studies are also brief: there is clearly very much more that could be said about each of them. We have sought to give an overview of each case and draw out some salient points rather than produce a comprehensive account. Nonetheless, a number of common themes emerge from which are worth restating: themes that also suggest recommendations. In this concluding discussion we draw together these common themes and make explicit the recommendations that arise from them.

1. High imprisonment rates are not inevitable

Wales has the highest imprisonment rate in Western Europe. Yet there is nothing inevitable about this situation. As five of our six case studies show, other countries and jurisdictions have shown that it is possible to drive down high imprisonment rates.

Recommendation:

Welsh politicians, civil society organisations and, indeed, Welsh society as a whole, needs to consider whether or not it is content to allow the current situation to persist. In short, we need a national conversation about our imprisonment rate.

2. Criminal justice reform is not (necessarily) a left-right issue

Even if there are some notable exceptions, there can be no doubt that, in general terms, prison reform and lowering the imprisonment rate tend to be regarded in the UK as a left-liberal 'issue'. As some of our case studies make clear, however, this is not necessarily the case. Republican-dominated Texas is one striking counter example. But even more germane is the Finnish case, perhaps the most successful European example of a process aimed to radically reducing and then maintaining a low imprisonment rate. We noted that this effort was motivated by a 'combination of a rational pragmatist calculation around the costs-benefits of incarceration, and a liberal desire for a 'humane' criminal justice system'.

Recommendation:

Advocates of a national effort to reduce Wales' imprisonment rate should attempt to build a cross-party consensus in support of such a move rather than assume that support can only be found on one side of the political spectrum. The very substantial (direct and opportunity)

costs of having Western Europe's highest imprisonment rates will be of concern to all who are interested in the country's future.

3. Driving down imprisonment rates is a multi-year, multi-phase process

Our case studies provide overwhelming evidence that successful attempts to drive down imprisonment rates requires a multi-year, multi-phase effort. New York has seen three major reforms. It will be recalled that over a forty year period, Finland made no fewer than "33 legislative changes...effecting the imprisonment rate, with no fewer than 24 of these...purposively introduced to reduce prisoner levels". Success in this policy area requires persistence and determination across multiple different legislative terms. This further underlines the desirability of building cross-party and, indeed, cross societal consensus.

Recommendation:

Advocates of a national effort to reduce Wales' imprisonment rate must recognise that theirs would be a 'long game'. Robust institutionalisation as well as consensus building are pre-requisites for success rather than an 'optional extra'.

4. Driving down imprisonment rates requires a 'whole system' approach

In addition to being multi-year and multi-phase, all our case studies also strongly suggest that successful attempts to drive down imprisonment rates require a 'whole system' approach. This means that *all* criminal justice agencies including police, prosecutors, courts, probation and prison services, need to work to deliver on a national strategy. But also that an approach extends beyond justice agencies *stricto sensu* to embrace other agents of social policy as well as other levels of government, in particular local government.

Given that research presented in our *Jagged Edge* report has already made clear the practical barriers to joined-up working created by the current division between devolved and non-devolved responsibilities in and around the area of justice in Wales, recognising the imperative of a 'whole system' approach if Wales is to move from being a high imprisonment society has clear implications for the debate over which if any criminal justice powers should be devolved to the Welsh level. Piecemeal or partial transfer of criminal justice powers may well be politically more palatable to some, but it needs to be recognised that this would almost certainly act as a significant barrier to successful action aimed at driving down Wales' imprisonment rates.

Recommendation:

Any future debate about the transfer of criminal justice powers to the National Assembly must recognise that any partial transfer will inevitably constrain the ability of devolved level politicians and civil servants to develop a 'whole system' approach to reducing Wales' high imprisonment rate.

5. The operation of welfare and justice systems are intimately interlinked

The evidence from our case studies is remarkably consistent: failing welfare systems substantially increase pressure on criminal justice systems tending to drive up imprisonment rates. Conversely, it would appear to be no coincidence that, for example, Finland's move from a high imprisonment to a low imprisonment society coincided with the country's adoption of the classic Scandinavian welfare model.

Recommendation:

The Welsh Government has recently indicated its desire to initiate a debate about the future of the welfare system in Wales and the Equality, Local Government and Communities Committee of the National Assembly is conducting its own enquiry into the subject.⁵⁸ All this contemporaneously with the work and forthcoming recommendations of the Commission on Justice in Wales. Given inevitable intertwining of the welfare and criminal justice systems, the coincidences of these debates offers an opportunity for policy makers to think holistically about how to tackle Wales' imprisonment rate.

6. Both 'front end' and 'back end' measures can play a useful role in attempts to reduce prisoner numbers.

Evidence that we have highlighted – from the Californian and New York cases in particular – shows the potential usefulness of pre-trial diversion ('front-end' measures) as well as early release schemes ('back-end' measures) as part of a whole-system strategy aimed at reducing prison numbers.

Recommendation:

Any attempt to develop a long-term strategy to reduce Wales' imprisonment rate will require much more detailed investigation of the approaches successfully adopted elsewhere than has been possible in preparing this report. Nonetheless it is clear that there exist a very wide range of potential policies that might be considered for emulation or adaptation, with actions focused on all stages of the criminal justice process. It is also noteworthy that some of these examples derive from jurisdictions that are not normally thought to offer a 'progressive' alternative. By confining our attentions to the 'usual suspects' only, there is a danger that we will miss out on useful experiences elsewhere.

7. Alternatives to Imprisonment

In the introductory chapter we noted that a loss of faith in non-custodial alternatives may have played a role in the high use of immediate custody in England and Wales (e.g. HMI Probation, 2019). Evidence from our case studies, and from New York, Finland and the

⁵⁸ See Ifan and Sion (2019).

Netherlands in particular, also underlines the central importance of robust and credible alternative to imprisonment to attempts to drive down prison numbers.

Recommendation:

Developing robust and credible alternatives to imprisonment is *central* to any strategy aimed at reducing imprisonment rates. And, again, there are numerous examples of possible approaches that might be adopted or adapted should the political will and constitutional structures align in such a way as to facilitate a concerted attempt to address Wales' imprisonment crisis.

8. Data matters

In the introduction to this report we noted and lamented the fact that so much basic data on the operation of the criminal justice system in Wales can only be accessed through freedom of information requests. Even within the context of the current division of devolved and non-devolved functions in an around criminal justice, the inaccessibility of data is a key barrier to understanding, debate and the development of policy. Any concerted effort to reduce Wales' imprisonment rate will place an even higher premium on the availability of data. The Portuguese case underlines how vital it is that these data are recognised as reliable and robust.

Recommendation:

Whatever the future constitutional configuration around the operation of the criminal justice system in Wales, it is vital that reliable and robust data on the operation of that system is readily available. This is currently not the case. The requirement for data becomes even more imperative should there be a concerted attempt to reduce Wales' imprisonment rate. Not least because across what would inevitably be a multi-phase, multi-year, multi-agency process, honest evaluation of the success or failure of particular initiatives will be wholly reliant on the existence of an adequate evidence base.

9. Academic research matters

Several of our case studies underline the importance of a vibrant academic debate in underpinning successful efforts to reduce high imprisonment rates. Two, in particular, stand out. In the context of New York's 'Alternatives to Incarceration' programmes, we noted the way that 'research findings are widely shared with practitioners, legal professionals and the judiciary in order to ensure that all have access to the best available evidence on desistance and offending as well as raising awareness of the options available to judges.' We also noted the key role played by Finland's Institute of Criminology and Legal Policy in that country's successful efforts to move from one of Western Europe's highest incarceration rates to one of the lowest.

Recommendation:

Given the current lack of academic interest in the workings of the criminal justice system in Wales, there is clearly a need to consider how academic research into and engagement with the subject can be encouraged, as well as how examples from other jurisdictions can be introduced into the Welsh debate. This will become even more important if an effort is to be made to reform that system and reduce Wales' imprisonment rate.

10. Popular/populist punitivism drive up imprisonment rates and hinder attempts at reform

As almost all of our case studies have shown, and as the experiences of the England and Wales system also demonstrate, whether it be inspired by so-called 'populist' forces or not, popular punitivism tends to drive up imprisonment rates and can hinder attempts at reform. Should an attempt be made to reduce Wales' imprisonment rate then there is every reason to believe that there will be at least some popular/populist resistance. Our case studies also suggest, however, that there are things that can be done to help ameliorate this. In particular, adopting the recommendations already made above – on developing a political consensus in support of reform; on ensuring the availability of robust alternatives to imprisonment; on making available trusted data; on encouraging the generation and discussion of independent academic evidence; and so on – can play an important role in supporting transition away from a high imprisonment society. Conversely, failing to do so makes it very difficult to imagine any other outcome other than more of the same.

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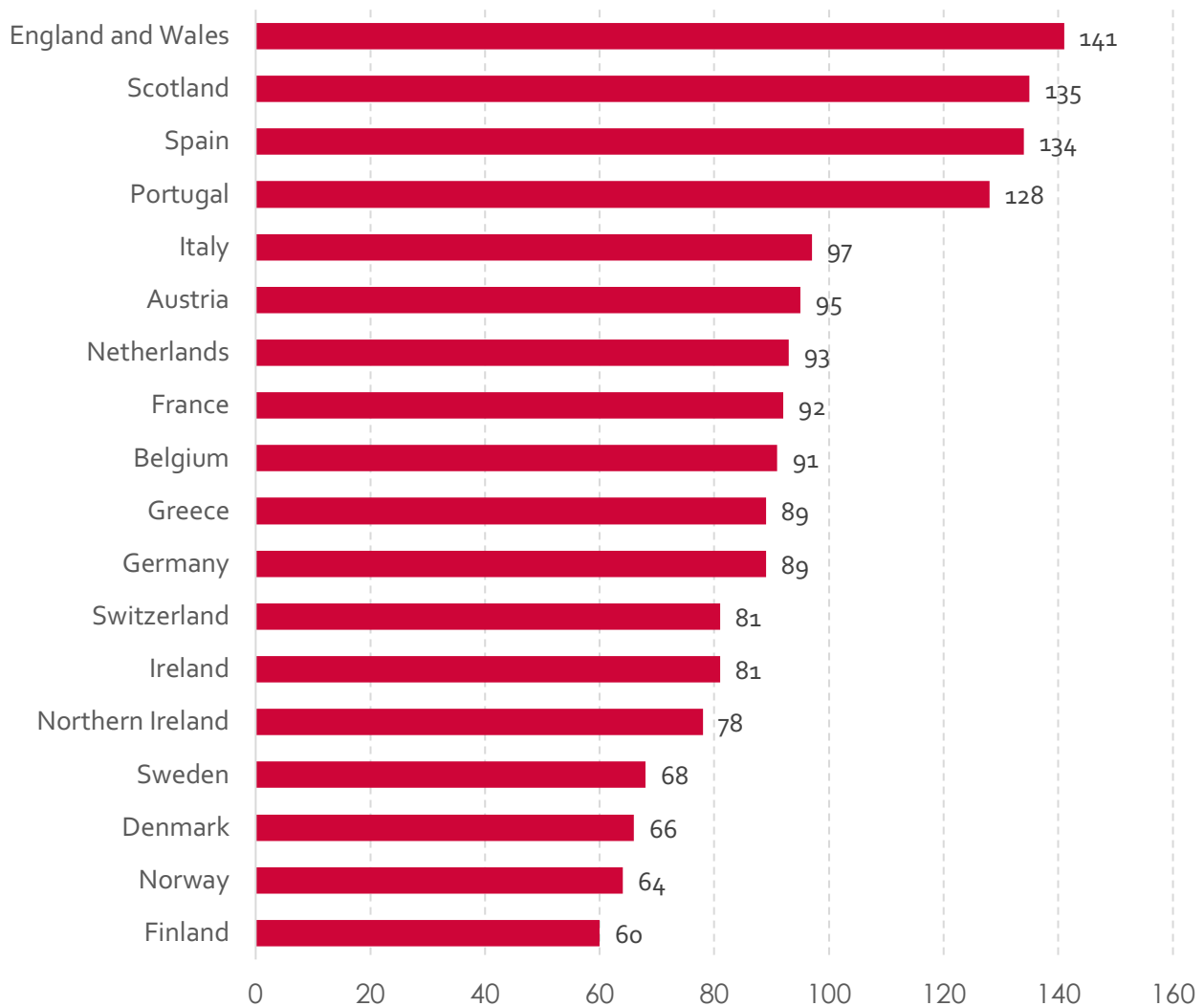
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Appendix

Figure A1

The average prison population rate per 100,000 in Western Europe, 1999 to 2018



Source: Institute for Criminal Policy Research

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